No. _____

In The Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

vs.

JAMES ALLEN CODDINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

W.A. DREW EDMONDSON
Attorney General of Oklahoma

SETH S. BRANHAM*
Assistant Attorney General

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 Fax
Counsel for Petitioner,
State of Oklahoma

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**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the capital sentencing jury in this case was prevented from considering, and giving effect to, relevant mitigating evidence in violation of the Eighth Amendment where: (a) Oklahoma's uniform instruction on impeachment of witness by former conviction was given to the jury; and (b) the jury was specifically instructed to consider as a mitigating circumstance that the defendant's family members had been, and were, incarcerated;

2. Whether a Fourteenth Amendment due process violation arose from exclusion during penalty phase of videotaped mitigation testimony of the defendant's emotionally-wrought mother where: (a) the same testimony depicted on the videotape was read verbatim to the jury; and (b) the lower court held it "cannot determine how the jury would have viewed [the mother's] testimony if it had actually seen her videotaped examination" but found that "the potential error would be of constitutional magnitude"; and

3. Whether the lower court's interpretation of *Lockett v. Ohio*, 438 U.S. 586 (1978), violates this Court's holding in *Johnson v. Texas*, 509 U.S. 350, 372 (1993), that a jury need only "be able to consider in some manner all of a defendant's relevant mitigating evidence," and need not "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant."

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The State of Oklahoma hereby petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

OPINIONS BELOW

The Oklahoma Court of Criminal Appeals's decision granting relief in favor of Respondent is reported at 2006 OK CR 34, 142 P.3d 437. It is reprinted at pages 1 through 55 of the appendix accompanying this petition ("App."). The Order of September 22, 2006, denying the Petition for Rehearing has not been reported. It is reprinted at pages 56 through 58 of the appendix.

JURISDICTION

The Oklahoma Court of Criminal Appeals entered its opinion on August 16, 2006. App. 1. The Order denying rehearing was entered on September 22, 2006. App. 56. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural History.

An Oklahoma jury convicted James Allen Coddington of one count of Murder in the First Degree, pursuant to Okla. Stat. tit. 21, § 701.7(A) (1996), and one count of Robbery with a Dangerous Weapon, pursuant to Okla. Stat. tit. 21, § 801 (1991), stemming from his robbery and murder of Al Hale. During a separate penalty phase, the jury found beyond a reasonable doubt the existence of two statutory aggravating circumstances alleged in the State's bill of particulars, namely, that the murder was especially heinous, atrocious or cruel and that, prior to his capital sentencing proceeding, Coddington was convicted of a felony involving the use or threat of violence to the person. Okla. Stat. tit. 21, § 701.12(1) & (4) (1991). The jury recommended a sentence of death for the murder conviction and life imprisonment for the robbery conviction. App. 1-2; S. Tr. 517-21. The Oklahoma Court of Criminal Appeals (OCCA) affirmed Coddington's murder and robbery convictions on direct appeal. However, the OCCA ordered a

new capital sentencing trial on two separate grounds, discussed more fully below. App. 1-51. The Court denied rehearing. App. 56-58.

B. Facts Material to Consideration of the Questions Presented.

On the afternoon of March 5, 1997, James Allen Coddington beat Al Hale over the head with a hammer inside Hale's home in Choctaw, Oklahoma. Coddington took approximately $525.00 cash from Hale's pocket, left the residence and immediately purchased cocaine. Hale was discovered later that night by his son. Despite being 73 years old and undergoing chemotherapy, Hale was found alive and lying in his bed. Hale was soaked in blood, and blood and blood spatter were found throughout the house. Hale died approximately twenty-four hours later at a local hospital. Coddington, by contrast, robbed five more convenience stores following the attack to get money for cocaine.

Arrested two days later, Coddington confessed to the convenience store robberies and the murder of Hale. He also led police to the murder weapon, which he had discarded in a creek near his apartment. Coddington admitted on the stand during the first stage of his capital murder trial that he murdered Hale. However, Coddington claimed that he only went to Hale's house to borrow money for cocaine, not to rob or kill Hale. The jury found Coddington guilty as charged. App. 2-4.

During the penalty phase of trial, the State presented testimony from several victims of the convenience store armed robberies Coddington committed before and after the murder. S. Tr. 15-37. Evidence was also presented

showing Coddington's violent acts towards innocent bystanders during his childhood and late adolescence. S. Tr. 37-55. After victim impact testimony from two of Al Hale's children, the defense presented a case in mitigation "to show how Coddington came from a bad background where his family members were drug addicts and criminals." App. 48. The defense presented testimony from Coddington's mother, step-mother and six of his siblings. All but three of these family witnesses had prior felony convictions. Four were incarcerated at the time of trial, including Gayla Hood, Coddington's mother. S. Tr. 145, 170, 190-91, 258-59, 278, 282-84, 307, 362, 431, 440 & 442.

Testimony from these family witnesses introduced, in pertinent part, mitigating circumstances falling into these major categories: (1) Coddington's father and brothers fed him alcohol in his baby bottle while he was an infant; (2) Coddington's father was a violent alcoholic with a bad temper who routinely and severely beat his children and inflicted psychological abuse; (3) Coddington suffered numerous head injuries as a child; (4) Coddington's father threw him headfirst into a wall and through a screen door when he was a child; (5) as a child, Coddington beat his head into the wall to the point of unconsciousness; (6) Coddington's brothers hit him in the head; (7) Coddington's sister ran away with him when she was 15 years old, resulting in his malnourishment, neglect and alcohol withdrawal; (8) the Department of Human Services took custody of Coddington, then returned him to his abusive father; (9) Coddington grew up in the squalid Mulligan Flats section of Oklahoma City in a house without a working toilet; (10) the Coddington children did not have enough food to eat and an uncle would take them to eat out of dumpsters; (11) Coddington's father spent welfare

