ORIGINAL

F-2021-867

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

District Court of Oklahoma County Case Number
CF-2015-6989

WILLIAM LEWIS REECE,

APPELLANT,

-vs-

THE STATE OF OKLAHOMA,

APPELLEE.

ORIGINAL BRIEF FOR AND ON BEHALF

OF

WILLIAM LEWIS REECE

APPELLANT.

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August 1, 2023

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BRIEF OF APPELLANT

William Lewis Reece was charged by Information in Oklahoma County District Court Case No. CF-2015-6989 with Count 1, murder in the first degree in violation of Okla. Stat. tit. 21, § 701.7. (O.R. 1)

After a two-stage jury trial held on May 10-June 2, 2021[1], before the Honorable Susan Stallings, Mr. Reece was found guilty. (O.R. 1131) At the conclusion of the second stage, the jury found the existence of four (4) aggravating circumstances: that the murder was especially heinous, atrocious or cruel, at the present time there exists a probability that the Defendant will commit criminal acts of violence that would constitute a continuing threat to society, the defendant, prior to the murder, was convicted of a felony involving the use or threat of violence to the person, and the murder was committed for the purpose of avoiding arrest or prosecution. (O.R. 1152) The jury set punishment at death. (O.R. 1153) At formal sentencing held on August 19, 2021, the trial court sentenced Mr. Reece in accordance with the jury's verdict. (S. Tr. 11)

Mr. Reece now appeals his sentence.

[1] The court reporter failed to mark any of the trial transcripts with either days or numbers. Appellant will cite 10th day of May, 2021 transcript as (Tr. I); 11th day of May, 2021 transcript as (Tr. II); 12th day of May, 2021 transcript as (Tr. III); 13th day of May, 2021 transcript as (Tr. IV); 14th day of May, 2021 transcript as (Tr. V); 17th day of May, 2021 transcript as (Tr. VI); 18th day of May, 2021 transcript as (Tr. VII); 19th day of May, 2021 transcript as (Tr. VIII); 20th day of May, 2021 transcript as (Tr. IX); 21st day of May, 2021 transcript as (Tr. X); 24th day of May, 2021 transcript as (Tr. XI); 25th day of May, 2021 transcript as (Tr. XII); 26th day of May, 2021 transcript as (Tr. XIII); 27th day of May, 2021 transcript as (Tr. XIV); 28th day of May, 2021 transcript as (Tr. XV); 1st day of June, 2021 transcript as (Tr. XVI); 2nd day of June, 2021 transcript as (Tr. XVII).

STATEMENT OF FACTS

The fifth[2] witness for the State, Bethany Police Officer John Reid, was the first person to testify about the Tiffany Johnston murder. On July 26, 1997 around 11:30 p.m. Officer Reid noticed an abandoned white car[3] at the Sunshine Car Wash[4] in Bethany, Oklahoma. Officer Reid and Detective Daniel Mobley drove by forty-eight (48) minutes later and the same white car was sitting in the same spot. Officer Reid and Detective Mobley approached the car and saw that the keys were still in the ignition and the doors were unlocked and the floor mats were hanging in the stall to be washed. Officer Reid started trying to contact the owners of the car, Tiffany and Ryan Johnston. (Tr. VIII 90-93, 96-97) Bethany Police contacted Ryan Johnston, Ms. Johnston's husband, and it was determined that Tiffany Johnston was a missing person. (Tr. VIII 100-101) On July 27, 1997 Jerry Callaway, his wife, and a friend were driving down dirt roads around Highway 66 and Southwest 15th west of Yukon, Oklahoma. They saw an area of smashed down weeds and found a girl's body laying facedown, naked other than a bathing suit top on and they called 911. (Tr. VIII 130-131, 133-136)

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[2] The first four (4) witnesses for the State were propensity/Burks evidence witnesses who will be discussed in Propositions IV and V.

[3] Merwin Hamman testified that on July 26, 1997 he was washing his car at the Sunshine Car Wash in Bethany, Oklahoma aroud 6:30 p.m. While he was there, a young girl drove up in a black car and used the vacuum cleaners and she had a flowered swimsuit. Mr. Hamman later saw a girl was missing on the news and believed it was the same girl he saw at the carwash. (Tr. VIII 120-125)

[4] George Brown testified that he owned the Sunshine Carwash. Mr. Brown said that he saw William Reece on the news from something in Houston in December 1997-January 1998 and recognized him from seeing him at his car wash. Mr. Brown claimed that on the news he saw a clip of Mr. Reece in the courtroom in front of the bench and someone yelled "what about the Bethany girl," and Mr. Reece spun around and said "you can't pin that on me." (Tr. IX 143-155) No other testimony or evidence corroborated this claim regarding this allegedly inculpatory news segment.

Bill Reece[5] said that on July 26, 1997, he was driving in Oklahoma City, OK when something malfunctioned on his truck and oil was under his truck. Mr. Reece's truck was smoking and he pulled into a carwash. Mr. Reece was washing off his truck when a girl, Tiffany Johnston, complained about getting wet. He then drug her into the tack room of his horse trailer and snapped off her overalls. Mr. Reece told Ranger Holland that he put his penis in her vagina for about two (2) minutes,[6] but it was hot, and he could not get it up. (4-29-21 Tr. 123-134)(State's Exhibit 86) Mr. Reece stopped, started to get up when Ms. Johnston hit him in the back of the head with a horseshoe. According to Mr. Reece, this made him mad. Mr. Reece and Ms. Johnston got into a struggle, and he started to choke her with his hands. Mr. Reece then grabbed a horse bridle and wrapped it around Ms. Johnston's throat and killed her. (4-29-21 Tr. 124)(State's Exhibit 86) Mr. Reece took Ms. Johnston's body on the interstate for a bit then exited off on a feeder road and took a bridge that went over the interstate. He drove down the road that had tall grass on either side and eventually placed Ms. Johnston's body in the grass. (4-29-21 Tr. 127) A calling card registered to Mr. Reece was later discovered which showed that a call was made from Yukon, Oklahoma on July 26th, 1997 at 6:22 p.m. (Tr. XIII 49-53)

Dr. Chai Choi with the Oklahoma Medical Examiner's office testified that she examined Tiffany Johnston and Ms. Johnston's face was "puffy, swollen, with a purple color." (Tr. IX 17) Ms. Johnston had petechiae on most of her face, neck, and

[5] Mr. Reece made these involuntary statements in an interview with Texas Ranger Jim Holland on 3-1-16.(State's Exhibit 86) The involuntary statements will be discussed in propositions I and II.

[6] Proposition III deals with deleted audio interrogations with Detective Doug Bacon. Attached is an affidavit from Mr. Reece, which states that Detective Bacon coached him about what to say in the videos and that he did not have sex with Tiffany Johnston.

eyes, most likely caused by compression of her neck before death. Ms. Johnston had scratches and bruises on the right side of her cheek and neck. (Tr. IX 17,23)(State's 68-69) Dr. Choi said that there were scratches and bruises on Ms. Johnston's wrist and a contusion and bruises on both of her hands, which indicated possible bondage. (Tr. IX 27-28, 38-43)(State's Exhibit 70) Dr. Choi testified that under Ms. Johnston's neck there were bruises that look like knuckles and fingers that indicated combined strangulation and Ms. Johnston most likely died within ten (10) to forty (40) minutes of being strangled. (Tr. IX 30, 47) Dr. Choi said that Ms. Johnston's nose was bleeding and had scratches on both shoulders, bruises on her left arm, and a bruise on her left hip. (IX 35-37,45,48-49)(State's Exhibit 54-55)

Dr. Choi testified that there was a pressed mark on Ms. Johnston's left lower chest under the right breast which indicated being held down and something pressing against her body. (Tr. IX 51-52) Dr. Choi said that there were also indications of small bruises on the right side scalp skin which could only be seen from flipping the skin back which was caused by blunt force trauma. There were muscle bruises from when she was struggling and not from sustained injuries. The same injuries were also on her left side. (Tr. IX 56-57, 59)(State's Exhibit 74) Dr. Choi testified that Ms. Johnston had a fractured hyoid bone on the left side which is often associated with strangulation. (Tr. IX 64-65) Dr. Choi testified that there was "fine petechiae of the right side wall of the vaginal canal, there were no other injuries to the genitalia. (Tr. IX 68) Dr. Choi determined that Ms. Johnston's cause of death as asphyxiation by strangulation and the manner of death was homicide. (Tr. IX 78)

A rape kit was collected from Tiffany Johnston's body. (Tr. VIII 260-261, Tr. IX 66) DNA testing was performed from a rectal swab taken from Tiffany Johnston's body. The partial profile obtained from the rectal swab showed that Mr. Reece could not be excluded as the donor of the partial profile. The probability of selecting an unrelated individual from the population having the DNA profile is at least one (1) in 11,200. (Tr. X 97-98) A YSTR DNA profile from a vaginal swab from Tiffany Johnston could be separated into a major and a minor component. Mr. Reece and "all his paternal male relatives are included as a potential source of the major component...using a published YSTR DNA population database this YSTR profile has been observed in 40 of 22,388 total individuals within the United States YSTR database." (Tr. X 116-117)

Dr. William Ruwe, a clinical neuropsychologist, testified that school records showed that Mr. Reece was placed in special education classes and potentially had learning disabilities. (Tr. XVI 75) Dr. Ruwe testified that Mr. Reece was given an IQ test when he was twelve (12) years old and had a score of 75. (Tr. XVI 76) Dr. Ruwe[7] performed an IQ test on Mr. Reece when he examined Mr. Reece in 2018 or 2019. Mr. Reece's full scale IQ score at that time was 78. (Tr. XVI 86-87, 94) Dr. Ruwe said that Mr. Reece was borderline intellectual functioning, and sometimes individuals with that level of functioning do not understand cause and effect and the consequences of their behavior and have problems with impulse control. Dr. Ruwe stated, "So it's difficult for them to say, okay, I need not to do that because that's something outside the norm. That's something that's socially unacceptable or legally

[7] Dr. Ruwe testified that Mr. Reece never showed any signs of malingering. (Tr. XVI 85)

unacceptable." (Tr. XVI 87, 91-92) Mr. Reece's verbal comprehension score was in the 7th percentile which is borderline for being intellectually disabled. Dr. Ruwe testified that someone with verbal comprehension on Mr. Reece's level may be able to fully understand what someone is saying to them but it would be hard to form concepts to think and reason, and make good judgements based on verbal information. (Tr. XVI 101, 103) Mr. Reece scored in the in the 5th percentile in the abstract verbal reasoning skills test which would make it hard for Mr. Reece to be able to go beyond a concrete level of understanding and would be challenging for someone like that to understand and appreciate what someone is talking about or a concept identified. (Tr. XVI 103-104) Dr. Ruwe testified that the from the tests that he performed he believes Mr. Reece has Post-Traumatic Stress Disorder (PTSD) with clinical levels of disassociation. (Tr. XVI 137-138)

Any and all other necessary facts will be contained in the propositions of error below.

PROPOSITION I

MR. REECE'S CONFESSIONS WERE NOT KNOWINGLY AND VOLUNTARILY GIVEN WHICH RESULTED IN AN UNFAIR TRIAL.

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

United States v. Lopez, 437 F.3d 1059, 1063 (10th Cir. 2006)(internal citations omitted) The trial court erred by failing to suppress Mr. Reece's statements under the Due Process Clause because they were not made knowingly and voluntarily as the product of his free and independent will. U.S. Const. amend. V, XIV; Okla. Const. art 2 § 7; *see J.D.B. v. North Carolina*, 564 U.S. 261, 280 ((the Due Process Clause "erects its own barrier to the admission of a defendant's inculpatory statements at trial"); *Reck v. Pate*, 367 U.S. 433, 440-41 (1961) ("[C]ircumstances may combine to produce an effect just as impellingly coercive as the deliberate use of the third degree.").

On February 9 and 15, 2016, Texas Ranger James Holland went to Texas Department of Criminal Justice, Ellis Unit to interrogate William Reece. During the interrogation, Ranger Holland coerced and induced Mr. Reece into confessing to murdering Tiffany Johnston, Laura Smithers, Kelli Cox, and Jessica Cain. (4-29-21 Tr. 77-79)(State's Exhibit 101[8] and 102[9]) Mr. Reece has a documented IQ of 75 at twelve (12) years old and an IQ of 78, when tested by Dr. Ruwe, which is borderline

[8] At the hearing on 4-29-21 the exhibit was admitted as State's Exhibit 5. At trial, the recording was admitted with redactions as State's Exhibit 101.
[9] At the hearing on 4-29-21 the exhibit was admitted as State's Exhibit 6. At trial, the recording was admitted with redactions as State's Exhibit 102.

intellectual functioning. (Tr. XVI 76, 86-87, 94) Mr. Reece was in special education classes while in school and his verbal comprehension is borderline for being intellectually disabled. (Tr. XVI 75) Mr. Reece told Ranger Holland during the interrogation on February 9, 2016, that he did not read well. (State's Exhibit 101 3:07:36-3:07:40) Ranger Holland used the death penalty as a weapon to convince Mr. Reece to confess. Ranger Holland told Mr. Reece that if he cooperated he would not get the death penalty, in reality Ranger Holland's coercion and inducements made it that even though Mr. Reece cooperated he still got the death penalty. Ranger Holland through these interrogations also inflated how much power he had which in turn made Mr. Reece trust him.

During the February 9, 2015 interview, Ranger Holland told Mr. Reece that he did not have to communicate with him and anytime he wanted to end the interview to go stand at the door. (4-29-21 Tr. 80) During the interview, Ranger Holland showed Mr. Reece the homicide warrant from Oklahoma County. (4-29-21 Tr. 132) Ranger Holland told Mr. Reece that he wanted to discuss Mr. Reece's options in life and that Mr. Reece controlled his own destiny. (4-29-21 Tr. 145)

During the recorded interviews on February 9 and 15, 2016, Ranger Holland made it seem like he was the best law enforcement officer in the world and only had Mr. Reece's best interest at heart.[10] Ranger Holland repeatedly tells Mr. Reece that he is not the decision maker but then followed that up with I do not think you will get the death penalty. Ranger Holland told Mr. Reece he would not "bullshit him"

[10] (State's Exhibit 101 13:56-14:18;14:47-15:18;15:28-15:40;2:14:00-2:15:01; 2:39:05-2:39-:49; 2:55:15-2:57:16;3:33:26-3:35:34;4:12:05-4:13:39;4:28:36-4:29:08;4:34:39-4:35:16;State's Exhibit 102 11:50-12:27;14:22-16:13;25:42-27:16;30:35-31:06)

and would not lie to him.[11] However, he later admitted he did lie to Mr. Reece. (4-29-21 Tr. 148-149) Ranger Holland told Mr. Reece he wanted him to help him solve cases and in exchange, Mr. Reece would control his own destiny and be "treated like a rockstar" and Mr. Reece would not get the death penalty.[12] All of these statements show that Mr. Reece was coerced and induced to confessing and therefore did not knowingly and voluntarily confess to murdering Tiffany Johnston, Laura Smithers, Kelli Cox, and Jessica Cain.

Ranger Holland makes a number of statements in State's Exhibit 101 and 102 that show that he coerced and induced Mr. Reece into confessing. Ranger Holland also made statements to Mr. Reece that showed he had the authority and the power to get these deals done.

A. Ranger Holland's Statements that Coerced Mr. Reece into Confessing:

> Ranger Holland: You have a bargaining chip, okay? Because there's things that you can offer and things that can help you and you know what?...I'm not going to get that unless you get what you want and you know what you want DA to take the death penalty off the table? I'm not the DA but I think they would. I think that if you are willing to help out that you can solve these things and you can give closure to the family. I mean what do you want, do you want to go to trial? Do you want to go to Oklahoma? You've got all these things that are out there. You know? What do you want? This is a very unique opportunity for you and this doesn't come around. **There's no one else in this entire state or probably the entire country that could pull this shit off but me because I can make phone calls to the governor.** But I'm telling you what man, I'm asking for your help and if you can help me solve some of these cases, dude, I'm going to bend over backwards and do everything I can to and there is a thing called consideration and there's things that you can get guarantees in advance, alright? I know, but this is there. This is there and there's a hammer, there's a hammer in

[11](State's Exhibit 1012:57:30-3:02:25;3:02:49-3:03:38;3:19:44-3:20:45;3:36:19-3:38:40;3:40:34-3:43:24;3:50:50-3:52:17;3:52:27-3:53:07;3:54:09-3:56:01;4:16:45-4:18:48;4:18:54-4:20:05;4:22:30-4:22:48;4:30:54-4:31:30;4:33:30-4:34:30; State's Exhibit 102 7:15-8:55;20:36-25:40;40:50-41:27;12:30-12:58)

[12](State's Exhibit 101 10:34-12:00;3:29:28-3:31:39;3:31:47-3:33:03;3:56:22-3:58:56;4:14:24-4:15:51;4:24:10-4:26:43;4:43:22-4:47:23)

Oklahoma, and there's a hammer in Texas and at this point its going to be me and him going out there and deciding what happens. Do you go back to Oklahoma and face the death penalty? Or do you stay here and face the death penalty? Or if you tell me you want to cooperate and work then we both get on the phone and we talk to our DA's and we both say how can we make this work? What would they do at the end of the day? I'm not the judge, I'm not district attorney, I'm not this deal maker and I can't promise you anything **but I think at the end of the day that you could arrange to spend your time here or you can go back to Oklahoma and you can arrange to spend your time there.** I think you could help people.

(State's Exhibit 101 3:33:26-3:35:34)

Ranger Holland: So let me show you what I have. So long story short. I visited with all the DAs, I talked to representatives Oklahoma Investigative (inaudible). The Galveston DA is here right now...He wrote this letter. Basically what he's wanting you to know is that they're not going to seek the death penalty, in this case. He would love for you (inaudible) You know...You already know that there's two parameters. It's either you know, life and death and you know, life obviously is...Yeah, he's basically said that that's, that's off the table. And he drove up here today because he would like to do anything that he can do to convince you that that's legitimate. Dade county, same thing.

(State's Exhibit 102 14:22-16:13)

Ranger Holland: But at the end of the day, the DA's going to move forward with this case and I think you have the ability to do the right thing. Well how does that play to you? Don't we all want something? That's why when I started off with this interview that I'm not the DA...but I start out this interview with do you like it here? And how do you spend the next 10 years of your life?...You know I think your next ten (10) years or whatever you live can continue like that. I think you have the ability to fully control it but I think this is the issue, the forensic evidence...I think it's there. They are going to prosecute you on it and they are going to give you the death penalty.
Mr. Reece: "Lets go to trial"
Ranger Holland: Can I show you one other thing?
Mr. Reece: Nope! We're through. If that's your decision then let's go.
Ranger Holland: If you don't want to talk you don't have to but it's not my decision. Okay?
Mr. Reece: Yeah.
Ranger Holland: That's what I'm telling you. It not my decision.
Mr. Reece: No, that's fine. I didn't do it. I'm not sweating it. I don't care what your forensics says.
Ranger Holland: Okay.

Mr. Reece: I'm being honest...
Ranger Holland: Let me say this. It's not my choice. A matter of fact that's not what I want to do because I don't think that's the best thing for the families. A matter of fact, I don't think that's even what the DA wants to do because A) it's going to cost a lot of money and I think it's gonna be painful but I think at the end of the day that's where they'll go. But I think you can do something about it. How is that better for you? This is my opinion, it's better for you because, you can carry on life and it doesn't change....So it's a mitigation of damages. It's like a Monica Lewenski thing and Bill Clinton deal. Well what screws him up in that whole deal?... he rode the horse too far. When all people wanted to hear him say was that he screwed up....And you, the way that you live the next ten (10) years...I mean, you tell me what you want because I want your help, alright? I don't want to come in here and push you, bust your nuts, or do any of that. I want your help, Bill. I want your help on my cases and I think you can help me on the cases and if that means that...we need to take a ride out to uh Denton and you need some special treatment, you know because your going to help us out there or Galveston or wherever you know then I almost look at it like a vacation for you. In other words this doesn't have to be bad for you. It could be good for you and it could be good for the family. You could bring them closure and that's kind of what I look at. If I wanted to come in here and I wanted you to get the death penalty, and I really wanted to push that on the DA then honestly I wouldn't have interviewed you...I come here believe it or not because I believe there is something in it for everyone and there is something in it for you and there's something in it for me and there's something in it for the family and there's something in it for the DA. My deal is if everyone can get something positive out of it including William, then isn't that better.

(State's Exhibit 101 2:57:30-3:02:25)

Ranger Holland: At the end of the day, man, you've got a choice. Okay. Now what's the upside to this? Well I'm going to tell you, okay so so why?...I mean William, you are fucked because Oklahoma County (inaudible) and we've got you on Smithers. Okay? But it doesn't have to be all bad. Alright? And I asked you, what do you want? And I'm being legitimate, okay? Please, don't misunderstand me, I'm not the DA, I'm not the governor, I'm none of those people, I'm not the decision maker. (Inaudible) But you have an opportunity in this and some decisions in this if you wanna make them...I don't know I'm not going to lie to you. But this is a fucking solid case, this is a fucking solid case. There's other cases out there and I want to solve them. I want to show you a picture and I want to ask if you did do it or didn't do it.

(State's Exhibit 101 3:19:44-3:20:45)

Ranger Holland: I think you have this opportunity though, to think about what you want and you need to realize...I will give you anything you want... But you can steer where you want to go with that. You want to go to Oklahoma? Fuck it, then go to Oklahoma. You want to stay in Texas, then fuck it, stay in Texas. If it was me? I'll be honest with you, at your age do you want to start out in a new unit?...Well I don't know if that's good here or bad. But what's the bad side? I'll tell you the bad side. You go back there on a death sentence because this is a death penalty case sitting in an 8x10, getting out an hour a day, not going anywhere or do anything. You are going to have a trial and they are going to have all this DNA evidence and bring all those girls in to testify and they are going to give you the death penalty and you are going to sit there for 15 fucking years, in isolation other than an hour a day. (Inaudible) And what happens in Texas? Well there's a unit and that's where they go and it's the same thing. An 8x10, your by yourself, you shit in your cell, you shower in your cell, you do everything in your cell and you get one hour a day out of your cell. And you know what? To me? Man, if I got a choice...So now it comes time for damage mitigation and you're a smart guy, you know what's out there and I'm giving you an opportunity. You don't have to, you don't want to? Fuck it. I'm not a moron. (inaudible) but if I go dig up a body we don't know about and I give you guarantees about that shit up front, all I say is this if you don't yank them around and you need it on paper from the DA in Galveston County at the end of the day then I think he could give it to you on a piece of paper, alright?

(State's Exhibit 101 3:36:19-3:38:40)

Ranger Holland: I think the worst thing that happens in this deal. I think the worst thing that happens is that you get tried for these cases and whichever one because you won't try them both and you get convicted and you get the death penalty...
Mr. Reece: So are they here to take me back to Oklahoma?
Ranger Holland: They are here because we had a deal. The deal was that one of us would broach you on the subject in hopes of the fact that basically to save your ass so that you'd help us. You know, that's the game plan.

(State's Exhibit 101 3:50:50-3:52:17)

Ranger Holland: Why is he here? It's because we both want other things. Alright? That's what we want. You have something to offer, you have a bargaining chip and that bargaining chips doesn't sit around. You know, end of the day if you are get extradited back to Oklahoma, Texas isn't going to do shit for you. You could step out there and you could say, I did this one, I did this one, I'll take you back to where the body is. They aren't going to bring you back here because Oklahoma has already said that they are giving you the death penalty so they

aren't going to bring you back. Your bargaining chip is now before these things are determined.

(State's Exhibit 101 3:52:27-3:53:07)

Ranger Holland: Z is that you get writed back to Oklahoma. You fight extradition, you don't fight it, it doesn't matter. You go to a shit little Okie jail and you sit there for the next two (2) to three (3) years in a cell by yourself. Brushing your teeth in your toilet and getting fed in your cell and maybe getting your hour of light every day. Getting some defense attorney who is probably making about 45,000 dollars a year who probably fixes lawn mowers on the side. He's got this DNA evidence and he's going do is just tell you Bill, (inaudible), because you are fucked on this and the DA is going to tell him to fuck off because the opportunity has already been presented. Let's face it, at the end of the day you don't have a whole lot to offer Oklahoma. You have things to offer Texas so he tells the defense attorney to fuck off. You get convicted and they are going to bring in all these little girls. The juries going to hammer your ass. They are going to testify at trial about how you sexually assaulted them. They are going to bring in Sapaugh, they are going to bring in the victims from Oklahoma that you went down on already and they are going to testify at trial about how much of an animal you are. Then they are going to turn around and give you the death penalty then you are going to be sitting in Oklahoma on death row.

(State's Exhibit 101 4:16:45-4:18:18)

Ranger Holland: "Texas at that point isn't going to give a shit because Oklahoma has already promised to give you the death penalty if you don't cooperate."

(State's Exhibit 101 4:18:42-4:18:48)

Ranger Holland: Well what's in the middle of A to Z? Well there's a lot of room. You know? Can you get promises? Can you have these DA's promise you this? Absolutely! There's no doubt about that. I'm willing to do that...But there's also a realization that, it's our ball and if you want to come play our game you gotta come play our game. Alright? But if you want to try to take the ball and try and run off by yourself and we are stuck out in the field alone then the motivation is that the DA has no choice than in Texas and Oklahoma then to file the death penalty on your for those murders because you're not doing anything to help and there is no reason that they have not to file.

(State's Exhibit 101 4:18:54-4:20:05)

Ranger Holland: They are going to seek the death penalty. You are going to be convicted because you can't beat these cases. You can't beat them because you did it...That doesn't have to be. Now, I'm willing to do anything. How many times am I going to say it? I'm willing to do anything that I can legally in my power to visit with these DA's to help you.

(State's Exhibit 101 4:30:54-4:31:30)

Ranger Holland: The problem is, that once you get there. Once that process goes thru. There's no bringing you back. Okay? Because we can't extradite you back here. They aren't going to do it because it's going to cost too much money and there's already an agreement about who would go forward first if you didn't want to cut a deal. So you know. There's no coming back. There's a timeframe. How do you stop it? Jim or Ranger if you prefer, I want to see what they'll do for me. That's all you have to say.

(State's Exhibit 101 4:33:30-4:34:30)

Ranger Holland: Well, so let me talk. Let me get on the same page. How do I say this? So I can do all these things. And I can get this rolling. Okay? I can tell you right now, I reached out to these two because they would do...Okay? Harris County is willing, and again, I'm not the elected District Attorney. I'm just telling you my understanding of it. Harris County's willing. They're skeptical. In other words, they're wondering, is he playing games, is he screwing with us?
Mr. Reece: No games.
Ranger Holland: Okay.
Mr. Reece: You keep your end, I'll keep mine.
Ranger Holland: Alright. I'll tell you and think about this for one second, and I'm not going to push you on it in any way, shape, or form. But I'm telling you that we're prepared today to go anywhere you want to take us and...
Mr. Reece: (Inaudible) I want it all in writing. I want a guarantee. You get that done, and I'll do what you want.
Ranger Holland: I'm gonna tell you what the hangup is going to be. The hangup is going to be I can tell you how it can go real smoothly. You can hold at the end of the day, you don't have one chip. You got two chips.
Mr. Reece: You want one of them, I'll give you one of them.
Ranger Holland: What I'm saying is, if you throw one out now and you still have a chip, and you prove up everything and then after this, everything moves really fast, because there's no way in hell that they wouldn't move immediately on it.
Mr. Reece: I'll give you one person...

Ranger Holland: Yeah, we can reach out to him now. I'll see if I can hold on. All I'm saying is okay. Let's see real quick. Okay? And then if you want to stop or get uncomfortable, I'm not gonna push you.
Mr. Reece: I'm ready for this to be over with.
Ranger Holland: Okay, well, I'm not going to push you. But what I'm saying is, so we can stack up all the stuff and it's gonna sit here because it's gonna be in Harris County's giant bureaucracy, and Oklahoma's a giant bureaucracy. But if you prove up one, you still have everything. And we can immediately get on the phone in Harris County. This is my thought process. If we do this today, you probably have a letter from Harris County by tomorrow and I guarantee you. Again, I'm not speaking for them, but **Oklahoma is going to turn around and immediately do the same thing**. **They've all said that they would play**. You got two skeptics out there...Harris County still has a case ready to file. You know, and obviously, Oklahoma has a case ready to file. So you know, what have you decided for? Well, so we sell them because if we do that he's gonna get this and you won't have to worry about trial and all these other things....You would ride with me. I would probably have a Denton county guy riding with us. You can smoke cigarettes, you do whatever you want, drink coffee. But we can go wherever. But if you prove up one, then everything falls in place and no one's going to question you because at that point it is the holy grail. You did, that it's a holy grail. And I said, you don't have to believe me just listen to me. What do you think Harris County? Well, he's giving up two, alright well he's giving up one of those and he doesn't have to. He's legit on everything why would he do that unless he's willing to do everything and everything falls into place after that.

(State's Exhibit 102 20:36-25:40)

Ranger Holland: So is there a deal though? So if you go out there and do this, I'm going to make sure that all of this other stuff falls into place.
Mr. Reece: And you're gonna make sure it'll all run CC with Oklahoma time?
Ranger Holland: Yeah, I'm gonna get on the phone. And again, don't, I told you I'm not going to screw with you. I'm not going to lie to you about that. I'm gonna make gonna make those phone calls. Do I see any issues with that? No, I don't.
Mr. Reece: Does Oklahoma promise the death penalty or no?
Ranger Holland: It's there but I think that...let me just say this. The indication based on what I was told is that if you were to give up the bodies, that will go away.
Mr. Reece: Alright. Deal.
Ranger Holland: Okay.

(State's Exhibit 102 40:50-41:27)

> Ranger Holland: The ones from Oklahoma, they are going to prove sexual assault and murder, okay? So it's a capital murder case. This could be a capital murder case, could it be a death penalty case? Absolutely. I'm not going to lie to you. (inaudible) are they going to go for it? Yeah. They are going to go for it. Okay? In Oklahoma, everything that you did whether you're convicted for it or not. They can testify. So all these people that lived are going to sit there and testify. I think the DA in Harris county is sitting there debating does he file on your for aggravated sexual assault and child (inaudible) I don't have the answer. I know, that there's a lot of shit out there. I'm going to tell you right now and I'm not going to lie to you that you are done on Smithers and are done on Oklahoma. And so I throw these things back at you... And I'm going to be honest with you, you got ten (10) years. I won't promise you things, I can't promise you things but at least for a little bit of time, you can get treated like rockstar. In other words, we can take a trip. If you did this girl up in Denton, you can't lie about it because you'd have to know where the body is...but, hey man, if you want a vacation, you want to go up there and you want a nice room and you want starbucks and you wanna and you can't smoke in here. And you want some starbucks, you wanna dip, you wanna walk around in the woods and get some fresh air and you wouldn't be wearing handcuffs and all that shit. You wanna helicopter ride? Get a helicopter to take you up there. That's there.

(State's Exhibit 101 3:29:28 – 3:31:39)

> Ranger Holland: Understand that there's this damage and mitigation part and it's completely up to you where you go. I'm not fucking with you and I'm not jerking your chain. I don't want to sit here all day and threaten you with these different things. You know that Smithers is there and you are going to get convicted on that and you are going to get the death penalty on that. You know that the one in Oklahoma, it's the same thing. You know that you did it and you know the evidence is there and you are going to get the death penalty on that. But what I'm telling you is why don't you let me, and this guy from OSBI talk to these prosecutors. Why don't you help us, why don't you spend the next ten (10) years of your life, instead of sitting there in a nasty ass Harris County jail in isolation or going to death row and sitting in an 8x10 and being labeled some juvenile sex offender. Why don't you do everyone a favor, including yourself and do things the way that you want to do them. Why don't you do your last years the way you want to do them? Why don't you do them where people aren't fucking with you, why don't you do them knowing that you did the right thing? You know what if you could get some special treatment out of it, right? That you could help solve cases.

(State's Exhibit 101 3:31:47-3:33:03)

Ranger Holland: Okay, Jeter told me that based on the phone records and credit card shit...you kind of fucked yourself. I'm going to be straight up. You kind of fuck yourself on the credit card because you know when you use a credit card, you generally don't pay with cash so you're real easy to track and then the phone shit. You are on the phone a lot, man. I mean it's tracking your things. It says exactly where you are, you have uh, this isn't my case but my belief is three (3) witnesses that put you at the carwash where she is abducted from, right? And this is the deal, I mean to go back to the Smithers thing, hey this chick is promiscuous. She's twenty (20) years old, she's married, she fucked around on her husband, we already know that. If you fucked her, I don't give a shit. Maybe you fucked her and her husband killed her. I don't give a shit. They are going to put you at this carwash and they are going to put you with her and that same day and at the end of the day if you fucked her, I don't give a shit. You say you didn't do it.
Mr. Reece: I didn't do it.
Ranger Holland: Okay, this is the issue and it's real weird. I'm going to show you a picture. And it's a picture of a body and it's not real gross because I don't want to freak you out but I want to show you this picture because if I don't show you the picture, you're not going to believe me. But you know her and you never fucked her?
Mr. Reece: That's right. I don't know her, know her.
Ranger Holland: You're sure you never slept with her?
Mr. Reece: I'm positive.
Ranger Holland: Maybe you went over and thought you were fucking her mama in the dark and you were drunk and that's how it slipped in her. So there's no way in hell that your penis was ever in her vagina?
Mr. Reece: That right.
Ranger Holland: Okay, no way in hell that (inaudible)
Mr. Reece: No.

(State's Exhibit 101 3:04:48-3:07:01)

B. Ranger Holland's Statement's that Inducement Mr. Reece into Confessing:

Ranger Holland: You have an opportunity to help yourself. You have an opportunity to, it's not a game. You have an opportunity for guarantees Bill. You think I'm just going to step up in here and blow smoke up your ass and think that you are going to do these things? No, but if you are serious about this then you are going to want guarantees in writing. You are going to want me to go visit with these DA's to figure out exactly what they are willing to do for you and what guarantee's they are willing to offer you. I'm not stupid, Bill. I know you want a contract. I understand that. It's out there. As much as I have going forward is you

tell me what you want to do. What you did, what you are responsible for, where you'll go. You don't have to give me details, you don't have to give me anything but give me an idea of what I can take to the DA...He recognizes he's going to have to do a life sentence for this but he's wanting to give you closure if you give him a guarantee on paper. He'll give you what you want, if he gets what he wants.

(State's Exhibit 101 4:12:05-4:13:39)

Ranger Holland: Think about what I'm saying. Okay? What doesn't make sense to you about helping me? I don't even know what there is to think about to tell you the truth. What's there to think about? Are you convinced that I'd lie to you, do you think that I'm fucking with you? Why would I do that? Why? Oh the ultimate last (inaudible) on Bill. Let's make up a story about him going back to Oklahoma and about making up a bunch of evidence and violate the law.

(State's Exhibit 101 4:34:39-4:35:16)

Ranger Holland: At the end of the day, I would like your help, that's my goal, that I would like you to help me...well I think it works out to your best benefit and I know that there's big difference between carrying on in life here and again, I'm not the DA, I'm not making promises, I'm not gonna lie to you, I'm not gonna blow smoke up your ass. I think it's better to live life here where you've assimilated and people don't screw with you and you have some privileges and it's a bearable life as opposed to sitting on death row. You know, I think that's better... At the end of the day you have to make that decision but there's a time limit and let me throw this at you.

(State's Exhibit 101 3:02:49-3:03:38)

Ranger Holland: But the problem that I made a case and Oklahoma made a case and the DA has to have a fucking reason to not seek the death penalty (inaudible) and you know what the reason is? The reason is because he helped us solve these other cases. The reason is that he asked for forgiveness and he gave the family closure and at the end of the day that's what they wanted but if you force either of these DA's to move forward with either of these cases they are going to move forward with the death penalty...it has to do with how you are going to spend your life for the next 10 years. Hey, it's not fucking Fort Lauderdale? Alright, it's not walking around chasing bikini's and drinking Bud Lights but you get to walk around and as you get older you are going to get more and more privileges...you'll get reclassified when you hit 60 and you'll get reclassified on all these other things and you are set up for life under the old system. I mean, dude, you make the decision and you are the master of your own destiny. I just want you to know what's out there and I just want you to listen to me because it makes sense

and you know that. (Inaudible) You know, you just have to make a decision as to what you want to do and make a smart play out of it. I mean this is the deal, Oklahoma is sitting out there and we rode down here together. Along with the DA from Galveston county and some other people, we drove down here last night and cut this whole thing up, okay? You saw the warrant and so the next thing is extradition and we have a choice on that you could waive extradition or you can fight it. If you fight it, it might take 16 to 30 days and then they are going to pick you back up because there's nothing you can do to stop it. Unless! Texas files a case on you. Okay? So you'll have these dueling things and I say its these DA's a rolling towards together. And at the end of the day I think that both of these DA's and again I'm not the DA and I'm not the decision maker but I think at the end of the day both of these DA's are going to turn around and you know what? Fuck it. This guy was helping us on these cases and let him do life if he wants to do it and if he lives til he's 75 under the old sentencing guidelines then fuck it...I think that's pretty good odds, do you walk out the door? Maybe? But I know you have something to look forward to and I know that doing time here is a fuck of a lot better than doing time on death row in Oklahoma or death row down in Huntsville.

(State's Exhibit 101 3:40:34-3:43:24)

Ranger Holland: What I'm telling you is, forget about the death penalty. Think about the ten (10) to twelve (12) years of getting there and the way that you could live...I believe that there's room in this that there's wiggle room. **I believe that the DA in both of these states, that if you help them, if you give these families closure and you help us on these other cases, I tell you what, there's no doubt in my mind that they'd bend over backwards to do what they want to help you.** You know? And I tell you what, and I go back to superstar status. I don't want you to lie, I mean I don't want you to jerk my chain or anything but if you had anything to do with the Denton one or if you had anything to do with Jessica Cain. There's more out there but I will guarantee you in talking to the Galveston DA that he would wave the death penalty.

(State's Exhibit 101 3:54:09-3:56:01)

Ranger Holland: All the DA wants is closure. They want to bury that body. You can get a guarantee upfront that they aren't going to add anything on you. That they aren't going to go for the death penalty. I know that DA will do that, there's no doubt in my mind.

(State's Exhibit 101 4:22:30-4:22:48)

Ranger Holland: Okay, I got no issues with that. I can't speak for Oklahoma. I can tell you that I've talked to them at length about all

this. I can tell you at the end of the day that if you cooperate my belief is, and again I'm not the district attorney, I'm not the judge, I'm not the attorney general, none those people so take what I'm saying with the right thought process. But in communications with them, if you help on this that they wouldn't do that. So that's my belief and that's from talking with them. So you want no death penalty in writing.

(State's Exhibit 102 7:15-8:55)

Ranger Holland: I'm not saying but if you'd like or let's say you say, man, I'm gonna, I'm gonna go to court on this. If you plead to these thing, you know. I'm not the defense attorney. I'm not the prosecutor, not the prosecutor. But if you plead to these things, I don't think it's an issue to have those writing maybe brought here or do it real quick, you know, with the district judge because I think he has to be present for it.

(State's Exhibit 102 12:30-12:58)

Ranger Holland: So I guess the question is, how do you spend the next ten (10) or so years of your life? And that's one of the reasons that I'm here because I'm a big proponent of options and choices. I think that sometimes there's people that want to control their own destiny, right? And today, I have a very unique opportunity for you, because you can basically control your own destiny...I'm not going to sit here and lie to you, blow smoke up your ass and tell you that, you know, I'm here to help you...But the neat thing, what I find about in life, as I've worked a lot of these cases and have a lot of successes. Sometimes there's something in it for everyone. In other words, me I care about closure, solvency for the family, those things, I wouldn't expect anything to mean anything to you. But I think that you're probably wondering, where am I a week from now? Or where am I two (2) weeks from now, or where am I a month from now? And those are the things that are probably more important to you at this point.

(State's Exhibit 101 10:34-12:00)

Ranger Holland: Well Bill, quite honestly, we know you did the other ones and if you end up cutting up some type of deal, and you are legit then why would you lie about those? Why wouldn't you just take it if you did it especially if you are over there smoking cigarettes and did cocaine, for awhile. We can run you around like a big celebrity. You get the star treatment...Hey, let me tell you something, there was a guy several months ago, and he did twenty (20) murders, and they interview him and he ends up confessing. You know what he asked for, what he wanted? Same thing, (inaudible), all I had to do was go back and talk to the DA, he was about your age and you know what his goal was? Was to stay in the same unit he was at because he didn't want to

change and he didn't want to go to a different unit. He didn't want to go to a jail and sit there and wait for trial and get screwed with. There was a point with where he was at that he realized that he was never going to get out of jail. He was very happy with where he was at and you know we brokered a deal. He pled to two (2) of them and he's about to plead to eighteen more (18). There's a bunch of different counties and it takes time...That's why you continually hear me saying, I can't promise you this, I'm not the doer, I'm not the DA and I'm not the judge. I can't that's coercion. All I can tell you is that I can reach out to these people. That they can make this happen but it took time because there's eighteen (18) different counties that's got twenty (20) murders and we've worked through two (2) or them and the DA's were happy, they were saying the same thing, they are 1990 cases and they were more than happy to close the cases...He's not making it up, he's not full of shit. The case files closed and at the end of the day, he gets what he wants.

(State's Exhibit 101 3:56:22-3:58:56)

Ranger Holland: A being the best case scenario, Z being the worst. This isn't a threat or anything. A being the best case scenario is you decide where you want to go. Whether that's here or Oklahoma. You provide information, you help us out and they give you an agreement for life and the unit that you want, whether it's here or Oklahoma and if you decide you want to help us with these other cases then we go on some road trips and you get treated like a rock star. You help us out then we will get guarantees from both of the DA's that they aren't go to put you on death row either. That could be an A that could be a really good thing then you spend the rest of your life uh here or in the unit of your choice...You get kind of left alone to do what you want. That's an A. What's an A+? An A+ is that you are under the old sentencing guidelines and as long as they don't give you the death penalty then you are looking at life and that's basically one (1) and three (3) and walking out the door at age 70 and you are parole eligible in twenty (20). Alright? Which is about the time you start getting parole eligible on your other stuff. So there's a chance, you know. There's all kinds of things that you can do.