money on alcohol and stayed drunk most of the time; (12) when Coddington did attend school, he had lice, body odor and ragged clothes; (13) Coddington was abandoned by his father in 1980 and placed in state custody; (14) Coddington was placed in a psychiatric hospital at age 8 because of his disruptive behavior at school; (15) Coddington was addicted to drugs, as was most of his family, and despite several attempts, he was unable to stay off drugs; (16) Coddington's mother was incarcerated at time of trial for a drug conviction, she was first incarcerated when Coddington was an infant, and had been in and out of prison ever since; (17) Hood's many husbands beat Coddington and his siblings; (18) Coddington completed the eighth grade, was always in trouble at school and received no encouragement towards his studies from his family; and (19) Coddington was protective towards his younger brother. S. Tr. 131-47, 160-64, 169-206, 257-88, 304-13, 318-33, 353-63 & 427-44; O.R. 1277-81.

The defense presented additional testimony from an employee of a drug and alcohol rehabilitation center, two detention officers from the county jail and a case manager from the state Department of Corrections (DOC). Their testimony showed that Coddington completed a thirty day drug treatment program six weeks prior to the murder, that Coddington was considered a model inmate in the county jail while awaiting trial, and that he was not considered a management problem by his DOC case manager. Evidence was also presented that Coddington was serving six consecutive life sentences for his commission of the six convenience store robberies before and after the murder. S. Tr. 125-30, 147-48, 289-90, 297-98 & 336-38; Defendant's Exhibits 21-21E.

The State countered these alleged mitigating circumstances by emphasizing on cross-examination Coddington's history of violence and disobedience in prison. This included an episode where Coddington entered a cell armed with a shank, wearing a hood over his head, with intent to do bodily harm to another inmate. S. Tr. 339-51. The State also emphasized that some of Coddington's family members had not been convicted of a felony or gone to jail. S. Tr. 440-43. The State also focused during closing argument on the contents of Defendant's Exhibit 9, a 1980 report detailing Coddington's evaluation and treatment at a state children's psychiatric hospital when he was 8 years old. This report showed that Coddington's mother reported to hospital staff that she was unaware of any childhood illnesses or accidents suffered by her son. She described how Coddington's father failed to set limits with him and that her attempts to discipline Coddington met with "interference" from the father who "babied and petted James". Hood stated that when she attempted to discipline Coddington, he would go to his father and that her son did not know the meaning of the word "no". The report describes that Coddington's referral was premised on Coddington's unruly behavior at home and in school, that there was fighting at school with his peers and that school officials had no control over him.

Defendant's Exhibit 9 also described a meeting between Coddington and his father at the hospital, that Coddington was "very excited" about the visit from his father and was sad when his father left. The report also described Coddington as having "average intelligence with an adequate fund of knowledge" plus age-appropriate speech and vocabulary. According to the report, Coddington was also evaluated by a pediatric neurologist who

found no indication of seizure disorder or malfunction with the brain. S. Tr. 168; Defendant's Exhibit 9.

During penalty-phase deliberations, Coddington's jury was told in Instruction No. 12 that evidence had been presented supporting thirty-three proposed mitigating circumstances. These proposed mitigating circumstances tracked the mitigating circumstances suggested by the defense evidence discussed above. Instruction No. 12 stated in pertinent part that:

> Evidence has been introduced as to the following mitigating circumstances:
>
> * * *
>
> 17. Gala [sic] Hood, James Coddington's mother, is in prison today for drugs and would bring her "drughead" friends around him. She first went to prison when he was six (6) weeks old, and has been in and out of prison ever since. He was in a psychiatric ward when she got out in 1980. She married an alcoholic and regained custody of James Coddington.
>
> * * *
>
> 21. James Coddington grew up surrounded by substance abuse. His mother and three (3) of his brothers are currently in prison for drug related crimes. His father is an alcoholic. Most of his siblings have struggled with substance abuse and most have been incarcerated.
>
> * * *
>
> In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well.

O.R. 1277, 1279-81. Instruction No. 15, Oklahoma's uniform impeachment of witness by former conviction instruction, told the jury that evidence of Coddington's family members' prior convictions:

> is offered to show that the witness's testimony is not believable or truthful. If you find that these convictions occurred, you may consider this impeachment evidence in determining what weight and credit to give the credibility of that witness. You may not consider this impeachment evidence as proof of innocence or guilt of the defendant. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the witness, if at all.

O.R. 1284. Based on the information in Defendant's Exhibit 9, as well as the mitigation witnesses' prior felony convictions, the prosecutor challenged the credibility of Coddington's mitigating circumstances. S. Tr. 451-61. Alternatively, the prosecutor argued, even if the jury found that all or some of Coddington's mitigating circumstances existed, they did not outweigh the aggravating circumstances established by the State and therefore, the death penalty was warranted. In this regard, the prosecutor specifically discussed most of the thirty-three proposed mitigating circumstances listed on Instruction No. 12 – including that Coddington's mother and relatives were, or had been, incarcerated – arguing that none of them outweighed the aggravating circumstances supported by the evidence. S. Tr. 462-84. The following excerpts from the prosecutor's closing argument are representative:

> And the judge tells you that you don't have to indicate which of the mitigating circumstances you might find or might not find. That's just for you

> to decide up in the jury room and you don't have to give notice of any of those.
>
> * * *
>
> The judge tells you that mitigating circumstances are those which in fairness, sympathy and mercy may extenuate or reduce the degree or moral culpability or blame.
>
> You have two things to do. Number one, you read the mitigating circumstance that have been proposed by the defendant. **The defendant wants you to believe that all of these are mitigating circumstances *but it's for you to decide.***

S. Tr. 463-64 (emphasis added).

> Number 17, "Gala [sic] Hood, James Coddington's mother is in prison today for drugs and would bring her drug head friends around him. She went to prison when he was six weeks old and has been in and out of prison ever since. He was in a psychiatric ward when she got out in 1980 and she married an alcoholic and regained custody of James Coddington".
>
> Well, those things may all be true. We don't know. But because Gayla Hood's regained custody in 1980 of this defendant, because she's in prison for drugs, because she married somebody else, what does that have to do – how in the world – even if those things are all true, how in the world does that lessen his degree or moral culpability or blame for what he did to Mr. Hale? I submit to you no.

S. Tr. 477.

> "James Coddington grew up surrounded by substance abuse. His mother and three of his brothers

> are currently in prison for drug related crimes. His father is an alcoholic. Most of his siblings have struggled with substance abuse and most have been incarcerated."
>
> According to Defendant's Exhibit Number 9 he only had occasional contact with those half siblings. And even so, it doesn't reduce his moral culpability or blame for what he did to Mr. Hale. He knew right from wrong. He made the choice to do it.

S. Tr. 479.

> [Defense counsel] was right when she told you that the law does not require you to impose the death penalty on someone. The law does not require it. **Your jury instructions tell you you have to look at the aggravators, *look at the mitigators.*** Do the aggravators outweigh the mitigators. And that's right, that's what you have to do.

S. Tr. 513 (emphasis added).

C. How the Issues Were Raised and Decided Below.

The OCCA ordered a new capital sentencing trial on two separate grounds. First, the court found that the trial judge erred in disallowing presentation of a videotape of Gayla Hood's testimony. Hood's testimony was taken by agreement of the parties prior to trial at the Federal Medical Center in Fort Worth, Texas, where she was incarcerated. Coddington sought to preserve Hood's testimony in this manner because of her deteriorating medical condition. Hood was sworn-in over the phone by the trial judge and her testimony was thereafter videotaped. Hood's examination was at times emotional and depicts her intermittently

crying. Over objection of defense counsel, the trial judge disallowed playing of the video to the jury, finding that the prosecutor had not agreed to play the videotape at trial and that Okla. Stat. tit. 22, §§ 781 through 792 (2001), the Oklahoma statutory provisions dealing with deposition of out-of-state witnesses in criminal cases, allowed only for the reading of such testimony at trial. As a result, defense counsel read Hood's testimony to the jury in lieu of playing the videotape of that same testimony. App. 36-40.

Coddington argued on appeal that failure to play the videotape deprived him of a reliable capital sentencing proceeding because his jury was precluded from considering all aspects of his mitigating evidence. Opening Brief of Appellant at 42-44, *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (D-2003-887). The OCCA interpreted Sections 781 through 792 as allowing the playing of the videotape to Coddington's jury and, applying *Green v. Georgia*, 442 U.S. 95 (1979), *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Chambers v. Mississippi*, 410 U.S. 284 (1973), the OCCA expressly found this error constituted a Fourteenth Amendment due process violation. App. 41-47. The OCCA reasoned that a capital sentencing jury should not be precluded from considering any relevant mitigating evidence, that Hood's videotaped examination showed the distress and sadness she had for her son and that "[t]he witness's demeanor in this case is exactly the type of evidence that *might* invoke sympathy for a defendant facing the death penalty." App. 47 (emphasis added). Although the OCCA held that "[*w*]*e cannot determine how the jury would have viewed Hood's testimony if it had actually seen her videotaped examination*", because of the trial judge's "mechanistic application" of Oklahoma law to prevent the jury "from receiving evidence in the form

likely to invoke sympathy and achieve the purpose of this mitigation witness" and because "the potential error would be of constitutional magnitude", a new sentencing trial was nonetheless warranted. App. 42 & 47 (emphasis added).

Coddington also argued on appeal that Instruction No. 15, the prior felony impeachment instruction, prevented the jury from giving "full effect to the proffered mitigating evidence" during penalty phase. Opening Brief of Appellant at 62-63, *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (D-2003-887) (citing *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*)). Although trial counsel did not object to this instruction, the OCCA found it violated *Lockett v. Ohio* and the Eighth Amendment in light of Coddington's mitigation strategy with the family witnesses. App. 47-49. The OCCA reasoned that "the purpose of the family witnesses during second stage was to show how Coddington came from a bad background where his family members were drug addicts and criminals", that Instruction No. 15 "*might* have led the jury to believe the evidence of these witnesses' prior convictions was offered for impeachment purposes and was not offered to explain Coddington's background" and thus, "the instruction *might* have prevented the jury from considering relevant mitigating evidence." App. 47-48 (emphasis added).

REASONS FOR GRANTING THE WRIT

Petitioner seeks review because the OCCA's decision in this case directly conflicts with *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Saffle v. Parks*, 494 U.S. 484 (1990) and *Boyde v. California*, 494 U.S. 370 (1990). Further, the

decision below, as it relates to the impeachment instruction, needlessly undermines the prosecution's ability to present a case in support of the death penalty where, as here, a parade of family members with prior felony convictions testify on a defendant's behalf to a series of highly questionable, distant events in a quest to secure a non-capital sentence. The decision below is only a half-step removed from Coddington's argument on appeal that the State should not be allowed to question at trial the veracity of *any* of a defendant's proposed mitigating circumstances. Opening Brief of Appellant at 76, *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (No. D-2003-887) ("[t]he issue of truth in the context of mitigating circumstances is not an issue for the jury").