(State's Exhibit 101 4:14:24-4:15:51)

Ranger Holland: There's gotta be something in it for you at the end of the day and you ultimately have to decide what that something is. You know what it is but until you tell me there's nothing I can do about that. It all starts with you but you are done. You are done on those and the future doesn't look bright but it doesn't have to be.

(State's Exhibit 101 4:24:10-4:26:43)

Ranger Holland: You wanna super star status, I'll tell you what, I'll personally drive you or if you wanna take a helicopter, we'll take you on a helicopter...We got the best helicopter, us rangers do. We can drive. We can go and get coffee. McDonalds. I like to dip. We can have a little dip. You wanna smoke some cigarettes? We can do whatever. Take a nice long ride. Find a nice room down in Galveston, by yourself. Good food. We can take some trips around. Talk and debrief. We can stretch it out for a week or two (2) weeks. Whatever you want Bill. We can go walk around in the woods or down by the water. Wherever. You can take us there. You can help us...How does it work out for you? Well, if you are helping us, Bill. What do you think we are going to do? How do you think we are going to treat you? Don't you think we want you to keep helping us? Right? We'll treat you like a king. We'll treat you like you've never been treated before. You'll have officers kissing your ass and getting you coffee, alright? If you can do it, same thing here. Same thing with whatever else is out there. You can get stuff in writing beforehand and no one is going to screw with you on it...They're not going to writ you back there for trial. They aren't going to do anything to fuck with you. I mean these various DA's, you could get anything in writing that you want. They have to be broached though. I talked to Galveston County this morning. What did he say? He said, I want closure for the families. Well I'll solve this case, right here. You don't think I'd bend of backwards? You think its going to be in the paper? Ohh he got a nice room, he got starbucks, steak at Ruth Chris, cigarettes, smokes, and dips, a refrigerator in his cell with all kinds of candy in it. Do you think that's going to be in the paper? No. I'm not going to give you (inaudible)...we'll treat you like a king.
Mr. Reece: Tell ya what. Give me until Monday and I'll give you an answer.
Ranger Holland: You want me to come back Monday or how do you want to do it?
Mr. Reece: Come back Monday and I will give you an answer.
Ranger Holland: You know I'm legit.
Mr. Reece: I know you're legit. If you come back Monday, I'll tell ya if we are going to do this or I ain't going to do it.
Ranger Holland: Not to get into it and I don't want you to give me any type of statement. I wanna put things in writing but if I'm going to –
Mr. Reece: We'll talk about all this.
Ranger Holland: All four (4)?
Mr. Reece: We'll talk about it.
Ranger Holland: Hey, Bill. I appreciate it.
Mr. Reece: But I want a deal.
Ranger Holland: I'm not going to bullshit you. I'm not going to play games. I'm not going to fuck with you and I will get everything on paper.
Mr. Reece: No news reporters.
Ranger Holland: I want something in exchange though. I want honest from you that you won't fuck with me.
Mr. Reece: I won't fuck with you. I'll be straight with you.

Ranger Holland: Alright, if you decide if you didn't do those, in other words, that you aren't going to play. Just be straight up.
Mr. Reece: I'll be straight with ya Monday.
Ranger Holland: Alright. I'm going to reach out to Denton County. I'm going to reach out to Galveston County. I'm going to reach out to Harris County. Oklahoma is already there.
Mr. Reece: Okay.
Ranger Holland: Deal?
Mr. Reece: Deal.

(State's Exhibit 101 4:43:22-4:47:23)

C. Ranger Holland's Statements to Mr. Reece about his authority and power:

Ranger Holland: I'll make you this agreement. I'm gonna be honest with you...I'm gonna be honest with you. If you are getting ready to tell me a lie, show me some respect and just don't say it. How's that? We won't bullshit each other, can we have that agreement?

(State's Exhibit 101 13:56-14:18)

Ranger Holland: Why we're here today. So I get a phone call from the Governor. "Jim. Do this." I get a lot of phone calls. I'm really, really good at what I do. I'm one of what they call (inaudible) Rangers, there's eight of us throughout the State that handle these special missions. And I actually trained the other ones how to do their job. And all I do is high profile cases. I'm not doing the little stuff. I don't do bank robbery, sexual assault. I'm doing the real stuff.

(State's Exhibit 101 14:47-15:18)

Ranger Holland: There's a couple of things too that you need to know about what I do and what I can't do. I can't make up forensic tests. In other words, I could lie to you, you know that.

(State's Exhibit 101 15:28)

Ranger Holland: Me being the smartest son of a bitch, because I know all about science and I've got a master degree. They don't call me and the governor don't call me because I'm a dumbass, he calls me because I'm a stud! I'm the shit. You want something done on a case call me. Call Jimmy. That's why they call Jimmy. I need you to do some shit for me, I've got a family writing me letters I need you to look at this. I need you to get in there and solve this case. Yes, sir. 3 minutes later know what happens? The Colonel of DPS calls me and tells me Jimmy did you just get a phone call from the governor? Yes, sir, I did. He tell you he wants you on it? Yes, sir, he did. If you need anything, you let me

know and you will have it. You need a helicopter tomorrow, you will have it. You need a satellite redirected, you will have it. You need me to fucking shut down the (inaudible) you will have it. You understand that? Yes, sir. I don't want the governor calling.

(State's Exhibit 101 2:14:00-2:15:01)

Ranger Holland: Who do you think continues to write letters to the governor?...I don't write to the governor. Hell, I only answer the phone when he calls. The Smithers continue to write letters to the governor. And who does he call when he gets these letters?
Mr. Reece: He calls you.
Ranger Holland: The DA fucked me because he wouldn't give me a hundred thousand dollar check to run my fiber analysis. And he said you'll have a check by the end of the day. And I get a phone call ten (10) minutes later and guess who is on the phone? The elected DA of Harris county and you know what he said? We set aside $750,000 dollars for you to do any testing you want to do. Okay, good deal.

(State's Exhibit 101 2:39:05-2:39:49)

Ranger Holland said: We go back to the death penalty and I'm not the decision maker, I've told you that before (inaudible) I'm not the DA, I'm not one of those things but I'm a pretty smart fucker. I've been on this for 24 years and I'm pretty fucking good at it and the governor doesn't call Jeter. Does he call pretty boy?...I make everything very neat, I document it, I lab test, I write really good reports, I get on the stand and wear my nice shirt and I testify. And I tell the story, I write history, okay? I base that on the common denominator whether its Mr. Jeter or myself is that we wear this badge and this badge means that we stand for integrity, what's right, and justice and this badge means that we are supposed to be blind to all these outside things and never let emotion play into things.

(State's Exhibit 101 2:55:15-2:57:16)

Ranger Holland: I will do anything that I can to accomplish my goal and my goal is to provide the families closure and solve the cases because that's what I do. I'm very fucking good at it...I'm the best at this ever. Alright? And that's why I get the phone calls. I'm so fucking good at it, Bill, I did shit that no one else could do.

(State's Exhibit 101 4:28:36-4:29:08)

Ranger Holland: Think about what I'm saying. Okay? What doesn't make sense to you about helping me? I don't even know what there is to think about to tell you the truth. What's there to think about? Are you convinced that I'd lie to you, do you think that I'm fucking with

you? Why would I do that? Why? Oh the ultimate last (inaudible) on Bill. Let's make up a story about him going back to Oklahoma and about making up a bunch of evidence and violate the law.

(State's Exhibit 101 4:34:39-4:35:16)

Ranger Holland: Okay, so it's a guaranteed no, they're not going to do that. So worst case scenario is you get life based on the '97 stuff, which is what, 33 years? Or whatever...What I'm saying is all this can go, laser fast. You take this one. We can leave in 30 minutes and it's laser fast. I give you my word. Okay? And I don't do that like, I don't give you my word of saying hey Bill someone else can fuck you, alright? I give you my word, and my word is my word. I don't care what I have to do to make sure my word is followed, but I will do that...
Mr. Reece: I'll give you one, and after everything's signed, judges, and everybody's signs off on everything, I'll give you the other one, deal? No bullshit?
Ranger Holland: No bullshitting. I wouldn't bullshit you, alright? I wouldn't do that. You alright? You tell me the direction that we're going and I'll get everything lined out. I'll have one of them come in here and sit with you for a minute and then we'll leave in about half an hour.

(State's Exhibit 102 25:42-27:16)

Mr. Reece: We do got a deal, right?
Ranger Holland: Yeah, do you want me to bring the DA in here? How about I bring the DA in, real quick? Okay, how about I run through what you want today? In other words we're gonna do this..

(State's Exhibit 102 30:53-31:06)

Ranger Holland: The problem is, that once you get there. Once that process goes thru. There's no bringing you back. Okay? Because we can't extradite you back here. They aren't going to do it because it's going to cost too much money and there's already an agreement about who would go forward first if you didn't want to cut a deal. So you know. There's no coming back. There's a timeframe. How do you stop it? Jim or Ranger if you prefer, I want to see what they'll do for me. That's all you have to say.

(State's Exhibit 101 4:33:30-4:34:30)

Detective Bacon testified that Mr. Reece began staying at the Friendswood City Jail on February 16, 2016. Mr. Reece had his own jail cell and no other inmates were at Friendswood Jail for the first two (2) months Mr. Reece was there. (Tr. XIII

58-59, 114-115, 4-29-21 Tr. 50-51) The police department gave Mr. Reece his own TV and brought him food from whatever restaurants Mr. Reece wanted. Mr. Reece was given art supplies and a projector and was treated very well while in Friendswood Jail. Mr. Reece also was never in handcuffs while in the Friendswood jail and only wore handcuffs when he was transported to and from the excavation sites. The police department bought cigarettes for Mr. Reece to smoke and he was allowed to go outside for smoke breaks. (Tr. XIII 58-60, 116-119) Detective Bacon also testified that he told Mr. Reece that "the only way we're going to make the deal work is if he tells the whole truth." (Tr. XIV 24) Detective Bacon's deal meant to take the death penalty off the table in the interview. (Tr. XIV 25) Detective Bacon's testimony shows that Mr. Reece still had reason to believe that the deal of no death penalty was going to be done. While in Friendswood jail Mr. Reece was treated like a "rock star" by law enforcement and basically everything that Ranger Holland[13] had promised was falling into place. Therefore, Mr. Reece still had reason to believe that he would not receive the death penalty in Oklahoma.

Ranger Holland admitted he lied when he told Mr. Reece that a case was going to be filed against him concerning Laura Smithers.[14] (4-29-21 Tr. 148-149) Ranger Holland read part of the DNA profiles to Mr. Reece during the interview and told Mr. Reece that he was a contributor to the partial profiled obtained from three (3) sperm

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[13] Ranger Holland testified that in June 2016 he, Mr. Reece's attorney from Texas, the Galveston County District Attorney, and the Galveston County First Assistant District Attorney flew to Oklahoma City to meet with the Oklahoma County District Attorney, David Prater to attempt to have Oklahoma County take the death penalty off of the table. Mr. Prater ultimately did not agree to not seek the death penalty. (4-29-21 Tr. 107-108)

[14] Ranger Holland testified that another officer had told him that Harris county was not going to file a case against Bill Reece but he believed that they would file a case because of a second forensic report would be more definitive and he believed either Harris or Galveston counties would pick up the case and they did. However, he agreed that only happened after Mr. Reece confessed to him two (2) times and to Detective Bacon two (2) times. (4-29-21 Tr. 149)

fractions found on Tiffany Johnston's vaginal and rectal swabs. However, Ranger Holland said he left out the language in the report that said Mr. Reece cannot be excluded and did not tell Mr. Reece the probabilities regarding the DNA evidence. (4-29-21 Tr. 164)

After two days of *Jackson v. Denno* hearings[15], the trial court ruled that the statements made by Mr. Reece over all the interrogations were knowingly and voluntarily made. The trial court reasoned that when Mr. Reece gave his list of demands to Ranger Holland, he knew there were no deals in place. The trial court said that "***Ranger Holland made a promise*** that he would try to get everybody on board. He fulfilled that promise. It was not up to him. It was up to the district attorney, Mr. Reece knew that, to give the last word." (5-7-21 Tr. 106-107) The trial court's own admission that Ranger Holland promised Mr. Reece things in exchange for Mr. Reece's confession is a clear indication that Mr. Reece's Fifth and Fourteenth Amendment rights were violated. "Where a constitutional question is concerned, the State must prove beyond a reasonable doubt that the error did not contribute to the jury's verdict." *LaFevers v. State,* 897 P.2d 292, 301 (Okl.Cr.,1995) (*citing Chapman v. California,* 386 U.S. 18, 23, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) and *Bartell v. State,* 1994 OK CR 40, 881 P.2d 92). This Court must determine whether a constitutional error is harmless. *See Van White v. State,* 1999 OK CR 10, ¶ 32, 990 P.2d at 265. In order for constitutional error to be deemed harmless, the Court must find beyond a reasonable doubt, that it did not contribute to the verdict. *Id., citing Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The standard for constitutional violations is well-known: reversal is in order

[15] (4-29-21 Tr. 7-208; 5-7-21 Tr. 81-108)

unless the State can show the error was harmless beyond a reasonable doubt. *Id., citing Arizona v. Fulminante,* 499 U.S. 279, 295, 111 S.Ct. 1246, 1258, 113 L.Ed.2d 302 (1991); *Bartell v. State,* 1994 OK CR 59, ¶ 11, 881 P.2d 92, 95–97; *Simpson v. State,* 1994 OK CR 40 ¶ 34, 876 P.2d 690, 701. The denial of a constitutional right is entitled to an independent *de novo* review on appeal. *See White v. Estelle,* 459 U.S. 1118, 1121-1122, n.3 (1983) (the accused is entitled to an independent determination on the merits as to constitutional claims). The Court should conduct an independent review of the evidence on dispositive constitutional issues. *Bose Corp. v. Consumers Union,* 466 U.S. 485, 508 (1984). "The State must prove beyond a reasonable doubt that the error did not contribute to the jury's verdict." *LaFevers v. State,* 1995 OK CR 26, 897 P.2d 292 (internal citations omitted)

It is the government's burden to prove Mr. Reece's statements were made voluntarily. *United States v. Lopez,* 437 F.3d 1059, 1063 (10th Cir. 2006) (citing *Missouri v. Seibert,* 542 U.S. 600, 608 n.1 (2004)). "When the government obtains incriminating statements through acts, threats, or promises which cause the defendant's will to be overborne, it violates the defendant's Fifth Amendment rights and the statements are inadmissible at trial as evidence of guilt." *Lopez,* 437 F.3d at 1063 (quoting *United States v. Toles,* 297 F.3d 959, 965 (10th Cir. 2002)). In determining whether statements were involuntary, courts look to the totality of the circumstances. *See, e.g., Schneckloth v. Bustamonte,* 412 U.S 218, 248-49 (1973).

It has long been the law that a defendant's right to due process of law is violated when a confession is obtained through coercion. *Dickerson v. United States,* 530 U.S. 428, 433, 120 S.Ct. 2326, 2330, 147 L.Ed.2d 405 (2000); *Brown v.*

Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940). To be admissible, a confession must be freely and voluntarily given, and must not be "obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 84 L.Ed.2d 653 (1964). Confessions induced through promises of benefit or leniency are likewise inadmissible. *Bram v. United States*, 168 U.S. 532, 542-543, 565-566, 18 S.Ct. 183, 187, 195, 42 L.Ed. 568 (1897); *Young v. State*, 1983 OK CR 126, ¶ 16, 670 P.2d 591, 595. *Clanton v. Cooper*, 129 F.2d 1147, 1159 (10th Cir.1997)

"The ultimate test of the voluntariness of a confession is whether it is the product of an essentially free and unconstrained choice by its maker." *Gilbert v. State*, 1992 OK CR 62, ¶ 28, 951 P.2d 98, 111 *(citing Crawford v. State*, 1992 OK CR 62, ¶ 28, 840 P.2d 627, 635); see *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973). To determine whether a confession was voluntarily given, a court must ask whether, in the totality of the circumstances, the police obtained the evidence by overbearing the will of the accused. *See e.g., Mincey v. Arizona*, 437 U.S. 385, 399-401, 98 S.Ct. 2408, 2416-2418, 57 L.Ed.2d 290 (1978). The dispositive question, this Court has held, is "whether police misconduct *contributed* to the confession." *Fontenot v. State*, 1994 OK CR 42, ¶¶ 17-18, 881P.2d69, 75.

Relevant factors to consider when determining the voluntariness of a defendant's statements include "(1) the age, intelligence, and education of the defendant; (2) the length of detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of his constitutional rights; and (5) whether

the defendant was subjected to physical punishment." *Lopez*, 437 F.3d at 1063-64 (Internal citations omitted). A defendant's statement may be coerced by promises of leniency. *Lopez*, 437 F.3d at 1064. In *Lopez*, the Court determined law enforcement officers violated the defendant's rights when the government agent made an impermissible promise of leniency *Id.* at 1065. The Court explained the agent's actions impermissibly misled the defendant to believe if he confessed to killing the victim by mistake, he would receive a lighter sentence, the sort of promise "that may indeed critically impair a defendant's capacity for self-determination." *Id.* at 1065. While the defendant in *Lopez* received *Miranda* warnings that "may, to some extent, have mitigated these coercive circumstances," the Court found his statements were coerced and involuntary where the agent also misrepresented the strength of the evidence against the defendant and threatened to prosecute members of his family. *Id.* at 1061, 1065.

In *United States v. Young*, 964 F.3d 938, 939 (2020), the 10th Circuit Court ruled that the agent's misrepresentations and false promises were sufficient to overbear the suspect's will and render his resulting confession involuntary. When a promise of leniency has been made in exchange for a statement, that inculpatory statement is the product of inducements and not an act of free will. *Id.* at 944. Even Young's prior experience with the criminal justice system did not convince the Tenth Circuit that he could withstand the coercive tactics. *Id.* at 946.

Here, Ranger Holland's actions went well beyond the actions of the agents in *Lopez* and *Young*. Ranger Holland's promises were not just limited to leniency but were promises that Mr. Reece would not be killed by the State of Texas or Oklahoma in exchange for Mr. Reece helping law enforcement find bodies and provide closure

to families. Ranger Holland also promised that Mr. Reece would be "treated like a rock star." Cleary, from the testimony above, Mr. Reece basically got everything he wanted while assisting Ranger Holland, except for not getting the death penalty in Oklahoma. Ranger Holland used the death penalty as both a threat and an inducement to Mr. Reece to get him to confess. It has been noted that there is an impact of the use of the death penalty as a threat to defendants.[16]

Mr. Reece has a documented IQ of 78 and has low verbal comprehension. Ranger Holland's extremely coercive statements to Mr. Reece become even more egregious when you take Mr. Reece's IQ into consideration. According to Dr. Ruwe, Mr. Reece has only a concrete level of understanding about what someone is talking about. (Tr. XVI 103-104) Therefore, it is very reasonable that Mr. Reece believed Ranger Holland when said he would not get the death penalty.

Mr. Reece had a reasonable belief that Ranger Holland could make all these deals happen. Ranger Holland presented himself as "Walker Texas Ranger", who the governor of Texas called first to handle cases he wanted looked into. Ranger Holland throughout the entire first interview talked about he is the best at his job. He will do anything to get deals done. Ranger Holland was the only person in not only the State of Texas but the entire country that could get this deal done. During the interrogation on February 15, 2016, Ranger Holland made phone calls in front of Mr. Reece and was able to get Mr. Reece out of Ellis Unit that day. Mr. Reece clearly had reason to believe that Ranger Holland could get this deal done. While Ranger Holland did say throughout the interrogations that he was not the decision maker,

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[16] Lauren Morehouse, *Confess or Die: Why Threatening A Suspect With The Death Penalty Should Render Confessions Involuntary*, 56 Am. Crim. L. Rev. 531 (2017)

he almost always follow up that statement with "but I think we can get this deal done."

Ranger Holland to Mr. Reece about someone who had murdered twenty (20) people in various counties and he was not going to get the death penalty. Ranger Holland told Mr. Reece that he could get a deal to sign to life on the Kelli Cox, Laura Smithers, Jessica Cain, and Tiffany Johnston cases. Those cases would be run concurrently with his current case and Mr. Reece could potentially get out of prison and Mr. Reece would be able to pick where he wanted to serve his time.

Mr. Reece had been incarcerated since 1997 and Ranger Holland dangled many carrots in front of him. Ranger Holland promised Mr. Reece helicopter rides. Ranger Holland told Mr. Reece that if he helped law enforcement, it would be a vacation for him. Ranger Holland ridiculously told Mr. Reece he could teach classes to family members of murder victims and help them cope. Ranger Holland told Mr. Reece he could smoke and dip if he wanted to if he helped law enforcement.

Ranger Holland also exaggerated evidence when talking to Mr. Reece on February 9, 2016. Ranger Holland neglected to tell Mr. Reece the DNA probabilities in the Tiffany Johnston case. Ranger Holland told Mr. Reece that there were three (3) witnesses who put him at the carwash on July 26, 1997. There was not a single witness who testified at trial that said they saw Mr. Reece at the carwash. Ranger Holland also told Mr. Reece that Harris County was going to file a death penalty case against him for Laura Smithers murder. That was a lie that Ranger Holland admitted to on stand. Ranger Holland told Mr. Reece that the ticket for Mr. Reece to get these deals was to give up a body. After Ranger Holland presented himself to Mr. Reece as

the most important and best law enforcement officer of all time, Mr. Reece believed him and trusted him.