The issues arising in this case are subject to repetition before this Court because practically every capital murder appeal involves an alleged Fourteenth Amendment due process violation stemming from penalty phase evidentiary error. *See, e.g.*, *Jackson v. State*, 2006 OK CR 45, ¶¶ 55-56, ___ P.3d ___; *Myers v. State*, 2006 OK CR 12, ¶¶ 94-95, 133 P.3d 312, 335; *DeRosa v. State*, 2004 OK CR 19, ¶¶ 71-73, 89 P.3d 1124, 1150. The impermissible standard for establishing a Fourteenth Amendment due process violation evident in the decision below therefore has the potential to affect the large number of capital cases arising in Oklahoma alone (the OCCA is the court of last resort in Oklahoma for criminal cases, OKLA. CONST. art. VII, § 4), as well as capital cases in other States using this published decision as persuasive authority. The Oklahoma court's analysis of the impeachment instruction issue also presents an issue that will likely recur. A common defense tactic is to advance a capital murder defendant's alleged bad background as a mitigating circumstance,

which often includes evidence of incarceration of family members. *See, e.g.*, *Smith v. State*, ___ So.2d ___, 2006 WL 2788994, at **7-8 (Ala. Crim. App. 2006); *State v. Hampton*, 140 P.3d 950, 967-68 (Ariz. 2006); *State v. Berry*, 141 S.W.3d 549, 571 (Tenn. 2004); *State v. Ortiz*, 2003 WL 22383294, at *2 (Del. Super. 2003) (unpublished); *State v. Tenace*, 2003 WL 21500249, at *32 (Ohio App. 6 Dist. 2003) (unpublished); *Peraita v. State*, 897 So.2d 1161, 1221-22 (Ala. Crim. App. 2003); *State v. Taylor*, 550 S.E.2d 141, 153 (N.C. 2001); *Stevens v. State*, 691 N.E.2d 412, 436 n.28 (Ind. 1997). *See also Williams v. Taylor*, 529 U.S. 362, 395 (2000) (trial counsel ineffective for failing to present mitigating circumstances that included evidence that capital murder defendant's parents were incarcerated for criminal neglect of defendant and his siblings). This "dysfunctional upbringing" approach frequently involves presentation of family members with prior felony convictions who relay distant events from a defendant's past. *See, e.g., State v. Conway*, 842 N.E.2d 996, 1034 (Ohio 2006); *Williams v. State*, 2001 OK CR 9, ¶¶ 102-07, 22 P.3d 702, 726-27; *Young v. Mullin*, 2005 WL 1828542, at *18 (W.D. Okla. July 29, 2005) (unpublished); *DeBruce v. State*, 890 So.2d 1068, 1088 (Ala. Crim. App. 2003). Thus, the Oklahoma court's impeachment instruction analysis may affect a large number of capital cases because of the great potential for use of this defense.

Finally, the decision below is based on an interpretation of *Lockett v. Ohio* that reflects the tension arising between certain cases from this Court's Eighth Amendment jurisprudence. In *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam), this Court indicated that capital sentencing procedures are constitutionally infirm whenever they do "not allow the jury to give '*full* consideration and *full* effect

to mitigating circumstances'" in assessing punishment. *Id.* at 38 (quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) (emphasis in original)). *See also Roper v. Simmons*, 543 U.S. 551, 603 (2005) (O'Connor, J., dissenting) (citing *Tennard v. Dretke*, 542 U.S. 274, 283-85 (2004) and *Lockett*, 438 U.S. at 604 (plurality opinion) for the proposition that "the sentencer in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence"). This language, which originated in Justice O'Connor's dissent in *Johnson v. Texas*, 509 U.S. 350, 381 (1993), is in tension with the majority opinions in *Johnson* and *Graham v. Collins*, 506 U.S. 461 (1993). In *Johnson*, this Court held that a jury need not "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Johnson*, 509 U.S. at 372. Rather, *Johnson* held, the Eighth Amendment requires only that "a jury be able to consider in *some* manner all of a defendant's relevant mitigating evidence". *Id.* (emphasis added). That is because "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Id.* at 373 (quoting *Saffle v. Parks*, 494 U.S. 484, 490 (1990)). *See also Graham*, 506 U.S. at 475 (quoting *Saffle*, 494 U.S. at 491) ("there is no contention that the State altogether prevented [the defendant's] jury from considering, weighing, and giving effect to all of the mitigating evidence that [the defendant] puts in front of them; rather, [the defendant's] contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered. As we have concluded above, the former contention would come under the rule of *Lockett* and

Eddings [*v. Oklahoma*, 455 U.S. 104 (1982)]; the latter does not").

This tension is the subject of this Court's recent grant of certiorari in *Abdul-Kabir v. Quarterman*, No. 05-11284, and *Brewer v. Quarterman*, No. 05-11287, both of which address the Fifth Circuit's review of the constitutionality of Texas's pre-1991 "special issues" capital sentencing system. *See Brewer v. Dretke*, 442 F.3d 273, 278-79 (5th Cir. 2006), *cert. granted*, ___ U.S. ___, 127 S. Ct. 433 (2006); *Cole v. Dretke*, 418 F.3d 494, 505-10 (5th Cir. 2005), *cert. granted*, ___ U.S. ___, 127 S. Ct. 432 (2006). *See also Nelson v. Quarterman*, No. 02-11096 (5th Cir. Dec. 11, 2006) (published opinion on rehearing *en banc*). The instant case shows that the tension between *Johnson*, *Graham*, *Penry II*, and *Smith* influences Eighth Amendment claims that arise outside the context of the Texas capital sentencing scheme. As shown below, the Oklahoma court's decision on both issues is driven by an interpretation of *Lockett* requiring capital sentencing juries to give *full* consideration and *full* effect to mitigating circumstances, a proposition directly at odds with *Johnson* and *Graham*. Coddington's case therefore provides a vehicle for this Court to address this tension in the context of evidentiary trial and instructional error and in light of the forthcoming decisions in *Abdul-Kabir* and *Brewer*.

It is also noteworthy that in *Ayers v. Belmontes*, No. 05-493 (U.S. Nov. 13, 2006), this Court recently declined to analyze California's "factor (k)" mitigation instruction using *Johnson* as a basis for reversal. Instead, this Court found it unnecessary to reach the applicability of *Johnson* to that case in light of application of *Boyde v. California* as a basis for reversal of the lower court. *Belmontes*, No. 05-493, slip op. at 16; *Belmontes*, No. 05-493, slip op. at 1 (Scalia, J.,

concurring). *Belmontes*'s reference to *Johnson* as a possible basis for relief highlights the vitality of this particular issue in a number of situations involving capital sentencing and further highlights the need for certiorari review in this case.

I. THE OCCA'S DECISION DIRECTLY CONFLICTS WITH *ROMANO v. OKLAHOMA*, *SAFFLE v. PARKS* AND *BOYDE v. CALIFORNIA*.

The OCCA's decision directly conflicts with Eighth and Fourteenth Amendment decisions from this Court. The OCCA's prejudice analysis regarding the trial judge's failure to admit the videotaped testimony of Gayla Hood is the most egregious instance of the lower court disregarding clearly-established Supreme Court precedent. The OCCA stated that "[w]e cannot determine how the jury would have viewed Hood's testimony if it had actually seen her videotaped examination" but that a new capital sentencing trial was warranted because "the potential error would be of constitutional magnitude." App. 47. This conflicts with *Romano v. Oklahoma*, 512 U.S. 1 (1994), where this Court considered whether admission of evidence during the penalty phase regarding a defendant's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process. *Id.* at 12. In its alternative prejudice analysis, this Court held:

> Even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could

> have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one's intuition. **To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the Thompson case rendered petitioner's sentencing proceeding for the Sarfaty murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment.**

Id. at 13-14 (emphasis added). *See also Jones v. United States*, 527 U.S. 373, 394-95 (1999).

In the instant case, the lower court made no definitive finding of prejudice to Coddington, instead merely speculating its way to a Fourteenth Amendment due process violation. It is just as plausible that Hood's videotaped statement would have *no* effect on the jury considering the emotional mitigation testimony from Coddington's other seven family members (who presented live testimony) and the fact that Hood's testimony was read verbatim to the jury. The OCCA's interpretation of the Fourteenth Amendment in this case appears driven by its own "personal and private notions of fairness", an approach condemned by this Court. *Dowling v. United States*, 493 U.S. 342, 352-53 (1990).

The OCCA's analysis of the videotape issue is further eroded when one considers the Eighth Amendment core of the decision. Although Gayla Hood's testimony was read verbatim to the jury, the OCCA found that "exclusion of the videotaped evidence constituted a violation of the Fourteenth Amendment" because the trial court "mechanistically" applied a state statute authorizing depositions of out-of-state

witnesses in disallowing this evidence. App. 42. Citing *Lockett v. Ohio*, the OCCA wrote that "[p]rohibiting the jury from receiving evidence in the form likely to invoke sympathy and achieve the purpose of this mitigation witness was improper." App. 47.

The OCCA's analysis, however, directly conflicts with *Saffle v. Parks*, 494 U.S. 484 (1990). In *Saffle*, the defendant challenged the constitutionality of the "anti-sympathy" instruction given to his jury during the penalty phase of his capital murder trial. Parks offered mitigation testimony from his father, who described Parks's background and character. During closing, defense counsel argued Parks's youth, race, broken home and school experiences as mitigating factors, and asked the jury to show Parks "kindness" in consideration of his background. *Id.* at 486. Parks's jury was instructed to consider all of the mitigating circumstances proffered by Parks and was further instructed that it could consider any mitigating circumstances that it found from the evidence. *Id.* at 487. Parks's jury was also provided the following instruction:

> You are the judges of the facts. The importance and worth of the evidence is for you to determine. **You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence.** You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

Id. (emphasis added). Parks argued on appeal that this "anti-sympathy" instruction violated the Eighth Amendment "because it in effect told the jury to disregard the

mitigating evidence that Parks had presented." *Id.* Applying *Lockett* and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court rejected that contention:

> Review of our decisions in *Lockett* and *Eddings* convinces us that the two cases do not dictate the result urged by Parks. There is no dispute as to the precise holding in each of the two cases: that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. These two cases place clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made. Indeed, that is how we have interpreted these decisions in later cases.
>
> *Lockett* and *Eddings* do not speak directly, if at all, to the issue presented here: whether the State may instruct the sentencer to render its decision on the evidence without sympathy. Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. **There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision.** We thus cannot say that the large majority of federal and state courts that have rejected challenges to antisympathy instructions similar to that given at Parks' trial have been unreasonable in concluding that the instructions do not violate the rule of *Lockett* and *Eddings*.

Saffle, 494 U.S. at 490 (internal citations omitted) (italicized emphasis in original; bold emphasis added).

Saffle demonstrates that sympathy relates merely to *how* the jury considers a defendant's mitigation evidence, not *what* categories of evidence were actually presented for its consideration. The OCCA's application of *Chambers* and *Green* to find a Fourteenth Amendment violation in the instant case is therefore gutted by *Saffle*. Both *Chambers* and *Green* involved the categorical exclusion of third-party perpetrator evidence critical for guilt-innocence and penalty phase moral culpability determinations. *Green*, 442 U.S. at 95-97; *Chambers*, 410 U.S. at 289-94. Coddington's case, however, does not involve the categorical exclusion of evidence – i.e., *what* may be presented. Rather, it involves only *how* testimony from a single mitigation witness was to be considered.

The OCCA's ruling amounts to a finding that Coddington was deprived of the ability to have his jury view the testimony of a single mitigation witness through the lens of extreme sympathy – a lens that "might" cause the jury to view her testimony in a more favorable light to the defense. App. 47. But if there is no Eighth Amendment right to have the jury consider sympathy evidence in the first place, there can hardly be a federal due process violation under the Fourteenth Amendment, as interpreted in *Green* and *Chambers*, where there is absolutely no categorical prohibition of the mitigating "evidence" presented by the defendant at his trial.