Mr. Reece's subsequent confessions should also be suppressed. "The appropriate inquiry in determining the admissibility is whether the coercion surrounding the first confession had been sufficiently dissipated so as to make the second statement voluntary." *United States v. Perdue*, 8 F.3d 1455, 1467 (10th Cir. 1993) The government must show intervening circumstances which indicate that the second confession was insulated from the effect of all that went before. The later confession will be admissible while the first confession will not only if such a distinction is justified by a sufficiently isolating break in the stream of events. *Id.* at 1467-68 (internal quotation, citations, alterations omitted.) This "depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances." *Lyons v. Oklahoma*, 322 U.S. 596, 602. (1944). In *Clewis v. Texas*, 386 U.S. 707, 710-12 (1967), the Court held that a third confession a suspect gave, nine days after being arrested, was involuntary because there was "no break in the stream of events" beginning when police first arrested the suspect. Here, there was no break in the steam of events until the June 21st, 2016, interview, which was entirely about Laura Smithers. During all of Mr. Reece's prior interviews,[17] he was still under the impression that Oklahoma was potentially not going to pursue the death penalty. Mr. Reece was still under the belief that Ranger Holland could get the death penalty taken off the table like he promised and repeatedly told him in State's Exhibit 101 and 102.

[17] (State's Exhibit's 79, 80, 83, 84, 86)

Under the totality of the circumstances when you consider Ranger Holland's promises and Mr. Reece's intelligence, Mr. Reece's confessions were not voluntary, and its admission into evidence violates the Fifth and Fourteenth Amendments to the U.S. Constitution, and also Art. II, §§ 7, 20, and 21 of the Oklahoma Constitution. It is the State's burden to prove beyond a reasonable doubt that the introduction of the coerced confessions did not contribute to Mr. Reece's conviction. *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257, 113 L. Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Simpson v. State*, 1994 OK CR40, ¶¶ 9, 34, 876 P.2d 690, 694, 701. This error is not harmless. On rare occasion, the admission of an involuntary confession can be harmless error. However, the standard for finding the admission of such a confession harmless beyond a reasonable doubt is very difficult to meet. See *Arizona v. Fulminate*, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991) *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Simpson v. State*, 1994 OK CR 40, ¶ 34, 876 P.2d 690, 701. The Supreme Court explained, "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him...certainly, confessions have profound impact on the jury." *Fulminate*, 499 U.S. at 296, 111 S.Ct, at 1258. Mr. Reece's confessions were the most damaging evidence against him and undoubtedly contributed to his conviction. *Pickens v. State*, 1994 OK CR 74, ¶¶ 3-5, 885 P.2d 678, 680-681, overruled on other grounds by *Parker v. State*, 1996 OK CR 19, 917 P.2d 980.

Even where harmless-error analysis is applied, the intention is "not to treat as harmless those constitutional errors that affect substantial rights of a party. An

error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless." *Bartell v. State*, 1994 OK CR 59, ¶ 13, 881 P.2d 92, 96-97; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711 (1967).

Mr. Reece's confessions were coerced and involuntary and should have been suppressed by the trial court. The State's evidence against Mr. Reece was not so overwhelming or strong that this Court can conclude beyond a reasonable doubt that his coerced, involuntary confession(s) did not contribute to his conviction. Admission of these confessions was not harmless. Under the facts and circumstances of this case, the admissions of Mr. Reece's confessions denied him a fundamentally fair jury trial. The totality of the circumstances indicate the officers obtained Appellant's confessions by coercion, manipulation, inducement, and improper promises especially when considering the death penalty was threatened to Mr. Reece. As these confessions were not voluntarily made, at the very least the death penalty should not have been sought. Alternatively, these statements should not have been used in the first stage of trial and should have been suppressed, Mr. Reece's conviction should be reversed and a new trial granted by this Court or this Court should modify Mr. Reece's sentence to life without parole or life.

PROPOSITION II

MR. REECE'S OUT-OF-COURT STATEMENTS WERE IMPROPERLY ADMITTED INTO EVIDENCE, VIOLATING HIS CONSTITUTIONAL RIGHT TO BE FREE FROM COMPELLED SELF-INCRIMINATION.

Mr. Reece was not given *Miranda* warnings until February 26, 2016[18]. Detective Bacon testified that he Mirandized Mr. Reece at that point because it was

[18] Mr. Reece was previously interrogated on February 9, 15, 18, 19, 2016.

going to be a formal interrogation and he would be asking questions about the cases. (4-29-21 Tr. 29)(State's Exhibit 83) Prior to the interview on February 26, 2016 Mr. Reece had already been interrogated four (4) times by with Ranger Holland or Detective Bacon or both of them together before being Mirandized. (State's Exhibit's 79, 80, 101, 102) Appellant's trial counsel objected under *Missouri v. Seibert.* (Tr. XIII 81-82, 92-93; XIV 42, 83-85, 110-11) Therefore, the Court should review this as an abuse of discretion[19].

The United States Constitution protects a defendant's right to be free from compelled self-incrimination. U.S. Const. amends. V, XIV. See also Okla. Const. art. II, § 21; Okla. Stat. tit. 22, § 15 (2011). In *Miranda v. Arizona,* 384 U.S. 436 (1966), the United States Supreme Court held, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., 384 U.S. at 444, 86 S.Ct. at 1612.

The procedural safeguards, as set forth by the Supreme Court, require the State to prove the defendant was warned of his constitutional rights at the time of his arrest or custodial interrogation. If the warnings are not given, during trial the State may not introduce any statements made by the defendant, regardless of the voluntariness of the statement. *Id. See also Lee v. State,* 1983 OK CR 41, ¶ 28, 661 P.2d 1345, 1353 (citing *Michigan v. Mosley,* 423 U.S. 96 (1975)).

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[19] An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Two preliminary questions must be answered to determine whether *Miranda* warnings were required - first, was the defendant in custody and second, was the defendant interrogated by police while in custody. *Miranda*, 384 U.S. at 444, 467-6. As to the first question, a suspect comes under arrest for *Miranda* purposes when he does not feel free to leave or terminate the exchange with law enforcement officers. *Howes v. Fields*, 565 U.S. 499, 509; see also *United States v. Berres*, 777 F.3d 1083, 1092 (10th Cir. 2015).

In *Missouri v. Seibert*, the Supreme Court held Miranda warnings given in the middle of an interrogation were improper and the resulting confession must be suppressed. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004). In *Seibert*, the police interrogated the defendant from 30 to 40 minutes without advising her of her rights under *Miranda*. *Id.* 604-05. After the defendant confessed, she was offered coffee and cigarette break and then the interrogating officer turned on a tape recorder, gave the defendant her Miranda warnings, obtained a waiver, and continued questioning, referring to the previous unwarned statements, thereby obtaining a second confession. *Id.* at 605.

The Court explained the United State Constitution prohibits states from admitting involuntary confessions into evidence. *Id.* at 607. (citing U.S. Const. amends. V, XIV). The Court recognized the holding in *Miranda* and explained that *Miranda* was an effort to "reduce the risk of a coerced confession and to implement the Self-incrimination Clause..." *Id.* at 608 (citing *Chavez v. Martinez*, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part)). The Court then addressed the strategic decision of law enforcement officers to interrogate, warn, and then interrogate again - aptly referred to as "question-first." The Court

explained, "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particular opportune time to give them, after the suspect has already confessed." *Id.* at 611. The Court continued:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 611-12(footnote omitted).

The Court explained that if the police withhold proper Miranda warnings until they obtain a confession, "the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 613. This is because, upon hearing the Miranda warnings after just giving a confession, "a suspect could hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again;" instead, "[a] more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision." *Id.* Furthermore, "[w]hat is worse, telling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could leave to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail." *Id.*

The Court expounded several factors to consider when determining whether Miranda warnings mid-interrogation were sufficient. To determine "whether Miranda warnings delivered midstream could be effective enough to accomplish their objective," courts must consider:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615.

The Court then held the interrogation technique used by the police in *Seibert* effectively invalidated the protections of *Miranda*. The Court explained:

> The impression that the further questioning was mere continuation of the earlier questions and responses was fostered by references back to the confession already given. These circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to covey a message that she retained a choice about continuing to talk.

Id. at 616-17.

Miranda requires suppression where law enforcement failed to give proper warnings and the defendant made incriminating, testimonial statements. *New York v. Quarles*, 467 U.S. 649, 669, 104 S.Ct. 2626 (1984); *Pennsylvania v. Muniz*, 496 U.S. 582, 597 (1990). The Court has explained suppression is proper because, "whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component." *Muniz*, 496 U.S. at 597. See also *Doe v. United States*, 487 U.S. 201, 212 (1988). When the State introduces incriminating

statements from the defendant obtained in violation of *Miranda*, and conviction is due in part or in whole on the statement, the defendant's due process rights have been denied. *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

In State's Exhibit 79, Mr. Reece is questioned by Ranger Holland and Detective Bacon about Kelli Cox, Jessica Cain, and Laura Smithers murders which required incriminating responses by Mr. Reece. (State's Exhibit 79[20]) In State's Exhibit 80 Detective Bacon questioned Mr. Reece about Kelli Cox, Jessica Cain, and Laura Smithers murders, which required incriminating answers. (State's Exhibit 80[21]) Detective Bacon testified that during the February 19, 2016 interview he was just letting Mr. Reece talk. (4-29-21 Tr. 29) However, State's Exhibit 80 is riddled with questions by Detective Bacon to Mr. Reece about Kelli Cox, Jessica Cain, and Laura Smithers and Mr. Reece's responses to those questions were incriminating. (State's Exhibit 80) State's Exhibit's 79, 80, 101, and 102 show both Ranger Holland and Detective Bacon asking Appellant questions that required Appellant to confront the "trilemma" described in *Muniz*. Ranger Holland and Detective Bacon's questions, prior to Mr. Reece being read his *Miranda* warnings, did result in many incriminating answers being given by Mr. Reece. Therefore, subsequent interrogations with Detective Bacon or Ranger Holland on February 26, 2016, State's Exhibit 83,

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[20] 1:08-1:15;1:34-2:02;2:05-2:13;2:23-2:26;2:40-2:47;2:48-2:51;2:56-3:25;3:34-3:39;4:03-4:30;4:45-5:04;5:07-5:45;6:28-6:58;7:04-8:00;8:00-8:40;8:49-9:20;9:24-9:30;9:45-9:54;11:51-11:54;12:35-13:55;14:14-14:22;15:11-15:18;20:55-22:25

[21] 3:00-3:23;4:44-5:16;7:49-7:52;8:05-8:19;8:37-8:55,9:23-9:38;9:53-10:00;10:19-10:22;10:24-10:40;11:00-11:23;11:36-11:45;11:58-12:05;12:08-12:28;12:45-12:50;14:09-14:30;14:40-14:51;19:18-19:25;19:38-19:41;19:46-20:02;20:03-20:09;20:27-20:34;20:52-20:59;21:53-21:08;22:58-23:23;23:52-24:01;24:06-24:17;24:37-24:47;24:50-24:58;25:10-25:15;25:17-25:21;25:43-26:00;26:02-26:27;26:30-26:36;27:13-27:24;28:00-28:08;28:19-28:21;28:50-29:00;29:15-29:23;30:00-30:20;30:57-31:05;31:06-31:13

February 27, 2016, State's Exhibit 84, March 1, 2016, State's Exhibit 86, June 21, 2016, State's Exhibit 88, should be suppressed.

Ranger Holland and Detective Bacon's failure to read Appellant his *Miranda* rights until after Appellant made incriminating statements is the exact kind of circumvention of constitutional protections that *Seibert* warned against. When Detective Bacon read Appellant his *Miranda* warnings and asked whether Appellant wished to speak with him, after Appellant had already made many incriminating statements, this indicative of the kind of "bewilderment" and "perplexity" the Supreme Court anticipated. *See Seibert*, 542 U.S. at 613. This is the exact situation the *Seibert* Court was concerned about. "[u]pon hearing warning only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." *Id.* Throughout the prior interrogations with Ranger Holland and Detective Bacon's interrogation technique of question-first, warn later was prohibited by the *Seibert* Court. Such interrogation technique required suppression of Detective Bacon's entire interrogation of Appellant and subsequent interrogations with Detective Bacon or Ranger Holland. Based on violations of State and Federal law, as well as Appellant's constitutional rights to due process of law, Appellant requests this Court grant him a new trial.

PROPOSITION III

DETECTIVE BACON DELETING 40-60 HOURS OF RECORDED INTERROGATIONS WITH MR. REECE VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS.

During the *Jackson v. Denno* hearing held on April 29, 2021, Detective Doug Bacon of the Friendswood Police Department testified that he began recording conversations with Mr. Reece on February 17, 2016, on a digital pocket recorder because he believed it would be a good idea to record the conversations in case he missed something. Detective Bacon also said he recorded the conversations because the stakes were high and that this could be a death penalty case. (4-29-21 Tr. 7, 25, 43, 46) The days were typically around eight (8) hours and that after about a week of recording, he was running out of space on his recorder but instead of downloading the recordings to a computer, he deleted the recordings[22]. (4-29-21 Tr. 26-27, 44) Detective Bacon alleges that he had listened to all the recordings before he deleted them and that the tapes were just dead time or conversations to and from the dig site, dinner conversations, and the conversations had nothing to do with the cases or references to a deal. Detective Bacon said that most of the conversations were about Mr. Reece's family, growing up, prison life, shoeing horses, and past relationships with people. He would only take notes if there were something pertinent to the investigation. (4-29-21 Tr. 16, 27, 48, 50) Detective Bacon estimated that he deleted between 50-60 hours of tape. (4-29-21 Tr. 49) However, at trial Detective Bacon testified that 95% of the time in the tapes they were not talking about the crimes. (Tr. XIII 123)

At the conclusion of the *Jackson v. Denno* hearing, the court said that Detective Bacon did not talk about the case, just general topics. Detective Bacon was recording more than ten (10) hours a day and most of it was "dead time." (5-7-

[22] Detective Bacon testified that he did not make reports concerning the deleted recordings. (4-29-21 Tr. 47-48)

21 Tr. 168) The court continued that Detective Bacon testified that he tried to go back and listen to the conversations in real time but was taking too much time. Detective Bacon also testified that the conversations deleted did not have anything to do with the case. The court found that those were "innocent explanations for deletion of the hours and hours of conversations that they have." (5-7-21 Tr. 168-169) The court found *Martinez v. State*, 2016 OK CR 3, to be persuasive. Unless the defendant can show bad faith then the State's destruction of potentially useful evidence does not constitute a due process violation. The Defense Motion to Exclude all Taped Recordings of Interviews Done at the Friendswood Jail was denied. (5-7-21 Tr. 169) This ruling by the trial court was an abuse of discretion[23].

Irrespective of the prosecution's good or bad faith, withholding of *material* evidence favorable to an accused violates due process and constitutes reversible error. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material under *Brady* if it creates a reasonable doubt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97, 112 (1976). The prosecution has a duty to disclose such evidence, even if there has been no request by the accused. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Agurs*, 427 U.S. at 107. The *Brady* rule encompasses not only purely exculpatory evidence, but also evidence which could be used for impeachment. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

To establish a *Brady* violation, a defendant must show that the prosecution suppressed evidence that was favorable to him or, in other words, exculpatory, and

[23] An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

that the evidence was material. *Jones v. State*, 2006 OK CR 5, ¶ 51, 128 P.3d 521, 540-541 *citing United States v. Bagley*, 473 U.S. 667 (1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Green*, 527 U.S. 263, 280 (1999). The Court has clarified that when reviewing a *Brady* issue for materiality the reviewing court should not engage in a sufficiency of the remaining evidence analysis. In *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) the Court stated:

> The second aspect of *Bagley*[24] materiality bearing emphasis here is that it is **not a sufficiency of evidence test**. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. (emphasis added)

When the State fails to produce evidence because the materials have been lost or destroyed, constitutional defect has occurred if the evidence had *apparent exculpatory value* prior to loss/destruction and was of such a nature that "The accused would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 749, 489 (1984).

By contrast, if the exculpatory nature of the destroyed materials is uncertain, and therefore *only potentially useful*, failure to preserve the evidence constitutes a due process violation only if the State has acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). In instances where evidence has been lost or destroyed, a court must look to the import of the lost or destroyed materials to determine if

[24] 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

the *Trombetta* standard or *Youngblood* standard should be applied. *United States v. Bohl*, 25 F.3d 904, 910 (10th Cir. 1994); *Martinez v. State*, 2016 OK CR 3, ¶ 24, 371 P.3d 1100, 1109.

Whether evaluated under *Trombetta, Youngblood*, or *Brady*, the State's failure to preserve the interrogation recording denied Mr. Reece his right to a fair trial by: 1) undermining Mr. Reece's ability to impeach Detective Bacon; 2) undermining defense counsel's ability to present a defense; 3) limiting Mr. Reece's ability to confront witnesses pursuant to the confrontation clause; and 4) limiting mitigation evidence. At trial, defense counsel renewed the pretrial motion and renewed the arguments made during the *Jackson v. Denno* hearing. (Tr. VIII 130) Therefore, the Court should review this as an abuse of discretion.

A. *Trombetta* Analysis

Failure to preserve the interrogation recordings is most appropriately viewed under *Trombetta*. To establish a *Trombetta* due process violation, an appellant must establish that the evidence 1) possessed apparent exculpatory value prior to being lost, and 2) be of such a nature that the accused is unable to obtain comparable evidence by other means. *Trombetta*, 467 U.S. at 489, 104 S.Ct. at 2534.

This Court found the first prong's "apparent exculpatory value" was lacking in liquor bottles and appellant's note, which were not preserved in a first-degree murder conviction. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶¶ 21-23, 241 P.3d 214, 225-226. This Court reasoned that liquor bottles at crime scenes were common, any exculpatory value in the bottles themselves was not apparent, and that the threatening note would actually have been inculpatory. *Id.* This Court also found no apparent exculpatory value related to a voluntary intoxication defense in a first-

degree murder case when police failed to immediately obtain and test Appellant's blood sample for alcohol concentration. *Martinez*, 2016 OK CR 3, ¶ 27, 371 P.3d at 1110. In *Martinez*, this Court discussed *Illinois v. Fisher* at length. *Id.*, 2016 OK CR 3, ¶¶ 22-24, 371 P.3d at 1109. The appellant in *Illinois v. Fisher* argued a due process violation when seized drugs, which had already been tested four times by the State, were destroyed thus depriving him of independent testing after the accused had absconded and remained at large for ten years. *Illinois v. Fisher*, 540 U.S. 544, 544-549 (2004). The Supreme Court reasoned that since prior testing had already suggested the evidence would be inculpatory, the materials could at best be considered only "potentially useful." *Id.* at 549.

The recordings exculpatory value is readily apparent in this case. Detective Bacon deleting 40-60 hours of recordings are easily distinguishable from both the unpreserved physical materials in *Cuesta-Rodriguez* and *Illinois v. Fisher* and from evidence which was never obtained, as in *Martinez*. *See also Gilson v. State*, 2000 OK CR 14, 8 P.3d 883 (there was no due process violation when State failed to record statements from each child victim). Detective Bacon testified during the *Jackson v. Denno* hearing that the recordings existed and that he decided to delete the recordings because he was running out of space on his recorder. (4-29-21 Tr. 7, 25, 43, 46) Detective Bacon even admitted at trial that 5% of what had been recorded that he then deleted was about the cases. (Tr. XIII 123) Detective Bacon, a police officer with over 40 years of experience, knew the stakes were high in Mr. Reece's case and that the cases could potentially be death penalty cases. However, instead of merely plugging in his recorder to his computer to download the recordings and then turn them over at the appropriate time, he deleted the recordings. "Interrogation

still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

In William Reece's affidavit, Mr. Reece says that during the forty (40) to sixty (60) hours of deleted recordings with Detective Bacon they talked about the Laura Smithers, Kelli Cox, Jessica Cain, and Tiffany Johnston cases[25] and he was coached on what to say in order to get the deal of no death penalty[26]. Mr. Reece attests that he and Detective Bacon would talk two (2) to three (3) times a day. Mr. Reece states that Detective Bacon said in order to get the deal of no death penalty, he had to change his story to fit what Detective Bacon wanted including that he had to say that he had sex with Tiffany Johnston in the horse trailer at the car wash, even though Mr. Reece states he did not have sex with her. Mr. Reece says that he was told by Detective Bacon that he could not say that on July 26, 1997, the day of Ms. Johnston's murder, he drank an entire bottle of tequila and used cocaine therefore he could not say he was drunk and using drugs in the recordings. (Attachment A)

Mr. Reece also said he was told by Detective Bacon that in order to get the deal of no death penalty, relating to Laura Smithers it had to be murder. Mr. Reece said in multiple interrogation videos that he had hit Ms. Smithers with his truck on accident and she was already dead when he found her in the ditch. Later, Mr. Reece said that Ms. Smithers was still alive in the ditch and he turned her neck. (State's Exhibit's 83, 84, 86, 88) Mr. Reece asked Detective Bacon if it would work for him to say that Ms. Smithers was alive in the ditch after being hit by his truck and that

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[25] A 3.11 Motion has been filed contemporaneously herewith.
[26] 3.11 Motion Attachment A.

he turned her neck. Detective Bacon said yes. (3.11 Motion Attachment A) Detective Bacon also told Mr. Reece that he could not say that when he took Kelli Cox to the dig site, he tried to shoot himself. Mr. Reece also said that Tiffany Johnston's shorts/overalls and underwear were recovered and that Mr. Reece's DNA were on the clothing[27]. (3.11 Motion Attachment A)

Exculpatory evidence is evidence that, if admitted, would create reasonable doubt that did not exist without the evidence. *Stouffer v. State*, 2006 OK CR 46, ¶ 195, 147 P.3d 245, 279, *citing Ellis v. Muffin*, 326 F.3d 1122, 1128 (10th Cir. 2002). The recording would have been invaluable to show that there was a deal of no death penalty promised to Mr. Reece[28]. The recordings also limited defense counsel's ability to present a defense and to confront witnesses. According to Detective Bacon there was even potential mitigation evidence discussed in the tapes. (4-29-21 Tr. 16, 27, 48)

While the deleted recordings possessed apparent value, the second requirement of *Trombetta* is that the nature of the destroyed material is such that the accused would be unable to obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 489, 104 S.Ct. at 2534. The 10th Circuit found the second prong lacking when a hard drive in a child pornography transportation case was damaged and discarded, because the e-mails in question were also available on another drive. *United States v. Pearl*, 324 F.3d 1210, 1215 (10th Cir. 2003). In *United States v. Ludwig*, the court determined that a deleted traffic stop video was not sufficient to make a *Trombetta* claim, because two other

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[27] Those items were never turned over to defense counsel. (3.11 Motion Attachment A)
[28] As argued in Proposition I *supra*.

videos of the same incident existed. *United States v. Ludwig*, 641 F.3d 1243, 1254 (10th Cir. 2011). In *Cuesta-Rodriguez*, this Court rejected the argument that the accused was unable to obtain comparable evidence for either of the subject materials, because there were photographs of the tequila bottles, and testimony was available to describe the contents of Appellant's lost note. *Cuesta-Rodriguez*, 2010 OK CR ¶¶ 21-23, 241 P.3d 214, 225-226.