The OCCA's finding of reversible error based on administration of Oklahoma's uniform instruction on impeachment of witness by former conviction also conflicts with prior decisions from this Court. The OCCA found

reversible error despite Coddington's failure to object to the instruction at trial because "the trial court's decision to give the impeachment instruction as it related to [Coddington's] family mitigation witnesses effectively recharacterized their testimony as impeachment evidence and precluded the sentencer from properly considering their testimony." App. 48. Again citing *Lockett*, the court noted "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." App. 48 (quoting *Lockett*, 438 U.S. at 604) (emphasis in original). It then went on to hold, however, that because the impeachment instruction "*might* have led the jury to believe the evidence of these witnesses' prior convictions was offered for impeachment purposes and was not offered to explain Coddington's background", the OCCA found the impeachment instruction "*might* have prevented the jury from considering relevant mitigating evidence." App. 48 (emphasis added).

Coddington's jury was presented, at worst, ambiguous instructions subject to possible erroneous interpretation regarding consideration of the family witnesses' prior felony convictions. Instruction No. 12 told the jury that evidence had been presented supporting thirty-three proposed mitigating circumstances tracking the defense evidence, including evidence that his mother and siblings had been, or were, incarcerated. O.R. 1277-81. While Instruction No. 15 directed the jury that evidence of the family witnesses's prior felony convictions was offered to show that their testimony was not believable or truthful and that "[y]ou may consider this impeachment evidence

only to the extent that you determine it affects the believability of the witness, if at all", O.R. 1284, there is no reasonable likelihood the jury applied Instruction No. 15 in a way that prevented it from considering constitutionally relevant mitigating evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990). *See also Belmontes*, No. 05-493, slip op. at 6.

Instruction No. 12 specifically stated that evidence had been introduced that Coddington's mother and siblings had been, or were currently, incarcerated and that such evidence was mitigating and should be considered by the jury. During closing argument, the prosecutor never questioned the fact of the prior felony convictions held by Coddington's family members and never told the jury not to *consider* that alleged mitigating evidence. Rather, the prosecutor: (1) appropriately urged the jury to consider all the written instructions; (2) appropriately argued that this evidence was not mitigating under the definitions for mitigating circumstances set forth in the instructions; and (3) appropriately argued that evidence of the family members' prior felony convictions was also evidence of bias. *See, e.g.,* S. Tr. 450-53, 462-63, 477-79, 502-04, 509-11, 513-14.

In light of defense counsel's closing urging that Coddington's bad background was a mitigating circumstance warranting a sentence less than death, S. Tr. 489-92, 494-500, there is no question the prosecutor and defense agreed that the jury was required to consider the evidence Coddington presented as mitigating. To accept that Instruction No. 15 "might have led the jury to believe the evidence of these witnesses' prior convictions was offered for impeachment purposes and was not offered to explain Coddington's background", App. 48, requires taking the

written charge completely out of the context of the trial proceedings. "It is improbable the jurors believed that the parties were engaging in an exercise in futility when [the defendant] presented (and both counsel later discussed) his mitigating evidence in open court." *Belmontes*, No. 05-493, slip op. at 8. The written instructions, combined with the argument of counsel and the large number of family members with prior convictions who testified during penalty phase, clearly conveyed to Coddington's jury that evidence of the family's prior felony convictions was relevant to show both Coddington's bad background (i.e., mitigation) and the witnesses' bias. Thus, there is no reasonable likelihood that the jury interpreted the written instructions to prevent consideration of the prior felony convictions as they related to his alleged bad background. *Boyde*, 494 U.S. at 380-81.

The OCCA's analysis of this issue does not cite, let alone attempt to apply, *Boyde*. Moreover, its finding that Instruction No. 15 "might" have prevented the jury from considering relevant mitigating evidence, App. 48, conflicts with *Boyde*'s mandate that "a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility" that infirm instructions inhibited consideration of mitigating circumstances. *Boyde*, 494 U.S. at 380. *See also Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (noting the *Boyde* test is "the test for determining, in the first instance, whether constitutional error occurred when the jury was given an ambiguous instruction that it *might* have interpreted to prevent consideration of constitutionally relevant evidence. In such cases, constitutional error exists only if 'there is a reasonable likelihood' that the jury so interpreted the instruction") (internal citation omitted) (emphasis added).

II. LEFT UNCHECKED, THE OCCA'S INTERPRETATION OF *LOCKETT V. OHIO* WILL RESULT IN CONTINUED EROSION OF THIS COURT'S REQUIREMENT UNDER THE EIGHTH AMENDMENT THAT CAPITAL SENTENCING DECISIONS BE RELIABLE, ACCURATE AND NONARBITRARY.

The OCCA's decision on the instructional issue is inconsistent with the Eighth Amendment's requirements of reliability, accuracy and nonarbitrariness in capital sentencing. *Saffle*, 494 U.S. at 493 (citing *Gregg v. Georgia*, 428 U.S. 153, 189-95 (1976); *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *Jurek v. Texas*, 428 U.S. 262, 271-72 (1976) (same); *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 333-35 (1976) (plurality opinion)). The decision below denies the State an important method of challenging the veracity of penalty phase testimony from convicted felons. The decision below is driven by an interpretation of *Lockett* mandating that the jury must be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant, even if that means championing defense evidence, or a defense strategy, that, left unchallenged, makes the capital sentencing decision less reliable, less accurate and more arbitrary – a concept directly at odds with *Johnson* and the above Eighth Amendment requirements. *Johnson*, 509 U.S. at 371-72.