There is no comparable evidence to replace the recording of Mr. Reece's forty (40) to sixty (60) hours of deleted recordings with Detective Bacon. There are no duplicate or additional tapes and Detective Bacon admitted that all he had to do to keep the recordings was to plug the recorder into a computer and download the recordings. Instead a detective with 40 plus years of experience who admitted that this was a potential death penalty case deleted the recordings. This evidence supports Appellant's arguments made in Proposition I that Mr. Reece did not knowingly and voluntarily confess to the crimes in this case because he was promised no death penalty in exchange for working with police to find Kelli Cox and Jessica Cain's bodies. Detective Bacon deleting the recordings violated defense counsel's ability to confront the evidence presented against Mr. Reece. Had these confessions been properly suppressed, the results of this trial would have been very different.

B. *Youngblood* Analysis

In the event that this Court does not recognize the apparent exculpatory and/or impeachment value of Mr. Reece's recordings, and considers the recordings to be only "potentially useful," this Court has recognized that the next step is a bad-faith consideration under *Youngblood*. *Martinez*, 2016 OK CR 3, ¶ 29, 371 P.3d at

1110. This Court adopted the *Youngblood* standard in *Hogan v. State*. *See Gilson*, 2000 OK CR 14, ¶ 52, 8 P.3d at 905, citing *Hogan v. State*, 1994 OK CR 41, ¶ 5, 877 P.2d 1157, 1161, *cert. denied*, 513 U.S. 1174, 115 S.Ct. 1154, 130 L.Ed.2d 111 (1995).

In *United States v. Bohl*, the 10th Circuit ordered dismissal of the indictments for false payment claims and mail fraud in connection with a government contract, as evidence destroyed through bad faith constituted a violation of appellants' due process rights. *Bohl*, 25 F.3d 904. *Bohl* involved appellants' contract with the Federal Aviation Administration (FAA) to construct radar and radio transmission towers, and the government alleged that the steel contained excessive and noncompliant levels of carbon and manganese. *Id.* After one of the tower's legs fractured, the FAA canceled the contract, ordered removal and disposal of the other towers, and proceeded with criminal charges against appellants. *Id.* Despite repeated requests from Appellants to preserve the towers for testing, the government was later unable to account for the whereabouts of the removed towers. *Id.* The court reasoned that the lost evidence was not patently exculpatory, foreclosing consideration under *Trombetta*, but found the government acted in bad faith pursuant to *Youngblood*. *Id.* Acknowledging that *Youngblood* forecloses a finding of bad faith based solely on mere negligence, the court applied the following five-factor test: 1) Was the government with notice that the accused considered the evidence to be exculpatory? 2) Is the assertion of the materials' exculpatory value merely conclusory, or instead supported with objective, independent facts? 3) Was the government still in possession of the evidence at the time it was destroyed? 4) Was the destroyed evidence central to the government's case? 5) Can the government

offer an innocent explanation for its failure to preserve the materials? *Id.; United States v. Beckstead*, 500 F.3d 1154 (10th Cir. 2007). Applying the five factors to the instant case:

1. *Government Notice.* Detective Bacon testified that he knew Mr. Reece was a suspect in serious crimes and that the death penalty was being discussed. Detective Bacon said that he was motivated to record the conversations because the stakes were pretty high in this case. (4-29-21 Tr. 46) Detective Bacon said he could have uploaded the recordings to the computer but did not. (Tr. 4-29-21 Tr. 47) While in *Bohl*, the defendant had the opportunity to make request of the police to preserve the issue, here there was no opportunity for defense counsel to make those requests because Detective Bacon destroyed the recorded interrogations. However, clearly from Detective Bacon's testimony the government was on notice that these recorded statements were exculpatory. Where material exculpatory evidence is concerned, courts do not distinguish between "no request," "general requests," and "specific requests." *Bagley*, 473 U.S. at 682, 105 S.Ct at 3383. The State is required to provide the defendant any evidence materially favorable to *guilt or punishment.* Okla. Stat. tit. 22 § 2002(A)(2).

2. *Independent Support for Accused's Claim that the Evidence was Exculpatory.* Here, in recorded interrogations with Mr. Reece, there were promises made to Mr. Reece that he would not get the death penalty on behalf of the government. (State's Exhibits 79, 80, 83, 84, 86, 88, 101, and 102) These deleted interrogations with Detective Bacon would have been useful to argue to the trial court and the jury about the knowing and voluntary nature of the statements made by Mr. Reece to law enforcement officers.

3. *Government Possession at the Time of Destruction.* Detective Bacon as a government agent had possession and control of the deleted interrogations with Mr. Reece prior to deleting them. Defense counsel never had an opportunity to request the evidence until after being appointed and by that point, Detective Bacon had already disposed of the evidence.

4. *Centrality of the Evidence to the Government's Case.* Detective Bacon's conversations in an overall sense were central to the State's case, most of the State's evidence against Mr. Reece were the recorded interviews with law enforcement officers. Admittedly, because the tapes were deleted by Detective Bacon there is no way of knowing what was said on the tapes. However, the State used what conveniently was not deleted as the bulk of their case against the defendant.

5. *State's explanation for the Failure to Preserve.* Detective Bacon's only reason for deleting the tapes was that the conversations were not important and were just general conversations that had nothing to do with the case. (4-29-21 Tr. 27-28) Detective Bacon also testified that in State's Exhibit 80 he just let Mr. Reece talk, however a close examination of that interview shows that Detective Bacon asked Mr. Reece many questions in that interview. (4-29-21 Tr. 29)(State's Exhibit 80[29]) If Detective Bacon cannot even recall asking Mr. Reece questions in a recorded interrogation he still had access to, it is reasonable to presume that other conversations about the cases and the deal were had on the deleted recordings.

[29]3:00-3:23;4:44-5:16;7:49-7:52;8:05-8:19;8:37-8:55,9:23-9:38;9:53-10:00;10:19-10:22;10:24-10:40;11:00-11:23;11:36-11:45;11:58-12:05;12:08-12:28;12:45-12:50;14:09-14:30;14:40-14:51;19:18-19:25;19:38-19:41;19:46-20:02;20:03-20:09;20:27-20:34;20:52-20:59;21:53-21:08;22:58-23:23;23:52-24:01;24:06-24:17;24:37-24:47;24:50-24:58;25:10-25:15;25:17-25:21;25:43-26:00;26:02-26:27;26:30-26:36;27:13-27:24;28:00-28:08;28:19-28:21;28:50-29:00;29:15-29:23;30:00-30:20;30:57-31:05;31:06-31:13.

Detective Bacon could have plugged his recorder into the computer and uploaded the recordings but chose not to. Detective Bacon also took no notes and generated no reports about the recordings. Regardless of any failure on the part of police, it is the prosecutor's responsibility to disclose evidence favorable to the accused. *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995). The prosecutor is charged with establishing procedures, which ensure communication with officers handling evidence. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Implicit from *Kyles* and *Giglio* is that the prosecutor also has the burden to implement adequate systems to preserve exculpatory evidence. This is especially so when the prosecutor is aware of the evidence.

Courts have held that the State does not necessarily engage in bad faith conduct when the destruction of evidence results from a standard procedure employed by the government regarding the disposal of like evidence. *Bohl*, 25 F.3d at 912-913, *citing United States v. Gibson*, 963 F.2d 708, 711 (5th Cir.1992) (United States Border Patrol agents "routinely" destroy seized controlled substances sixty days after informing the United States Attorney about the seizure, pursuant to agency procedure) *and United States v. Belden*, 957 F.2d 671, 673-73 (9th Cir.) (cutting of marijuana plants pursuant to routine practice due to lack of storage capacity does not rise to the level of bad faith), cert. denied, 506 U.S. 882 (1992). The record contains no contention by Detective Bacon or the State that the recording was destroyed pursuant to a standard procedure[30]. Given the fact that Detective Bacon testified that he knew this was a high stakes case and recorded these

[30] In Proposition III Appellant will raise an Ineffective Assistance of Counsel Claim for defense counsel's failure to flush out this prong.

conversations with Mr. Reece because of that, and lack of explanation, the State's failure to preserve the important interrogation recordings shows bad faith.

C. *Brady* Analysis

The violation to Mr. Reece's due process rights could also be framed as a pure *Brady* claim as the prosecution failed to produce material evidence favorable to the accused. *Brady*, 373 U.S. at 87. Regarding materiality, the Supreme Court explains "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 105. A showing of materiality does not necessarily require demonstration by preponderance of the evidence that disclosure of the suppressed evidence would have resulted in an acquittal. *Kyles*, 514 U.S. at 434, *citing Bagley*, 473 U.S. 667.

Evaluating materiality in a *Brady* claim is a mixed question of law and fact. *Gates v. State*, 1988 OK CR 77, ¶ 19, 754 P.2d 882, 886, *citing Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir.1986), *cert. denied*, 479 U.S. 962 (1986). The reviewing court should assess the effect of the undisclosed evidence in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had subject material been disclosed. *Bagley*, 473 U.S. at 683.

Since Detective Bacon failed to preserve the forty (40) to sixty (60) hours of recorded interviews with Mr. Reece, the true exculpatory value cannot now be gauged. But as Detective Bacon clearly testified to the purpose of his recording the interrogations was because he knew this was a big case with high implications. The

court held a *Jackson v. Denno* hearing and found that Mr. Reece knowingly and intelligently waived his *Miranda* rights and that all his statements were voluntary because when Mr. Reece made his list of demands to Ranger Holland, no deals were in place. The trial court said that Ranger Holland only promised to try to get deals in place and that it was not up to him but the district attorney. (5-7-21 Tr. 106-107)

However, according the Mr. Reece's attached affidavit there was a deal of no death penalty already in place. (3.11 Motion Attachment A) Had the trial court been able to listen to the recordings that Detective Bacon deleted, it would have had little trouble finding an involuntary admission and suppressing all the later statements because of the police officer's promise of no death penalty. The prosecutor then would not have been allowed to reference all the recorded statements made by Mr. Reece throughout the entire trial and through exhibits introduced. (State's Exhibits 79, 80, 83, 84, 86, 88, 99, 101, 102) Without the confessions, the State's ability to connect Mr. Reece to Tiffany Johnston's murder was not nearly as strong. Here, there is a reasonable probability that the jury would have reached a different outcome, thus rendering the recordings "material."

D. Conclusion

By Detective Bacon's own admissions, the deleted interrogations contained conversations about Mr. Reece's life which could have been mitigation evidence in second stage and therefore the evidence was material and exculpatory. According to Mr. Reece's statements in 3.11 Motion Attachment A, Detective Bacon's recordings would prove that Mr. Reece's confessions were involuntary because they show that a deal of no death penalty had been reached between various police officers and Mr. Reece, thus possessing apparent exculpatory/ impeachment value,

the issue is most-appropriately viewed under *Trombetta*. Alternatively, the facts support both a showing of bad faith on the part of the State and materiality under *Youngblood* and *Brady*, respectively. Regardless of which doctrine is applied, there was an abuse of discretion at Mr. Reece's trial, which affected the outcome, thus violating Mr. Reece's rights to due process and to a fair trial. The missing evidence would not be available to Appellant even if he were granted a new trial. Appellant should be granted relief by reversal of his conviction or by favorable modification of his conviction and sentence.

PROPOSITION IV

MR. REECE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO FULLY CROSS-EXAMINE ABOUT AN ISSUE WHICH RESULTED IN AN UNFAIR TRIAL.

Trial counsel failed to fully flesh out a factor when cross-examining Detective Bacon as required in *United States v. Bohl*, 25 F.3d 904, 910 (10th Cir. 1994) when evaluating a bad-faith consideration under *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). In *United States v. Bohl*, the fifth factor the Court must consider is "Can the government offer an innocent explanation for its failure to preserve the materials?" *Bohl*, 25 F.3d 904. Courts have held that the State does not necessarily engage in bad faith conduct when the destruction of evidence results from a standard procedure employed by the government regarding the disposal of like evidence. *Bohl*, 25 F.3d at 912-913, *citing United States v. Gibson*, 963 F.2d 708, 711 (5th Cir.1992) (United States Border Patrol agents "routinely" destroy seized controlled substances sixty days after informing the United States Attorney about the seizure, pursuant to agency procedure) *and United States v. Belden*, 957 F.2d 671, 673-73 (9th Cir.) (cutting of marijuana plants

pursuant to routine practice due to lack of storage capacity does not rise to the level of bad faith), cert. denied, 506 U.S. 882 (1992).

Trial counsel argued the first four (4) factors to the trial court, but failed when cross-examining Detective Bacon to actually ask if it was standard procedure for the Friendswood Police Department to destroy evidence. (5-7-21 Tr. 160-166) Trial counsel at the *Jackson v. Denno* hearing stated "I'm not aware of any procedure that says that this would be acceptable." (5-7-21 Tr. 164).[31] [32] The failure to ask this key question qualifies as ineffective assistance of counsel. Trial counsel's function "is to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that counsel's representation fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 693, 104. Allegations of ineffective assistance of counsel are reviewed *de novo* as mixed questions of law and fact. *Hanson v. State*, 2009 OK CR 13, ¶ 35, 206 P.3d 1020, 1031. An affidavit by Mr. Reece details parts of the deleted recordings with Detective Bacon which supports this ineffective assistance of counsel claim. (3.11 Motion Attachment A[33])

In determining whether a defendant has been prejudiced by his trial counsel's deficient performance, an appellate court must consider the totality of the evidence before the fact finder. *Strickland*, 466 U.S. at 695. Trial counsel's failures were not

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[31] Appellate counsel "do[es] not cast any aspersion on [trial counsels'] general competence as an attorney [but contends] only that their performance in this case...fell below the minimum permissible level of representation." *Harris v. Towers*, 405 F.Supp. 497, 506 (Del.1974).

[32] This issue is raised in Proposition VI.

[33] Mr. Reece has contemporaneously filed a Motion To Supplement the Record under Rule 3.11A and B, *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App.

"within the range of professionally reasonable judgments." *Strickland*, 466 U.S. at 699. The focus is not on whether the result would have been different, but rather on whether "counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. *See also Rompilla v. Beard*, 545 U.S. 374, 380-381 (2005); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

Trial counsel failed to adequately cross-examine Detective Bacon about a factor to consider from *United States v. Bohl.* Trial counsel failed to ask Detective Bacon if it was part of Friendswood Police Department procedure to destroy evidence. Clearly, trial counsel was on notice that this element was part of the needed argument to the trial court but failed to cross-examine Detective Bacon on the issue. (5-7-21 Tr. 164) The trial court did not fully get to assess this factor because of trial counsel's failure to cross-examine Detective Bacon, and had the trial court known that this was not standard procedure, a different ruling would have been made. Trial counsel's relinquishment of duty in this instance was unreasonable and cannot be considered trial strategy. *Strickland,* U.S. at 688-89.

Counsel's deficient performance by failing to fully cross-examine Detective Bacon clearly prejudiced Mr. Reece. Therefore, it must be concluded that his performance was deficient and that "counsel failed to meet minimum performance standards and that his actions (or lack thereof) prejudiced" Appellant. *Raygoza v. Hulick*, 474 F.3d 958, 959 (7th Cir.2007). For this reason, Appellant asks this Court

to reverse and remand his case for a new trial where he is provided effective assistance of counsel.

PROPOSITION V

THE TRIAL COURT ERRED BY ADMITTING PROPENSITY EVIDENCE WHICH RESULTED IN AN UNFAIR TRIAL VIOLATING APPELLANT'S FUNDAMENTAL DUE PROCESS RIGHT TO A FAIR TRIAL.

On July 6, 2018 the State filed a notice of its "Title 21 Section 2413 Evidence and/or in the Alternative Notice of Intent to Use Evidence of Other Crimes I.E., Decision of *Burks v. State*, 594 P.2d 771 (Ok.Cr. 1979)". (O.R. 322-349) Hearings on the motion were held on April 20, 2021, April 29, 2021, and May 7, 2021. At the hearings, Ladawna Frederick, Sandra Merck, Carla Brzozowski, Elizabeth Dolan, and Angela Cary testified for the State. Ultimately, the trial court ruled that their testimony would be allowed in as propensity evidence and *Burks*[34] evidence. (5-7-21 Tr. 137-138) During trial, before the witnesses testified, the trial court read only the propensity evidence instruction to the jury. (Tr. VII 69-70, 73-74, 115-116; Tr. VIII 23-24; Tr. IX 79-80)

LaDawna Frederick[35] testified that on April 3, 1986 she was traveling from Norman to Oklahoma City to teach an aerobics class. (4-20-21 Tr. 7-8) On her way to Oklahoma City, her car broke down on I-35. (4-20-21 Tr. 8-9) Mr. Reece pulled up in his 18-wheeler and told her that he would take her to go get help. (4-20-21 Tr. 11-12) Ms. Frederick got into the truck and Mr. Reece drove to a grocery store where

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[34] The trial court also ruled that the Laura Smithers, Kelli Cox, and Jessica Cain murders would be allowed in as *Burks* evidence. Appellant will discuss the *Burks* evidence in Proposition VI. (5-7-21 Tr. 137-138)

[35] Ms. Frederick was declared unavailable at trial and the transcript from her preliminary hearing testimony was read to the jury. The testimony from Ms. Frederick's preliminary hearing was substantially the same as what was presented at the hearing on 4-20-21. (Tr. VII 70-72; 4-20-21 Tr. 6-57)

he then taped her up and put her in a sleeping bag. (4-20-21 Tr. 12-14) Mr. Reece then went to where he was picking up a load for his truck and made her perform oral sex on him and threatened her with a knife. Eventually Mr. Reece let her go to the bathroom and let her leave. (4-20-21 Tr. 18-20, 23-27)

Sandra Merck[36], formerly Sapaugh, testified that the night of May 15, 1997 into May 16, 1997, she had dropped her kids off with her parents in Taft, Texas and was heading back to Corpus Christi, Texas. Ms. Merck went to a gas station in Weber, TX to get change for a hotel room. (4-20-21 Tr. 58-60) Ms. Merck got back into her van, but a tire was flat. She made it to the Waffle House across the street. Mr. Reece pulled up in his white dually (sic) truck and asked if she needed help. (4-20-21 Tr. 61-64, 67) Mr. Reece told her to get a rag from inside his truck. Mr. Reece then went up to her while she was leaning over into his truck and put a knife to her neck. Mr. Reece pushed her into the truck. (4-20-21 Tr. 64-65) Mr. Reece drove to a U-Haul store next to the Waffle House. Mr. Reece told her he was taking her to Dallas, Texas and started trying to touch her chest. They then drove onto I-45 and he told her to take her pants off multiple times. She told Mr. Reece no, and he started reaching for the knife. (4-20-21 Tr. 67-69) Ms. Merck said that she pretended to take her shoes off then slid over on the bench seat, opened the truck door, and jumped out of the moving truck. (4-20-21 Tr. 70)

[36] Ms. Merck's testimony at trial was substantially the same as what she testified to at the hearing on 4-20-21. (Tr. VII 117-154; Tr. VIII 5-22)