That is a particularly important issue where, as here, a capital murder defendant offers in mitigation a parade of family members attesting to his alleged bad background. The prosecutor appropriately pointed out the major discrepancies between testimony from Coddington's

relatives and the complete absence of those same details in Defendant's Exhibit 9, the medical and psychiatric history report generated when Coddington was admitted for psychiatric treatment at age 8. The fact that many of Coddington's relatives had been convicted of felonies by the State of Oklahoma was an important, and proper, fact explaining for the jury why mitigation testimony from these same witnesses was wholly inconsistent with observations and interviews made 23 years earlier by Coddington's doctors. S. Tr. 167-68, 451-64; Defendant's Exhibit 9. Again, the lower court's decision is only a half-step removed from Coddington's argument below that the prosecution should not be able to question at trial the veracity of *any* of his alleged mitigating circumstances. Opening Brief of Appellant at 76, *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (No. D-2003-887) ("[t]he issue of truth in the context of mitigating circumstances is not an issue for the jury"). Such a result is especially perverse where, as here, family members described for the jury a litany of wildly unbelievable episodes from Coddington's childhood. *See, e.g.,* S. Tr. 135 (bathtub used as toilet in family home); S. Tr. 135-36, 270-71, 306 (children ate with uncle from trash dumpsters); S. Tr. 140, 175-76, 194, 279, 318 (father and brothers fed Coddington beer from a baby bottle); S. Tr. 176 (Coddington knocked from stroller and thrown against wall by drunk father); S. Tr. 190 (description of infants in Mulligan Flats drinking alcohol "when they were still in diapers"); S. Tr. 195 (description of children in Mulligan Flats "that were two or three years old huffing paint out of a sock"); S. Tr. 280 (testimony that Coddington was hit in the head "[s]everal times a day").

By ordering that Oklahoma's uniform impeachment of witness by former conviction instruction not be administered where family members with felony convictions testify about a defendant's alleged bad background, the OCCA has interpreted *Lockett* in a way that does violence to the requirements of reliability, accuracy and nonarbitrariness mandated by this Court's Eighth Amendment jurisprudence – the very principles Coddington championed below on appeal – in the name of full consideration and full effect for mitigating circumstances at any price. Thus, as described above, the OCCA's decision presents a federal constitutional issue of national significance in light of: (1) the tension between *Johnson*, *Graham*, *Penry II* and *Smith*; (2) the frequent use of the "dysfunctional upbringing" defense in capital mitigation cases; and (3) the exceptionally bad policy underpinning the decision below, namely, that the State is barred from impeaching convicted felons when they are paraded before a capital sentencing jury as mitigation witnesses and describe all form of unbelievable events from a capital murder defendant's past.

Likewise, the OCCA's analysis of the videotape issue reflects the tension inherent in this Court's Eighth Amendment jurisprudence regarding the extent to which a jury must be allowed to consider mitigating evidence. *Saffle* expressly held that an allegation that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered does not fall under the rule of *Lockett* and *Eddings*. *Saffle*, 494 U.S. at 492. *Saffle* also recognized that "[i]t would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital

sentencing must be reliable, accurate, and nonarbitrary." *Id.* at 493. The decision below conflicts with *Johnson*'s holding that there is no requirement "that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant", *Johnson*, 509 U.S. at 372, and it does so in the most extreme possible manner by championing, under the auspices of the federal constitution, evidence that has the effect of making the capital sentencing decision less reliable, less accurate and more arbitrary. *Saffle*, 494 U.S. at 495 ("[t]he objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror").

Certiorari should therefore be granted so this Court may find that the Eighth Amendment reliability, accuracy and nonarbitrariness requirements for capital sentencing systems mandate adherence to *Romano*, *Saffle* and *Boyde*, despite the tension apparent in *Johnson*, *Graham*, *Smith* and *Penry II,* and that vacatur of the lower court's overreactive interpretation of *Lockett* is required for restoration of fairness in the capital sentencing process to both the accused and the accuser. This Court should also grant certiorari so that it may find that *Johnson* alone warrants reversal of the lower court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

W.A. DREW EDMONDSON
Attorney General of Oklahoma

SETH S. BRANHAM*
Assistant Attorney General

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Counsel for Petitioner,
State of Oklahoma

**Counsel of Record*

2006 OK CR 34
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES ALLEN CODDINGTON, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	FOR PUBLICATION Case No. D 2003-887

OPINION

(Filed Aug. 16, 2006)

C. JOHNSON, JUDGE:

¶1 Appellant, James Allen Coddington, was convicted by a jury in Oklahoma County District Court, Case No. CF 97-1500, of First Degree Murder, in violation of 21 O.S.Supp.1996, § 701.7(A) (Count 1) and of Robbery with a Dangerous Weapon, in violation of 21 O.S.1991, § 801 (Count 2). Jury trial was held before the Honorable Jerry D. Bass, District Judge, on April 21st – May 1st, 2003. On Count 1, the jury found the existence of two aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence,[1] and (2) the murder was especially heinous, atrocious, or cruel.[2] The jury set punishment at death on Count 1 and life imprisonment without the possibility of parole on Count 2.

[1] 21 O.S.1991 § 701.12(1)

[2] 21 O.S.1991 § 701.12(4)

Judgment and Sentence was imposed in accordance with the jury's verdicts.

¶2 Coddington gave timely notice of his intent to appeal the convictions and sentences. The record on appeal was completed September 3, 2004. Coddington filed his Brief of Appellant on November 8, 2004, and the State filed the Brief of Appellee on March 8, 2005. Coddington filed a Reply Brief on March 28, 2005. This matter was originally set for oral argument on October 18, 2005. At Coddington's request, oral argument was rescheduled and was subsequently held on November 8, 2005. The parties each filed supplemental authorities on November 18, 2005.