Carla Brzozowski[37] and Elizabeth Dolan[38] testified that late on July 3-4, 1997, they went to the Busy Bee Café in Pearland, Texas. Ms. Brzozowski at the time was 17 and Ms. Dolan was 16. (4-20-21 Tr. 111-113, 157-159) They left the Café around midnight and were trying to decide whether to walk home or call Ms. Brzozowski's Mom. Mr. Reece came out of the Busy Bee Cafe and offered them a ride. They got in and Mr. Reece said he needed to get gas first. (4-20-21 Tr. 114-116, 159-164) They drove 45 minutes around Houston to a gas station. Mr. Reece gave them $100 to get gas and snacks and drinks. (4-20-21 Tr. 116, 164, 166) Mr. Reece ended up driving back close to the same area as the café to get some things from his house. They all went inside. (4-20-21 Tr. 117-118, 165) Mr. Reece then told Ms. Brzozowski to come look at something, and Ms. Dolan stayed in living room. Mr. Reece then got Ms. Brzozowski on the bed and put her hands over her head and tried to rape her. Mr. Reece's was penis exposed. Ms. Dolan came in and attempted to get him off of Ms. Brzozowski. Ms. Brzozowski was able to get up but Mr. Reece then got Ms. Dolan on the bed. Ms. Brzozowski tried to get Mr. Reece off of Ms. Dolan whom he was also trying to rape. (4-20-21 Tr. 117-121, 167-170) Ms. Dolan was able to get up and took off running but Ms. Brzozowski was left alone with Mr. Reece. Mr. Reece continued to try to rape Ms. Brzozowski. Ms. Dolan came back and talked Mr. Reece into taking them home and he took them home. (4-20-21 Tr. 122-125, 171-173)

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[37] Ms. Brzozowski's testimony at trial was substantially the same as what she testified to at the hearing on 4-20-21. (Tr. IX 80-141)

[38] Ms. Dolan's testimony at trial was substantially the same as what she testified to at the hearing on 4-20-21. (Tr. VIII 24-88)

Angela Cary[39] testified that on May 24, 1986, she was 20 years old and living in Anadarko, Oklahoma. That night, she went to a bar there with friends. At the bar she had a few drinks and then started feeling sick. Ms. Cary had one of her boyfriend's friends drive her back to her apartment where her 2-year-old daughter and the babysitter were asleep. (4-20-21 Tr.205-207, 211) Ms. Cary got into bed and woke up to a man standing above her, naked and trying to undress her. Ms. Cary tried to scream but he covered her mouth and throat and choked her. He made her take her clothes off and then had vaginal and oral sex with her. (4-20-21 Tr. 211-214) Ms. Cary told the man she needed to go to the bathroom and grabbed her robe and then turned on the light and saw him. Ms. Cary then ran out of the apartment and got in her car then drove back to the bar. Ms. Cary's boyfriend and the bartender were there, and she told them what happened. The bartender said he knew who did it. The next day, Ms. Cary went with her boyfriend to Mr. Reece's mother's house, where she identified him as the man who assaulted her. (4-20-21 Tr. 218-221)

Defense counsel objected to the admission of the evidence. (5-7-21 Tr. 123-129) Defense counsel also properly renewed the objections during trial. (Tr. VII 7-8, 72, 74; Tr. VIII 23; Tr. IX 79) The trial court committed a constitutional error. "Where a constitutional question is concerned, the State must prove beyond a reasonable doubt that the error did not contribute to the jury's verdict." *LaFevers v. State,* 1995 OK CR 26, ¶ 14, 897 P.2d 292, 301 (*citing Chapman v. California,* 386 U.S. 18, 23, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) and *Bartell v. State,* 881 P.2d 92 (Okl.Cr.1994)). This Court must determine whether a constitutional error is

[39] Ms. Cary's testimony at trial was substantially the same as what she testified to at the hearing on 4-20-21. (Tr. VII 74-115)

harmless. *See Van White v. State,* 1999 OK CR 10, ¶ 32, 990 P.2d at 265. In order for constitutional error to be deemed harmless, the Court must find beyond a reasonable doubt, that it did not contribute to the verdict. *Id., citing Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The standard for constitutional violations is well-known: reversal is in order unless the State can show the error was harmless beyond a reasonable doubt. *Id., citing Arizona v. Fulminante,* 499 U.S. 279, 295, 111 S.Ct. 1246, 1258, 113 L.Ed.2d 302 (1991); *Bartell v. State,* 1994 OK CR 59, ¶ 11, 881 P.2d 92, 95–97; *Simpson v. State,* 1994 OK CR 40 ¶ 34, 876 P.2d 690, 701.

Based on the testimony at the hearing, the trial court ruled that the proposed § 2413 evidence was admissible. "I find that the State met it's burden as to D4, deriving sexual pleasure or gratification in the infliction of death, bodily injury, emotional stress, or physical pain on another person. So that testimony is going to come in." (5-7-21 Tr. I 137) The above testimony about propensity evidence was improperly admitted under the plain language of the statute and under the factors set out in *Horn v. State,* 2009 OK CR 7, ¶ 40, 204 P.3d 777.

Okla. Stat. tit. 12 § 2413 states in relevant part:

> A. In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant....
>
> D. For purposes of this rule, offense of sexual assault means a crime under federal law or the laws of this state that involve:
>
> 4. Deriving sexual pleasure or gratification from the infliction of death, bodily injury, emotional distress, or physical pain on another person;

The issue of what "deriving sexual ..." means appears to be an issue of first impression in Oklahoma. The term is not defined within the statute and no definition is given to the jury in the applicable jury instruction. It appears that only one jurisdiction has attempted to define this term. In *People v. Walker*, 139 Cal.App.4th 782, the appellant was charged with first-degree murder and the court considered:

> whether evidence of prior sexual assaults was admissible under section 1108[40] in a case where the defendant was charged solely with murder. The facts of the case showed that the victim was a prostitute and the defendant had sexual contact with her near the time of her death; however, the parties stipulated that there was "no medically valid way to determine whether the sexual contact" was consensual. The trial court admitted evidence of the defendant's prior sexual assaults on prostitutes under section 1108. "The *Walker* court summarized the issue before it as 'whether section 1108, subdivision (d)(1)(E)'s inclusion in the definition of sexual offense of crimes that involve "[d]eriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person" authorizes use of evidence of other sexual offenses when the circumstances under which a violent crime has been committed suggest the defendant derived sexual pleasure or gratification from the victim's pain, even though sexual pleasure or gratification is neither a necessary element of the charged offense nor alleged in the information as an enhancement or aggravating factor.' The appellate court interpreted section 1108 as requiring 'that the requisite sexual transgression must be an element or component of the crime itself without regard to the evidence establishing a specific violation.' Under this standard, the court held that the trial court erred in admitting the evidence under section 1108." The *Walker* court reasoned that requiring the sexual component of the crime to be "an element of the charge (or applicable enhancement or aggravating factor) and not simply a circumstance of the crime's commission," was consistent with the ordinary meaning of the phrase "'accused of a sexual offense'" used in section 1108.

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[40]California's 1108 in relevant part, is identical to Okla. Stat. tit. 12 § 2413:(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. § 1108. Evidence of another sexual offense by defendant; disclosure; construction of section, West's Ann.Cal.Evid.Code § 1108

People v. McClish, No. H032050, 2009 WL 2914205, at 7 (Cal. Ct. App. Sept. 11, 2009)(Internal citations omitted)

Here, Mr. Reece was initially charged with first-degree murder and kidnapping[41]. (O.R. 1-8) Neither of the alleged crimes require an element of sexual transgression to be proven. OUJI-CR 4-61 states:

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

OUJI-CR 4-110 states:

No person may be convicted of kidnapping unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

> First, unlawfully;
>
> Second, seizes/confines/inveigles/decoys/kidnaps/abducts/(carri es away);
>
> Third, another person;
>
> Fourth, with the intent to (confine that person)/(imprison that person)/(send that person out of the State)/(sell that person as a slave)/(hold that person to service): against that person's will.

Appellant asserts that the *Walker* formulation is the right one and urges this court to adopt it. Clearly, neither the murder in the first-degree nor the kidnapping

[41] The State later filed an amended information that did not include count 2, kidnapping. (O.R. 1056-1061)

jury instructions require a sexual component in the elements. Therefore, the trial court improperly admitted the above testimony as propensity evidence. There is also no proof from any testimony in the trial that Mr. Reece derived sexual pleasure or gratification from Tiffany Johnston's death. Mr. Reece told Ranger Holland that he had sex with Tiffany Johnston in the back of his horse trailer. When Mr. Reece was getting up after having sex with her, she hit him in the back of the head with a horseshoe, then they got into a struggle and then he strangled her[42]. (4-29-21 Tr. 124) The alleged sexual act was completed before the murder happened; therefore, Mr. Reece did not derive sexual pleasure or gratification from Tiffany Johnston's death. When looking at the plain language of the statute and the only case law Appellant has found on point, the trial court committed constitutional error when it allowed the above testimony in as propensity evidence.

The trial court also violated Mr. Reece's due process right to a fair trial because it's admission violated this Court's mandates in *Horn v. State*. In *Horn v. State*, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786, the Court outlined what a trial court should consider in making the admissibility determination:

> [When determining the relevance of propensity evidence] trial courts should consider, but not be limited to the following factors: 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the dangers that admission of propensity evidence poses, the trial court should consider: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; and 2) the extent to which such evidence will distract the jury from the central issues of the trial.

[42] Appellant is only highlighting what was presented at trial. Appellant does not waive what Appellant attests to in his affidavit.

This Court also held that evidence that is admitted under Okla. Stat. tit. 12, § 2413 is subject to Okla. Stat. tit. 12, § 2403's balancing test; meaning, that the probative value of any evidence admitted pursuant to § 2413 cannot be outweighed by its prejudicial effect. *Horn* at ¶ 29, 204 P.3d at 784. The *Horn* Court relied on the Tenth Circuit Court of Appeals case *Guardia v. United States*, 135 F.3d 1326, 1330 (10th Cir. 1998) wherein the Tenth Circuit said that the trial court must balance the propensity evidence proffered by the prosecution against the, "...danger of unfair prejudice, confusion of the issues, or misleading the jury, or...considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Therefore, the trial court's application of the § 2403 balancing test is not just for unnecessarily prejudicial evidence but also evidence that might be confusing, cumulative, misleading, overly time-consuming or needless under § 2403.

In *James v. State*, 2009 OK CR 8, 204 P.3d 793, this Court elaborated on the trial court's responsibility to "...consider, on a case-by-case basis, whether the probative value of the proffered evidence is substantially outweighed by an unfairly prejudicial effect." *James* at ¶ 9, 204 P.3d at 797. In this regard the *James* Court stated:

> When evidence meeting the criteria of §§ 2413 or 2414 is offered, the Evidence Code's examples of how other-crimes evidence may properly be used (e.g. to show motive, opportunity, or common scheme or plan), found in § 2404(B), are still helpful to the trial court's assessment of probative value, and, consequently, in balancing probative value against unfairly prejudicial effect under § 2403. As we have observed many times, the probative value of other crimes committed by the accused increases when there is a visible connection between the crimes, or when all of the offenses, taken together, demonstrate a common scheme or plan.

James at ¶ 10, 204 P.3d at 797–98. The trial court did not engage in the type of § 2403 analysis mandated by *Horn* and *James*. Under such analysis the evidence could not have been admitted. There is no visible connection between the charged offense and the § 2413 allegations. In all of the above testimony the victims are still alive and other than Sandra Merck, Mr. Reece let them all leave. The above testimony is also not probative to if Mr. Reece murdered Tiffany Johnston. The trial court had already improperly ruled that Mr. Reece's confessions would be allowed into evidence. With Mr. Reece's improperly admitted confessions, the material fact at issue was not in dispute. In multiple exhibits Mr. Reece confessed to killing Tiffany Johnston.

This evidence was highly prejudicial to Mr. Reece in the first stage of trial because the trial should have focused on whether Mr. Reece killed Tiffany Johnston. Instead, the State's first four (4) witnesses presented to the jury at trial were propensity evidence witnesses that had no connections to Tiffany Johnston's death and only painted Mr. Reece as a horrible person. (Tr. VII 70-72, 74-116, 117-154; Tr. VIII 5-22, 24-86; Tr. IX 80-141) It cannot be said that the above evidence did not contribute to an improperly-based jury verdict and only distracted from the central issue of the trial, which was Tiffany Johnston's murder and not all of Mr. Reece's sexual assaults.

As argued above, the probative value of the § 2413 evidence was substantially outweighed by its prejudicial impact on the jury. Mr. Reece was charged with first-degree murder, which is not a sexual assault charge under Okla. Stat. tit. 12 § 2413. Accordingly, the admission of the § 2413 evidence was error and violated Mr. Reece's fundamental right to a fair trial. U.S. Const. amends. V, XIV; Okla. Const. art. 2, § 7. Because of the nature of the evidence, the admission of the evidence cannot be deemed to be harmless. As such, Appellant respectfully asks that this Court reverse and

remand this matter with instructions to prohibit the introduction of overly prejudicial testimony pertaining to § 2413 or in the alternative, grant any further relief this Court deems just and equitable.

PROPOSITION VI

THE TRIAL COURT ERRED IN IMPROPERLY ADMITTING EVIDENCE OF OTHER BAD ACTS WHICH DENIED APPELLANT A FAIR TRIAL AND CONSTITUTES REVERSIBLE ERROR.

On July 6, 2018 the State filed a notice of its Title 21 Section 2413 Evidence and/or in the Alternative Notice of Intent to Use Evidence of Other Crimes I.E., Decision of *Burks v. State*, 594 P.2d 771 (Ok.Cr. 1979). (O.R. 332-349) Hearings were held on April 20, 2021, April 29, 2021, and May 7, 2021. At the hearings, Ladawna Frederick, Sandra Merck, Carla Brzozowski, Elizabeth Dolan, and Angela Cary, Texas Ranger James Holland, and Friendswood Police Detective Doug Bacon testified for the State.

As discussed *supra* in Proposition IV, before the State even attempted to connect Mr. Reece to the crime he was actually accused of committing, the prosecutors began to present evidence of other crimes/propensity evidence through LaDawna Frederick, Sandra Merck, Carla Brozozowski, Elizabeth Dolan, and Angela Cary. They testified to various interactions with Mr. Reece. (Tr. VII 70-72, 74-116, 117-154; Tr. VIII 5-22, 24-86; Tr. IX 80-141) The trial court only gave propensity evidence jury instructions prior to each of the above witnesses testimony and did not give a Burks instruction at the same time. (Tr. VII 69-70, 73-74, 115-116; Tr. VIII 23-24; Tr. IX 79-80)

Texas Ranger James Holland testified at a pretrial hearing that Mr. Reece told him that relating to Jessica Cain, he said he was at a Bennigan's restaurant and Ms. Cain bumped his truck door. Mr. Reece said he got on the highway going towards

Galveston Island, Texas and she pulled up next to him and they exchange words and she gave him the finger and he yelled at her. Mr. Reece signaled for her to pull over and they "got into it." (4-29-21 Tr. 125) Mr. Reece said they both pulled over and eventually he took Ms. Cain to the ground and began strangling her with his hands. Mr. Reece then found a rope, wrapped it around Ms. Cain's neck, and choked her and she eventually died. (4-29-21 Tr. 125) Mr. Reece told Ranger Holland that he drove Ms. Cain's body to a location outside of Houston and used a bulldozer near a pipeline to dig a hole and buried Ms. Cain in the hole. (4-29-21 Tr. 127)

Detective Doug Bacon testified that Mr. Reece told him that with Laura Smithers[43], he went into work around 9:00 a.m. but was told to go home because it was raining. He then went to see a female friend at a horse stable but she was not there. (4-29-2 Tr. 19) Mr. Reece said he then went back in the direction he had just come from and was trying to get his windshield wipers to come on when he heard a "thud." (4-29-21 Tr. 20) Mr. Reece told Detective Bacon that he thought he hit a mailbox and jumped out of his truck but then saw a little girl in the ditch. Mr. Reece said he panicked and put her in the floorboard of his truck then later drove to a pond in Pasadena, Texas and put her body in the pond. (4-29-21 Tr. 20)

Ranger Holland said that Mr. Reece told him concerning Kelli Cox that he drove into Denton, TX off the interstate looking for a bottle of whiskey and went into a convenience store. Mr. Reece told him that when he was walking in, a girl was walking out with a Coke and spilled the Coke on him. She called him drunk which made him mad. Mr. Reece said he grabbed Ms. Cox and slammed her into the A pillar on his truck and broke her neck. (4-29-21 Tr. 126) Mr. Reece then drove Ms. Cox's body to

[43] Laura Smithers was twelve years old. (State's Exhibit 101 47:31-47:35)

Brazoria County, Texas where he stored a bulldozer south of Houston on highway 288. Mr. Reece said that he sat out there all night and got drunk. Mr. Reece woke up the next morning and dug a hole with the bulldozer and put Ms. Cox in the hole and covered her up. (4-29-21 Tr. 126-127)

The court ruled, "As to the Burks information under Title 12, Section 2404 the Court finds the evidence of the five living victims is admissible for other purposes such as proof of motive, opportunity, and absence of mistake or accident." (5-7-21 Tr. 137) The State then had to ask if the homicides of Jessica Cain, Kelli Cox, and Laura Smither were permitted for purposes of 2404(B) and the court said yes. (5-7-21 Tr. 137-138)

At trial, defense counsel renewed objections to the above testimony under Okla. Stat. tit. 12, § 2404(B) and *Burks v. State*, the objections were overruled. (Tr. I 7-13, Tr. VII 7-8, 22, 72, 74, 115, Tr. VIII 23, Tr. IX 79, Tr. XI 15-16, Tr. XII 47, 55, XIII 39-40, 45-46, Tr. XIII 68, 82, 93, Tr. XIV 28, 42) The trial court abused its discretion by allowing this evidence in. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. No analysis or reasoning was given by the court therefore, this Court should conduct *de novo* review of this claim. *State v. Raby*, 2022 OK CR 30, ¶ 7, 522 P.3d 822.

Section 2404(B) states "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or

accident." In *Burks v. State,* 1979 OK CR 10 ¶ 7, 594 P.2d 771, 774-775, *overruled in part on other grounds, Jones v. State,* 1989 OK CR 7, 772 P.2d 922, the Court set out procedures to be followed when the State seeks to introduce evidence of crimes other than the one charged.

A criminal defendant is to be convicted, if at all, by evidence of the charged offense. *Bryan v. State,* 1997 OK CR 15, ¶ 33, 935 P.2d 338 at 357; *Sattayarak v. State,* 1994 OK CR 64, ¶ 11, 887 P.2d 1326, 1331; *Burks v. State,* 1979 OK CR 10, ¶ 10, 594 P.2d at 773-775. Other crimes evidence should not be admitted where it is so prejudicial it denies a defendant his right to be tried only for the offense charged or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity therewith. *Bryan v. State,* 1997 OK CR 15 ¶ 33, 935 P.2d at 357; *Blakley v. State,* 1992 OK CR 70, ¶ 12-13, 841 P.2d 1156, 1159. Okla. Stat. tit. 12 § 2403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.

Through these witnesses, the State was able to introduce highly prejudicial testimony that was more prejudicial than probative. The *Burks* evidence left the jury with the impression from the first witness presented at trial that Mr. Reece is a terrible person and therefore deserves to be punished. The evidence was cumulative and went well beyond what the State needed to present to meet its burden of proof.[44] The

[44] (1) The state shall, within ten days before the trial, or at a pretrial hearing, whichever occurs first, furnish the defendant with a written statement of the other offenses it intends to show, describe with the same particularity required of an indictment or information; (2) At the time the evidence is offered the prosecutor shall specify the exception under which the evidence is sought to be admitted; (3) Regardless of the exception used, there must be a visible connection between the offense charged

testimony in Proposition IV and the above testimony is a very brief glimpse into the testimony that the State was allowed to present to the jury from the *Burks* witnesses. In fact, most of the first stage of trial is entirely propensity and *Burks* evidence witnesses. (Tr. VII 74-154, Tr. VIII 5-87, Tr. IX 80-141, Tr. XI 10-70, Tr. XII 5-162, Tr. XIII 4-132, Tr. XIV 4-128, Tr. XV 4-38, 58-84)

While Ranger Holland and Detective Bacon did testify to statements made to them by Mr. Reece about Tiffany Johnston, most of their testimony concerned the Laura Smithers, Jessica Cain, and Kelli Cox cases and recovering Jessica Cain's and Kelli Cox's bodies. (Tr. Tr. XI 10-70, Tr. XII 5-162, Tr. XIII 4-132, Tr. XIV 4-128, Tr. XV 4-38, 58-84) There were ten (10) hours of recorded interviews between Mr. Reece and Detective Bacon and/or Ranger Holland introduced at trial. A majority of the recorded interviews revolved around Laura Smithers, Jessica Cain, and Kelli Cox, not Tiffany Johnston. (State's Exhibit's 79, 80, 83, 84, 86, 88, 101, 102) The State during its opening statement devoted over half of its argument to *Burks* evidence to be presented. (Tr. VII 16, 28-49) The State also devoted a good portion of its closing statements to the *Burks* evidence and not the death of Tiffany Johnston. (Tr. XV 6-19, 35, 37, 59-60, 69-70, 76. Tr XVII 51, 54-62, 95-97, 99-100, 103) The judge ultimately abused her discretion when she allowed the jury panel to be bombarded with prior bad acts that had nothing to do with the death of Tiffany Johnston.

Mr. Reece's jury verdict was improperly based on evidence of these bad acts in violation of his due process right to a fair trial. U.S. Const. amends. V, XIV; Okla.

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and the offense sought to be proved; (4) There must be a showing by the State that the evidence of other crimes is necessary to support the State's burden of proof; that the evidence is not merely cumulative. Such evidence should not be admitted where it is a subterfuge for showing to the jury that the defendant is a person who deserves to be punished; *Burks v. State,* 1997 OK CR 15, ¶ 33, 935 P.2d at 357.

Const. art. 2, § 7. As such, he respectfully asks that this Court reverse and remand this matter with instructions to prohibit the introduction of overly prejudicial testimony pertaining to § 2404(B), or in the alternative, grant any further relief this Court deems just and equitable.

PROPOSITION VII

ADMISSION OF RANGER HOLLAND AND DETECTIVE BACON'S CHARACTER EVIDENCE OF MR.REECE DENIED MR. REECE A FAIR TRIAL.

The State improperly used evidence of Mr. Reece's character to strengthen its case. Testimony from Ranger Holland and Detective Bacon about Mr. Reece's character should have been excluded because defense counsel never offered character evidence. However, the State was allowed to offer bad character evidence and the testimony *infra*, went beyond what the trial court ruled as admissible *Burks* evidence. Okla. Stat. tit. 12 § 2404(A)(1) states: "evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same." The accused must put character in issue before the prosecution can offer evidence of bad character. *Ingram v. State*, 1988 OK CR 102, ¶ 8, 755 P.2d 102. This evidence was also more prejudicial than probative. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Okla. Stat. tit. 12 § 2403

The trial court abused its discretion by allowing this testimony before the jury. Defense counsel objected to the many instances of character testimony therefore this Court should review this as an abuse of discretion. (Tr. XI 43-44, 46, 55-56, XII 25, 56-57, XIII 19-21, 23-24, 102-104, 106-107, XIV 26, 85-86) An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous

conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

During trial, Ranger Holland was allowed to testify about Mr. Reece's character:

Ranger Holland: The majority of homicide investigations that I've worked and that I've studied through the years, appealing to his sense of morality generally works in most homicide investigations to retrieve a confession.

Mr. Harmon: Why didn't you think it would work here?

Mr. Benedict: Objection. Speculation.

The Court: Overruled. He can answer based on his experience.

Ranger Holland: I felt like he lacked morality based on my experience and training and -

Mr. Benedict: Objection. 2404, Your Honor.

The Court: Okay. Overruled.

Mr. Harmon: Go ahead, Ranger.

Ranger Holland: Based on training and experience I just concluded that that would never go anywhere with him. And that it had to be tangibles and there had to be mitigation. And that if I went down the road of remorse, of can't sleep at night, of you know, God will never forgive you or anything like that that it would immediately end and he would have zero respect for me. And the interview would be over before it ever started.

(Tr. XI 43-44)

Mr. Harmon: Did you feel like you needed to take a different approach in talking to Bill Reece about Laura Smither than you did the other girls?

Ranger Holland: Yes, I thought that would be the hardest one for him to overcome.

Mr. Harmon: Why?

Mr. Benedict: Objection. Speculating.

The Court: Overruled.

Ranger Holland: It would change his status in prison. The crimes that he had -- that would -- the crime that he was in for was an adult crime. And if he was convicted or arrested for a child crime it would completely change his status in prison. It would become a dangerous place for him. Convicts don't like child molesters. I felt like a murder is fairly easy to cop to believe it or not from my experience. People have issues.

Mr. Benedict: Objection. Nonresponsive at this point.

MR. Harmon: I'll ask another question, Judge.

The Court: Please.

Mr. Harmon: Ranger Holland, in you [sic] experience is it harder for people to admit being a killer or admit to being a child molester?

Ranger Holland: Child molester.

Mr. Harmon: And in this case there could be ramifications if Bill Reece goes to prison as a child molester, sexual motivated killer of a child?

Mr. Benedict: Objection. That's leading

Mr. Harmon: Is there -- would there be potential repercussions?

Ranger Holland: His status in prison would change if he was charged with a crime against a child.

Mr. Harmon: And also did you believe that Bill Reece wanted you to think of him or other people to think of him as a pedophile?

Ranger Holland: No, absolutely not.

Mr. Harmon: Is that why you steered him away from whoever abducted Laura Smither being a pedophile?

Ranger Holland: Right. I was looking at mitigation based on the research that I'd done. Interviews that have been done of convicts that had served time with him, there seemed to be a very I think, a good play I guess would be the only way I'd describe it. Going at him as Smither being mistaken as an adult and that's kind of where I was going.

(Tr. XI 55-56)

Ranger Holland: No, Oklahoma had already issued an arrest warrant for murder for the murder of Tiffany Johnston. I believes [sic] that they had a solid case --

Mr. Benedict: Objection to what he believed. It's not relevant.

The Court: Overruled.

Ranger Holland: I believed that they had a solid case with tangible evidence and DNA.

(Tr. XII 25)

Mr. Harmon: Counsel asked you some questions about William Reece crying and getting emotional; do you remember those . . . questions?

Ranger Holland: Yes, I do.

Mr. Harmon: Did William Reece cry and get emotional when he talked about Laura Smither? Killing Laura Smither?

Ranger Holland: No, he didn't.

Mr. Harmon: Did he cry and get emotional when he talked about killing Tiffany Johnston?

Ranger Holland: No, he did not.

Mr. Harmon: Did he cry and get emotional when he talked about killing Jessica Cain?

Ranger Holland: No, he did not.

Mr. Harmon: Did he cry and get emotional when you told him about Jessica Cain's mother? How she couldn't sleep waiting on a phone call? Did that make him cry?

Ranger Holland: No, he did not.

Mr. Harmon: What did he cry about?

Ranger Holland: During the second interview when we were going through -- when he accepted and laid out his terms of delivering the two bodies, basically after he said that he was going to do it and committed to it, he broke down and started crying. A little bit later we talked about it more and then he started crying again a second time.

Mr. Harmon So fair to say he's crying about himself?

Mr. Benedict: Objection. Speculation and leading.

Mr. Harmon: Is he crying about himself and his own situation?

Mr. Benedict: Also speculation.

The Court: Overruled. He can testify to his observations.

Ranger Holland: I believe he was crying about the situation he put himself in and moving forward and maybe wondering if it was the right move or not.

(Tr. XIII 19-21)

Mr. Harmon: Counsel asked you about his anxiety whenever Kelli Cox's body wasn't found quickly and asked you a question along the lines of is it possible that anxiety was because of the death penalty or some deal with the death penalty. And I think you said, sure. It's possible. Did it appear to you that that's what his anxiety -- that was the source of his anxiety?

Mr. Benedict: Objection. Speculation.

Mr. Harmon: Counsel asked that.

The Court: Overruled.

Ranger Holland: Is it possible? Yes. Is it probable, no. Based on everything that I saw, the totality of the circumstances, meaning everyone that was around there, the feedback that he was getting from officers and from people that were assisting, I believe, still believe, firmly believe, that it was caused -- his anxiety was caused because we were not finding the body at the locations that he had pointed out. And we had already dug up those location [sic]. In addition to that we had not found the body where the cadaver dogs had alerted and we had dug up those positions. He, you know, even made the statement that we were digging too deep and wasting too much time because we were going down five feet and he said he buried her at two. And, you know, a lot of that was very animated that he wanted us to do things different because he believed that we would -- you know, it would help us speed up finding the body?

(Tr. XIII 23-24)

Mr. Stephenson: Ranger, going into to this interview have you ever received a version of events regarding Laura Smither other than that William Reece hit her with his truck and that she was dead in the ditch?

Ranger Holland: No, not from my memory.

Mr. Stephenson: Ranger, the version of events he give you here pertaining to Laura Smither, particularly that he barely turned her head?

Ranger Holland: Correct. This is the first time I heard that. He said that he hit her with his vehicle. I believe he changed from the mirror to the back part of his dually. And when he went around to examine what he hit he saw her in the ditch and she was crying and screaming. And he said that he tried to quiet her by putting his hand over her mouth and when he did that he said that he moved her head around and felt her neck snap.

Mr. Stephenson: In your experience of law enforcement you've seen, do people get their necks broken by people barely turning their heads?

Mr. Benedict: Objection, Your Honor. He lacks personal knowledge of that.

The Court: He can testify as to his training and experience in his field.

Mr. Benedict: Objection. He's not a medical doctor though.

The Court: Overruled.

Ranger Holland: No.

Mr. Stephenson: Have you ever seen that?

Ranger Holland: Yes.

Mr. Stephenson: You ever seen someone barely turn someone's head?

Ranger Holland: No, I've never seen that. I've dealt with several broken necks and obviously a lot of strangulation cases.

(Tr. XIV 85-86)

During trial, Detective Bacon was allowed to testify to Mr. Reece's character:

Mr. Stephenson: Okay. During -- and I'm sorry. I jumped ahead a little bit. In talking about Jessica Cain, at one point the Defendant says -- and you've been talking about this for a significant amount of time, he says it's possible we had sex. To be honest I can't remember. Did that strike you as an odd statement?

Ms. Messina: Objection. May we approach?

The Court: Yes.

Ms. Messina: Judge, I'm going to object to the relevance. I'm also going to object to any of this testimony to this particular victim coming in for Burks under 2413. His opinion on the matter isn't relevant for that purpose and would unduly prejudice Mr. Reece, deny him the right to a fair trial.

Mr. Stephenson: Your Honor, the Defendant's truthfulness during the entirety of his statements is certainly an issue. I'm not going into the facts or Detective Bacon's beliefs but I do believe that his observation of the answer not making any sense given the scenario of these crimes is relevant to the jury determining whether or not William Reece is telling the truth.

Ms. Messina: And, Judge, he'd be speculating as to whether or not William Reece was telling the truth because he wasn't a witness there. He wasn't the primary investigator. There's no physical evidence of any type of sexual assault. Mr. Reece's credibility in those interviews is a question for the jury to determine and to allow Detective Bacon's testimony on that would invade the province of this jury in addition to the previous grounds I objected on.

The Court: The credibility of the witness is always an issue and the State, if they can, can bring out any contradictory statements. But, again, the witness is a seasoned homicide investigator and can give an opinion. He can make inferences based upon his investigation -- or the entire investigation so I'm going to overrule your objection.

Mr. Stephenson: Was that an odd statement to you, Detective?

Detective Bacon: Yes, it was.

Mr. Stephenson: Why?

Detective Bacon: Well, he could remember every detail of their interaction except the part whether he had sex or not.

(Tr. XIII 102-104)

Mr. Stephenson: At one point he describes the interaction that he has her in the back of his horse trailer. He uses phrases, I remember her being on top of me. Told her I couldn't do it. She climbed on top of me. She jumps in my lap. She unsnaps from the top. It's too hot. I tell her I can't do this. Those statements, you eventually confront him about that. Why?

Ms. Messina: Objection. Relevance.

The Court: Overruled.

Detective Bacon: Because it was ridiculous.

Mr. Stephenson: What do you mean by that?

Detective Bacon: Well, he just got through grabbing her, pushing her into the trailer, beating her. All of sudden she wanted to have sex with him. I found that pretty ridiculous.

Mr. Stephenson: And in fact you confront him on that; is that fair?

Detective Bacon: Yes.

Mr. Stephenson: And what was his response?

Detective Bacon: He said, well, I didn't say it was consensual.

Mr. Stephenson: Would you agree with me that up until that point the way he described it sounded consensual?

Mr. Bacon: Yes.

Ms. Messina: Objection. Leading.

The Court: Sustained.

(Tr. XIII 106-107)

Mr. Stephenson: February 19th, February 26th, February 27th, do you ever feel like he is fully truthful with you during those interviews?

Detective Bacon: No.

Ms. Messina: Objection. Relevance.

The Court: Overruled.

(Tr. XIV 26)

The admission of the above testimony from Ranger Holland and Detective Bacon was more prejudicial than probative. Ranger Holland and Detective Bacon repeatedly were able to say that Mr. Reece was lying in his interviews and that he

only cared about himself and lacked morality. The testimony presented also painted Mr. Reece as someone who had no humanity and was a pedophile. Ranger Holland was also allowed to testify that Oklahoma had a strong case. The above testimony was extremely prejudicial that had a high probability of influencing the jury's verdict and defense counsel had not presented character evidence therefore the above testimony that went beyond the *Burks* ruling and should have been excluded.

The admission of the testimony from Ranger Holland and Detective Bacon was an actual error, as the admission violated Okla. Stat. tit. 12, §§ 2403 and 2404(A)(1) . The inclusion of the testimony had a high likelihood of prejudicing the jury's analysis of the case, and the prejudice substantially outweighed any probative value. The United States and the Oklahoma Constitution guarantee a criminal defendant the right to a fair trial before an impartial jury. U.S. Const. amend. VI, XIV; Okla. Const., art. II, §§ 19, 20. As such, A respectfully asks that this Court reverse and remand this matter with instructions to prohibit the introduction of overly prejudicial testimony or in the alternative, grant any further relief this Court deems just and equitable.

PROPOSITION VIII

INCIDENTS OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS DEPRIVED MR. REECE OF HIS DUE PROCESS RIGHT TO A RELIABLE SENTENCING PROCEEDING IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS AND CORRESPONDING PROVISIONS OF THE OKLAHOMA CONSTITUTION.

The prosecutors in this case exceeded the bounds of proper and professional prosecutorial advocacy. During the State's first and second stage closing argument, the prosecutors made numerous improper statements which individually and collectively worked to deny Mr. Reece a fair and reliable

sentencing. The prosecutors repeatedly injected personal beliefs into the proceedings. Trial counsel timely objected to the prosecutors' statements. Therefore, this Court should review this as an abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

During first stage closing argument, Mr. Harmon repeatedly told the jury that Mr. Reece was guilty of murdering Tiffany Johnston:

> Mr. Harmon: But going through these from starting in 1986. LaDawna Frederick, Angel Cary. And then we know -- we see a break of time of ten years because we know that Reece was released from prison in October of 1996. It starts up pretty quickly thereafter. Laura Smither, April 3, 1997. Sandra Sapaugh, May 16, 1997. Carla Beam, Elizabeth Dolan, July 4, 1997. Kelli Cox, July 15, 1997. Tiffany Johnston, why we are here today because law enforcement did not give up and her family did not give up on finding her killer. He's right over there.
>
> Mr. Benedict: Objection. That's personal opinion, Your Honor.
>
> The Court: Overruled.

(Tr. XV 69)

> Mr. Harmon: He just happened to wander in there? Maybe. But he did. He was there at the same time --
>
> Mr. Benedict: Objection. That's his personal opinion.
>
> Mr. Harmon: It's in evidence.
>
> The Court: Overruled.
>
> Mr. Harmon: Bill Reece tells us he was there. Bill Reece's DNA tells us he was there. So he just pulls off the road, goes two and a half miles. And this isn't the days where you can Google car wash near me. If he's never been there how does he know a car wash is going to be exactly two and a half miles off of I-40 on Northwest 23rd Street in Bethany, Oklahoma. There's a lot of things that don't make sense. But, again, not necessary for us to determine -- or your determination of his guilt. Because his guilt is clear.

Mr. Benedict: That's -- objection. Personal opinion.

The Court: Overruled.

Mr. Harmon: So he's at the Sunshine Car Wash. Whether or not that was coincidental or whether or not it was planned. And he kills Tiffany Johnston.

Mr. Benedict: Objection. That's also personal opinion.

Mr. Harmon: It's in evidence.

Mr. Benedict: Okay. Hang on a second.

Mr. Benedict: May I approach?

The Court: No. Counsel may make inferences from the evidence.

Mr. Benedict: But he can't state his personal opinion, Your Honor.

The Court: No, he's not. Overruled.

(Tr. XV 75-76)

This Court has held that it is improper for a prosecutor to express his personal opinion of the guilt of the accused. *McCarty v. State*, 1988 OK CR 271, ¶ 13, 765 P.2d 1215. (internal citations omitted).

Both Mr. Harmon and Mr. Stephenson repeatedly expressed in various ways that justice demanded death:

Mr. Stephenson: And, ladies and gentlemen, I would contend that what you heard of William Reece, there is no mitigating evidence out there that can outweigh these aggravators. Not even close. These are the victims of William Reece. These are the ones you have heard about over the last three to four weeks. And Tiffany Johnston is here, who you are here to sentence him for the horrible death of Tiffany Johnston. She didn't deserve to die. William Reece does. And, ladies and gentlemen, that is what it comes down to. His actions have shown that it's the only just verdict in this case. His actions both at the time and his actions since. His words showing his demeanor and his thought of these crimes render the death penalty the only just --

Mr. Benedict: Objection, Your Honor. I believe that inappropriate.

The Court: Overruled.

Mr. Benedict: May I approach?

The Court: Yes.

Mr. Benedict: Judge, I believe that pursuant to Lee (sic) versus State, 1997 Oklahoma Court of Criminal Appeals 55, that these arguments are improper. And in Lee there was a series of arguments by both prosecutors which essentially suggested it was unfair that he should live while the person was dead. I think it's similar to their expressing their personal opinion about the appropriateness invading the province of the jury.

Mr. Stephenson: Your Honor, I've been very careful not to say that the death penalty is the only sentence for William Reece but that it is the only just sentence for William Reece.

The Court: Overruled.

Mr. Stephenson: The death penalty is the only just punishment for William Reece for the murder of Tiffany Johnston. And, ladies and gentlemen, that is what the State of Oklahoma is boldly asking you for because it's the appropriate sentence in this case. . .

(Tr. XVII 70-72)

Mr. Harmon: What the State of Oklahoma is asking you to do, what I am asking you to do is difficult. It would be easy to give William Reece a life without parole sentence and go on down the road and try to forget about Tiffany Johnston and all the other young women and girls that he victimized. Get on with your life. But I know that you will not do that. I know that you will not do that because you each individually took an oath and swore that you would consider each legal punishment and then, under the appropriate circumstance, impose a sentence of death. And, ladies and gentlemen, if there was ever an appropriate circumstance --

Mr. Benedict: Objection. That's improper, Your Honor.

The Court: Overruled.

Mr. Harmon: If there was ever an appropriate circumstance for a death sentence, ladies and gentlemen, this is the case and this is the Defendant, William Lewis Reece. There is an easy way out. But it would not be justice. Any sentence less than death is not justice for William Reece and it is not justice for Tiffany Johnston.

Mr. Benedict: Objection, Your Honor. May I approach?

The Court: You may.

Mr. Benedict: Judge, the last two comments are improper under Ochoa versus State, Torres versus State, and McCarty versus State.

Mr. Harmon: Judge, I'd like to see actual language from those that say that.

> Mr. Benedict: If this isn't a death penalty case then I don't know what is contained in Ochoa versus State and Torres versus State. All these comments were held to be inadmissible.
>
> Mr. Harmon: I don't think that's precisely what they held. I'd like to see the whole case before we make an argument. I think here's the distinction between that. Is that if it's not a death penalty case then I don't know what is. That's not what I said.
>
> The Court: I'm going to overrule your objection.
>
> Mr. Benedict: And in Lee versus State, which I've cited earlier, in there the Court -- or the prosecutor made the argument of telling the jury they could do justice by finding Lee guilty and bringing a verdict of death is similar to what he's just said, Your honor.
>
> The Court: All right. So noted. Overruled.

(Tr. XVII 105-107) It is improper for a prosecutor to give a personal opinion that justice demands death or is the only appropriate sentence. *McCarty v. State*, 1988 OK CR 271, ¶ 14, 765 P.2d 1215, 1221; *Torres v. State*, 1998 OK CR 40, ¶ 48 962 P.2d 3; *Le v. State*, 1997 OK CR 55, ¶ 58, 947 P.2d 535.

It is clear that repeated admonishments to prosecutors not to engage in the improper behavior described above, yet failing to take any corrective action, has led prosecutors to believe they can flout this Court's decisions and continue to make these remarks with impunity. At some point this Court must realize the harm that this behavior has on the entire justice system. As was stated so eloquently by Justice Stevens:

> Automatic application of harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever present and always powerful interest in obtaining a conviction in a particular case.

Rose v. Clark, 478 U.S. 570, 588-89, 106 S.Ct. 3101, 3111-12, 92 L.Ed.2d 460 (1986)(Stevens, J., concurring).

A prosecutor's words and opinions carry with them the imprimatur of the

government and may influence a jury's verdict. *Bechtel v. State*, 1987 OK CR 126, ¶ 11, 738 P.2d 559, 561. Appellant submits that because the prosecutors interjected personal opinions about Mr. Reece's guilt in first stage closing and personal opinions about the death penalty in second stage closing rendered Mr. Reece's trial unfair under U.S. Const. amends. V, VI, XIV and Okla. Const. art. 2, §§ 7, 20. and his sentence unreliable. These errors cannot be said to be harmless in any of the claims when looking at them individually but it is especially not harmless error when looked at cumulatively. Accordingly, Mr. Reece requests that this Court either modify or vacate his sentence of death.

PROPOSITION IX

THE TRIAL COURT'S REFUSAL TO REMOVE PROSPECTIVE JURORS FOR CAUSE DENIED MR. REECE HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS RELEVANT PROVISIONS OF THE OKLAHOMA CONSTITUTION.

It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412 (1985); *Trice v. State*, 1993 OK CR 19, ¶ 8, 853 P.2d 203, 209. The trial court failed to exclude for cause jurors who made it clear their views would prevent them or substantially impair the performance of their duties as jurors.

Prospective Juror N.P. said that "if someone's guilty and, like I said, it was, like, murder – premeditated murder, planned out murder, it's pretty cut and dry

with the death penalty. I mean, if you've premeditatedly set in stone something to do it and did it and you killed somebody, it's cut and dry". (Tr. I 243) Defense counsel continued to attempt to clarify the prospective juror's stance.

> "the Judge asked you...if you find beyond a reasonable doubt that the Defendant is guilty of Murder in the First Degree will you automatically impose the penalty of death. And you answered no to that. But it seemed like your answer that it was pretty cut and dry in terms of premeditation that it's pretty cut and dry with regards to the death penalty...can you explain – do you understand my concern...can you think of a situation where, you, N.P., would automatically impose a sentence of death without considering the other two options?

(Tr. I 247-248) N.P. said "if there is proof that it was planned out and there's, you know, within a shadow of a doubt a person planned it, out was premeditated, and they, you know, there's proof that they premeditatedly murdered somebody then it's pretty straight forward." (Tr. I 248) Defense counsel then asked "that you would impose the death penalty; is that fair to say?" (Tr. I 248) N.P. replied, "yes." (Tr. I 248) Later N.P. said "well, you know, it – premeditated murder, that's like I said, that's pretty cut and dry. I mean, that's a death penalty case." (Tr. I 250) Defense counsel asked the trial court to excuse N.P. for cause. (Tr. I 251) Eventually, the State was able to rehabilitate N.P. and he said he could consider all three punishments and hear both sides. (Tr. I 253)

Prospective Juror R.S. boldly stated when asked if she could think of a situation where she would automatically impose the death penalty said that she would push for it if it happened to one of her kids. (Tr. II 24) R.S. later said that she would want to get justice for the victim and everyone involved. (Tr. II 27) Defense counsel ask R.S. and if getting justice for the victim would "diminish or lower the burden of proof" for the State in determining guilt or the aggravators and R.S. said "yes." (Tr. II 31) R.S. agreed that she was very focused on getting justice for the

victims and that would lower the burden of proof. (Tr. II 32) Defense counsel moved to strike R.S. for cause and the trial court denied the motion. (Tr. II 33-34, 36)

Prospective Juror R.G. initially said that she would impose the death penalty if the Defendant was found guilty of Murder in the First Degree. (Tr. II 39) R.G. also said that she believed life imprisonment was wrong because "if a person commits murder then shouldn't that person be judged on that? And if you give them life, the victim didn't have a life." (Tr. II 42) After the prosecutor explained the process to R.G. she then said she could consider all three options of life, life without the possibility of parole, and the death penalty. (Tr. II 43-45) R.G. also stated that a life without the possibility of parole sentences was not a severe sentence. (Tr. II 59-61) R.G. later said that she would automatically impose a death sentence if it had to do with the death of a child, no matter what. (Tr. II 61) Defense counsel moved to excuse R.G. for cause and the trial court denied the motion. (Tr. II 61-62) The trial court later dismissed for cause a different juror who said they would automatically impose the death sentence if it was for the death of a child. (Tr. IV 335-337,

All three (3) perspective jurors should have been excused for cause. While they gave lip service to the idea they would be willing to consider all three available punishments, it was clear that they were unwilling to *fairly* consider all three options. This Court has noted that the single word – fairly – "carries an inescapable constitutional weight." See *Hanson v. State,* 2003 OK CR 12, ¶ 10, 72 P.3d 40, 48. R.G. expressed she would automatically impose the death penalty if the victim was a child[45]. (Tr. II 61) R.S. said she would focus on getting justice for the victim. (Tr. II

[45] The State presented evidence that Mr. Reece had killed a child, Laura Smithers, a twelve-year-old girl. (State's Exhibit 101 47:31-47:35)

27) N.P. said that it would be "cut and dry" for the death penalty if the murder was premeditated. (Tr. I 250) Each juror's individual views raised a serious question that those views might have prevented or substantially impaired the performance of her duties as a juror in accordance with her instruction and oath. *Rojem v. State*, 2006 OK CR 7, ¶32, 130 P.3d 287, 295.

As stated above, a juror's bias does not have to be proven with "unmistakable clarity." *Patton v. State,* 1998 OK CR 66, ¶16, 973 P.2d 270, 282. All doubts regarding juror impartiality must be resolved in the defendant's favor. *Warner v. State,* 2001 OK CR 11, ¶ 8, 29 P.3d 569, 573 (reversing death penalty conviction, in part, based upon trial court's failure to excuse a juror for cause who harbored a "strong bias towards the death penalty").[46]

After exercising the allotted nine (9) peremptory challenges, defense counsel requested three (3) additional challenges because three (3) of counsel's for-cause challenges with regards to N.P., R.S., R.G. were denied in error. Defense counsel stated that had the defense been given three (3) additional challenges, they would have been used to strike Jurors A.K., W.S., and T.S. (Tr. VI 263-264) Mr. Reece was forced to keep T.S. who rated her support of the death penalty at a 7.5 out of 10 and believed the death penalty is justified because people get away with things they shouldn't. (Tr. II 223, 235) A.K. said that she believed a death sentence would be appropriate for a murder if it was premeditated. (Tr. IV 42-43) W.S. said that "if a person is found guilty according to the Old Testament they deserve the death

[46] In *Warner,* prospective juror McKinnis stated that he could consider all three punishments, but when asked directly whether he could *fairly consider* all three, he responded, "I would say that I would be biased towards the death penalty." *Warner,* 2001 OK CR 11, ¶ 9, 29 P.3d 569, 573.

penalty...and it seems to be what the Bible indicates should happen in that type of case if you're found guilty." (Tr. IV 87) W.S. then said that he supports the death penalty in cases where the person is found guilty. (Tr. IV 88) Appellant need only show that an unacceptable juror was "undesirable to his position." *Hanson v. State,* 2003 OK CR 12, ¶12, 72 P.3d 40, 49.

The trial court's denial of Appellant's for cause challenges violated his right to a fair and impartial jury pursuant to the U.S. Const. amend. V, VI, VIII, and XIV and Okla. Const., art. II, §§ 7, 9, 19 and 20. Accordingly, his conviction and sentence should be vacated.

PROPOSITION X

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT MR. REECE MURDERED TIFFANY JOHNSTON IN ORDER TO AVOID ARREST OR PROSECUTION REQUIRING THE COURT TO VACATE THE "AVOID ARREST" AGGRAVATOR.

The standard of appellate review for the factual sufficiency of an aggravator is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the facts necessary to support such aggravator beyond a reasonable doubt. *Lewis v. Jeffers*, 497 U.S. 764, 781-82, 110 S.Ct. 3092, 3102-03, 111 L.Ed.2d 606 (1990); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Powell v. State*, 906 P.2d 765, 784 (Okl.Cr.1995).

In the present case, the State relied upon the fact that Mr. Reece had previously sexually assaulted women and went to prison because of it so, therefore, Mr. Reece killed Tiffany Johnston to avoid arrest and going back to prison. The State also argued that Mr. Reece killed Laura Smither, Kelli Cox, and Jessica Cain to avoid

arrest. (Tr. XVII 53-58) The evidence presented at trial showed no proof that Mr. Reece murdered any of the woman to avoid arrest. Concerning Jessica Cain and Kelli Cox, some sort of altercation happened according to Mr. Reece before their deaths. Concerning Laura Smithers, Mr. Reece told Ranger Holland that he hit Ms. Smithers with his truck, and when he went to her in the ditch, she was crying and he tried to quiet her and moved her head around and felt her neck snap. (Tr. XIV 85) If anything the other murders show that Mr. Reece had a short fuse and did not kill Ms. Johnston in order to avoid arrest or prosecution. (Tr. XII 52-53, 55-57, Tr. XIV 49-50) In his statements to Ranger Holland, Appellant told him that after he had sex with Ms. Johnston, he was getting up and Ms. Johnston hit him in the head with a horseshoe, then he strangled her. (State's Exhibit 86 44:00-44:22) At best, the evidence relied upon by the State showed only that Appellant killed Ms. Johnston after she hit him in the head with a horseshoe, which is insufficient to prove the aggravator. OUJI-CR 4-75 requires that the state prove:

> Second: the defendant committed the murder with the intent to avoid being arrested or prosecuted for the murders.

As such Appellant respectfully requests that this Court vacate this "to avoid arrest" aggravator.

PROPOSITION XI

THE APPLICATION OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS OVERBROAD AND THEREFORE FAILS TO FULFILL THE NARROWING FUNCTION NECESSARY OF AGGRAVATING CIRCUMSTANCES UNDER THE EIGHTH AMENDMENT.

The heinous, atrocious or cruel aggravator is unconstitutionally vague and applied in an overbroad manner. In order to define the aggravator narrowly to

comport with the requirement that aggravators sufficiently channel the jury's sentencing discretion, the Court has held that the aggravator is limited to those cases where serious physical abuse is present. *Stouffer v. State*, 1987 OK CR 166, ¶ 6, 742 P.2d 562, 564.

Despite the Court's attempt at limiting the aggravator, it remains vague and overbroad and is, therefore, unconstitutional. *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). This is particularly true where there is no evidence that the defendant intended to cause pain and suffering beyond the act of killing. *See Harmon v. State*, 2011 OK CR 6, ¶ 77, 248 P.3d 918, 942-943 (Heinous, atrocious or cruel aggravator supported where defendant acted with utter indifference to the victim's suffering); *Coddington v. State*, 2011 OK CR 17, ¶ 62, 254 P.3d 684, 710 ("However, this Court should not create an intent requirement when considering whether the proof is sufficient for this aggravating factor").

> Virtually any murder in which the victim did not die instantly could qualify for the enhancement under [the current] construction if there is a possibility that the act of murder did not immediately render the victim unconscious and the wounds could have caused pain.

Pavatt v. Royal, 859 F.3d 920, 936 (2017). Given the failure of this aggravator to genuinely narrow the class of persons eligible for the death penalty, the Court should declare that the aggravator operates in the same unconstitutionally overbroad manner recognized by *Maynard* and vacate the aggravator in this case.

PROPOSITION XII

APPELLANT RAISES AND REQUESTS THE COURT TO RECONSIDER WHETHER PREVIOUSLY ADJUDICATED ISSUES VIOLATED MR. REECE'S RIGHTS TO A FAIR TRIAL, AN IMPARTIAL JURY, DUE PROCESS, OR A RELIABLE SENTENCING PROCEEDING.

To preserve Mr. Reece's right to have arguable assignments of error (not yet determined by the United States Supreme Court) preserved for review in the Court on direct appeal and in subsequent state and federal proceedings, Mr. Reece sets forth the following previously rejected issues to give this Court a fair opportunity to reconsider them.[47]

A. Sentencing-phase jury instructions seriously diminished the effect of mitigating evidence.

The jury was instructed in mandatory terms, that it had to consider the aggravating circumstances before it could impose the death penalty. (O.R. 1140) *See Oklahoma Uniform Jury Instructions*, OUJI-CR (2d) 4-76. By contrast, the instructions did not require the jury to consider evidence in mitigation even after the jurors determined that such evidence existed, but instead told the jurors only that such evidence "may lead you as jurors individually or collectively to decide against imposing the death penalty." (O.R. 1142) *See Oklahoma Uniform Jury Instructions*, OUJI-CR (2d) 4-78. The permissive language of the uniform jury instructions improperly allowed the jury the option of ignoring mitigating circumstances altogether.

The instructions given created ambiguity as to the sentencer's constitutional duty to consider the mitigating circumstances and thus violated the Eighth and

[47] *See Walker v. State*, 1997 OK CR 3, ¶ 4, 933 P.2d 327, 344 (Lane, J., dissenting)("Today, we are telling counsel that even though we have decided the issue, they should raise adjudicated issues in all future cases...to prevent waiver in case our opinions are overturned in the federal system.")

Fourteenth Amendments.[48]

B. The trial court erred by failing to specifically instruct jurors that they could consider a sentence of life or life without parole even after finding an aggravating circumstance.

Second Stage instruction number 35, OUJI-CR (2d 4-76), informed jurors that if they found an aggravating circumstance beyond a reasonable doubt, they would be "authorized to consider imposing a sentence of death." (O.R. 1140) The same instruction only mentions the sentencing options of life and life without parole in the context of which penalties the jury should consider if it did not find the existence of an aggravating circumstance.

The trial court's instruction implied that a life sentence was appropriate only if the jury failed to find the existence of an aggravating circumstance. In Oklahoma, however, a jury may choose a life sentence notwithstanding the finding of an aggravating circumstance, even if the jury also finds that the aggravating circumstance outweighed mitigating circumstances. *See Parks v. State*, 1982 OK CR 132, ¶ 37, 651 P.2d 686, 694; Okla. Stat. tit. 21, § 701.11.

By clouding these rules, the trial court's instructions violated the Eighth and Fourteenth Amendments. *See Cunningham v. Zant*, 928 F.2d 1006, 1012 (CA 11 1987). The failure of the trial court to inform the jury of the complete law mandates the vacation of Mr. Reece's death sentence. *See Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

C. Sentencing-phase instruction on the manner in which the jury was to

[48] *See Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982).

weigh aggravating circumstances was erroneous and set forth an improper burden of proof.

Second Stage Instruction Number 42, OUJI-CR (2d) 4-80 permitted the jury to weigh the totality of aggravating circumstances against each individual mitigating circumstance, rather than weighing the aggregate mitigating factors found against each separate aggravating circumstance as is required by Okla. Stat. tit. 21, § 701.11. (O.R. 1146)

Failure to conform the instruction to the statute violated due process. *See Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) (Fourteenth Amendment violated when defendant was not given benefit of applicable state law regarding punishment.)

OUJI-CR 2d 4-80 also instructed jurors that they were authorized to impose the death penalty if it was simply determined that the evidence in aggravation outweighed mitigating evidence. Although it has been approved by the Court,[49] such a procedure contravenes the heightened need for reliability in death penalty cases.[50] Additionally, it violates the mandates of the United States Supreme Court that any fact necessary to increase a punishment beyond the statutory maximum must be proven beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Because it is the determination that the aggravators outweigh the mitigating circumstances that make a defendant death eligible, that "fact" must be established beyond a reasonable doubt.

D. Victim impact evidence has no place in Oklahoma's sentencing scheme.

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[49] *See* e.g. *Fields v. State*, 1996 OK CR 35, ¶ 73, 923 P.2d 624, 638, and *Allen v. State*, 1994 OK CR 13, ¶ 87, 871 P.2d 79, 101.

[50] *See Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

Oklahoma's death penalty scheme requires the jury to make a determination of the appropriate punishment based on balancing aggravating circumstances and mitigation. Okla. Stat. tit. 21, § 701.11. Victim impact evidence is not relevant to either factor. Instead, victim impact evidence operates as an irrelevant, improper, nonstatutory "super-aggravator" that will always be present in every capital case. It therefore negates the narrowing function required under Supreme Court jurisprudence and skews the results in Oklahoma's weighing process. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Because victim impact evidence is considered outside of the weighing process to determine death and the State carries no burden of proof to establish the reliability of the evidence, it serves as a "super-aggravator" tipping the scales in favor of death. Appellant recognizes that this issue has been rejected by this Court. *See Malone v. State*, 2007 OK CR 34, ¶¶ 45-46, and 168 P.3d 185, 204. However, victim impact testimony continues to exceed the scope of permissible testimony outlined by statute and caselaw, and its inclusion in the penalty phase of the trial before the jury confuses Oklahoma's weighing process. The process would be better served by allowing victim impact testimony prior to the trial judge sentencing a defendant to death rather than before the jury whose responsibility is supposed to be channeled by aggravating circumstances. Therefore, Appellant again asks the Court to reconsider whether the introduction of victim impact testimony is consistent with the mandates of the Eighth Amendment.

PROPOSITION XIII

TRIAL ERRORS, WHEN CONSIDERED IN A CUMULATIVE FASHION, WARRANT A NEW TRIAL OR A MODIFICATION OF MR. REECE'S SENTENCE.

An accused is entitled to a fair and impartial trial. *Stevens v. State*, 1951 OK CR 86, 232 P.2d 949, 958. When a review of the entire trial record reveals numerous irregularities that tend to prejudice the rights of the accused, and where a cumulation of said irregularities deny the accused a fair trial or sentence, the case will be reversed for a new trial or the sentences modified, even though one of the errors standing alone would not justify reversal. *Skelly v. State*, 1994 OK CR 55, 880 P.2d 401, 407; *Penninger v. State*, 1991 OK CR 60, 811 P.2d 609, 613; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561; *Chandler v. State*, 1977 OK CR 324, 572 P.2d 285, 290; *see also* U.S. Const. amend. XIV; *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49, 94 S.Ct. 1868, 1874, 40 L.Ed.2d 431, 440 (1974) (Douglas, J., dissenting); *United States v. Rivera*, 900 F.2d 1462, 1469-70 (10th Cir. 1990); Okla. Const. art. II, § 7; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1221-22.

A cumulative error analysis aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. *Rivera*, 900 F.2d at 1470. Unless an aggregate harmlessness determination can be made, collective error will mandate reversal. *Id.* If any of the errors being combined are constitutional in nature, the State must prove beyond a reasonable doubt that such errors could not have contributed to the verdicts rendered. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710 (1967); *Rivera*, 900 F.2d at 1470 n.6.

Considerations of cumulative error override the absence of defense objections or invited error. *Faubion v. State*, 1977 OK CR 302, 569 P.2d 1022, 1024. In determining whether a sentence is excessive, this Court considers the entire record,

including improper matter received without objection, and where justice requires, the sentence will be modified. *Freeman v. State*, 1984 OK CR 60, ¶ 8, 681 P.2d 84, 86. Mr. Reece asks the Court to not only analyze the trial errors raised herein individually, but also collectively, to determine their cumulative effect on his conviction and sentence.

PROPOSITION XIV

THIS COURT SHOULD VACATE MR. REECE'S DEATH SENTENCE UNDER ITS MANDATORY SENTENCE REVIEW AUTHORITY.

> [D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, [a death sentence] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357–58, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977) (internal citations omitted). This Court has a duty to conduct a mandatory sentence review. Okla. Stat. tit. 21, § 701.13(C)(1). The two considerations for that review are 1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and 2) whether the evidence supports the jury's finding of the statutory aggravating circumstances. Appellant respectfully submits that the death sentence was rendered arbitrarily in this case as a result of passion and prejudice caused by all of the aforementioned errors, specifically, given that most of Mr. Reece's trial was based around propensity and *Burks* evidence and aggravating factors evidence. (Tr. Tr. XI 10-70, Tr. XII 5-162, Tr. XIII 4-132, Tr. XIV 4-128, Tr. XV 4-38, 58-84)(State's Exhibit's 79, 80, 83, 84, 86,

88, 101, 102) (Tr. VII 16, 28-49) (Tr. XV 6-19, 35, 37, 59-60, 69-70, 76. Tr XVII 51, 54-62, 95-97, 99-100, 103)

According to the Death Penalty information Center, "Death-row prisoners in the U.S. typically spend more than a decade awaiting execution or court rulings overturning their death sentences. More than half of all prisoners currently sentenced to death in the U.S. have been on death row for more than 18 years."[51] Mr. Reece is right now sixty-four (64) years old.[52] The cost to house a defendant sentenced to death for fifteen (15) years costs $382,406 more than the cost to house a defendant sentenced for life.[53] Because of Mr. Reece's age and the cost, it does not make sense for the death penalty to be applied to Mr. Reece. There were also multiple instances of error by the trial court that support the conclusion that his death sentence was rendered arbitrarily in this case.

Appellant has challenged the evidence supporting the "to avoid arrest or prosecution" aggravator. The evidence was insufficient to show that Mr. Reece murdered Tiffany Johnston to avoid arrest. He also challenged the validity of the overbroad "heinous, atrocious, and cruel" aggravator as any murder where the decedent does not die immediately is death eligible.

Because the jury in Mr. Reece's trial was so infected with the above-argued errors, the verdict rendered holds no assurance of reliability, and the death sentence here violates "the evolving standards of decency that mark the progress of

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[51] Death Penalty Information Center, *Time on Death Row*, https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row.
[52] Mr. Reece's date of birth is 7-1-59. (State's Exhibit 1)
[53] Oklahoma Death Penalty Commission, *The Report of the Oklahoma Death Penalty Review Commission; Appendix IB An Analysis of the Economic Costs of Capital Punishment in Oklahoma*, 226 (2017).

a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958). *Callins v. Collins*, 510 U.S. 1141, 1153, 114 S.Ct. 1127, 1128-30, 127 L.Ed.2d 435, 436-439 (1994) (Blackmun, J., dissenting); *Singleton v. Norris*, 108 F.3d 872, 874-876 (8th Cir.1997) (Heaney, C.J., concurring) ("[T]his nation's administration of capital punishment is simply irrational, arbitrary and unfair.").

Under this Court's authority to conduct a mandatory sentence review, Mr. Reece respectfully asks the Court to vacate his death sentence in the interest of justice.

CONCLUSION

Based on the above and foregoing arguments and authorities, Appellant respectfully asks this Court to reverse and remand his convictions for a new trial, modify his sentence, or grant any and all other relief the Court deems necessary to meet the ends of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the date of filing of this instrument, a true and correct copy of the same was delivered to the Clerk of the Court of Criminal Appeals with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.

Hallie Bovos

HALLIE ELIZABETH BOVOS