¶3 In early March of 1997, Appellant, a cocaine addict, suffered a relapse and began using cocaine again. He estimated he spent one thousand dollars ($1000.00) a day to support his habit. Within a short time, he was desperate for money and robbed a convenience store on March 5, 1997 to feed his habit. The robbery did not yield enough money, so Coddington went to his friend Al Hale's home to borrow fifty dollars ($50.00).

¶4 Hale, then 73 years old, worked with Coddington at a Honda Salvage yard. Hale had previously loaned Coddington money and had also contributed towards Coddington's previous drug treatment. Hale's friends and family knew he kept a large amount of cash at his home. On March 5, 1997, he had over twenty-four thousand dollars ($24,000.00) stashed in his closet.

¶5 Coddington went to Hale's home on the afternoon of March 5, 1997 to borrow money, because he had been on a cocaine binge for several days and needed money for more cocaine. Coddington watched television with Hale for an hour or two and then smoked crack cocaine in Hale's

bathroom. Hale knew Coddington was using cocaine again. Hale refused to give him money and told him to leave. As he was leaving, Coddington saw a claw hammer in Hale's kitchen, grabbed it, turned around and hit Hale at least three times with the hammer. Coddington believed Hale was dead, so he took five hundred twenty-five dollars ($525.00) from his pocket and left. Following the attack on Hale, Coddington robbed five more convenience stores to get money for cocaine.

¶6 Oklahoma City police detectives arrested Coddington on March 7, 1997, outside of his apartment in south Oklahoma City. Coddington told one officer he had been on a cocaine binge. On the way to the police department, Coddington tried to choke himself by wrapping the seat belt around his neck. He also stated he wanted to die. At the police station, during an interview with a robbery detective and a homicide detective, Coddington confessed to the convenience store robberies and also to the murder of Mr. Hale. He admitted he struck Mr. Hale in the head with a claw hammer and believed Hale was dead when he left. At trial, Coddington admitted he murdered Hale. He testified he did not go to Hale's house with the intent to do anything except borrow money to buy more cocaine. He said he did not have a weapon with him, did not intend to rob Hale, and did not intend to kill him.

¶7 Ron Hale, the victim's son, discovered Hale after the attack on the evening of March 5, 1997. There was blood and blood spatter everywhere. Hale was lying in his bed, soaked in blood, still breathing but unable to speak. Hale was transported first to Midwest City Hospital and then to Presbyterian Hospital. He died approximately twenty-four hours later. An autopsy showed Hale died from blunt force head trauma. The medical examiner

testified he sustained at least three separate blows to the left side of his head, consistent with being hit in the head with a claw hammer. He also testified Hale had defensive wounds.

¶8 Coddington admitted that he did not call the police when he left Hale's house because he did not want to get caught. He also admitted he had prior felony convictions.

¶9 Other relevant facts will be discussed under the related propositions of error.

JURY ISSUES

¶10 In Proposition Two, Coddington contends he was denied an impartial jury comprised of a fair cross-section of the community when the State exercised five peremptory challenges against minority jurors in violation of his state and federal constitutional rights and in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The State exercised peremptory challenges to exclude four of six African-American jurors from the jury panel of thirty. Coddington claims the State also exercised a peremptory challenge to excuse a woman of "Spanish heritage."

¶11 A defendant may raise an equal protection challenge to the use of peremptory challenges by showing that the prosecutor used the challenges for the purpose of excluding members of the defendant's own race from the jury panel. *Batson,* 476 U.S. at 96, 106 S.Ct at 1723-1724; *see also Powers v. Ohio,* 499 U.S. 400, 415, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991) (extending *Batson* to include race-based exclusions even when the defendant and the

potential juror are not of the same race). Under *Batson,* the defendant must first make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Then, the burden shifts to the prosecutor to articulate a race-neutral explanation related to the case for striking the juror in question. The trial court must then determine whether the defendant has carried his burden of proving purposeful determination. *Batson,* 476 U.S. at 98, 106 S.Ct. at 1724. The race-neutral reason given by the prosecutor need not rise to the level of justifying excusal for cause, but it must be a "clear and reasonably specific" explanation of his or her "legitimate reasons" for exercising the challenges. *Id.,* 476 U.S. at 98, *n.* 20, 106 S.Ct. at 1724, *n.* 20; *see also Neill v. State,* 1994 OK CR 69, ¶ 17, 896 P.2d 537, 546, *cert. denied,* 516 U.S. 1080, 116 S.Ct. 791, 133 L.Ed.2d 740 (1996); *Short v. State,* 1999 OK CR 15, ¶ 12, 980 P.2d 1081, 1091, *cert. denied,* 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (2000). The trial court's findings are entitled to great deference, and we review the record in the light most favorable to the trial court's ruling. *Batson,* 476 U.S. at 98, *n.* 21, 106 S.Ct. at 1724, *n.* 21; *Neill, id.; Bland v. State,* 2000 OK CR 11, ¶ 9, 4 P.3d 702, 710-711, *cert. denied,* 531 U.S. 1099, 121 S.Ct. 832, 148 L.Ed.2d 714 (2001).

¶12 Defense counsel objected to the prosecutor's exercise of peremptory challenges against African-American jurors, and in response, the State articulated the following reasons for excusing those jurors: the State excused Juror Christian because he had been prosecuted by the Oklahoma County District Attorney's office for embezzlement and had a brother in prison; the prosecutor excused Juror Mann because the prosecutor believed he could not impose the death penalty and did not believe he

truly had a change of heart after taking a walk; the prosecutor excused Juror Graham, because she had previously been prosecuted for embezzlement; the prosecutor excused Juror Mensah, because she had previously been prosecuted for fraud, because her brother was being prosecuted for larceny, and because she acted totally disinterested in what was going on during *voir dire.* Defense counsel did not object to the State's excusal of Juror Equigua, but now asks this Court to consider her removal in its consideration of the State's "pattern" of excusing minority jurors.[3] Defense counsel argued that excusing African-American jurors based upon prior contact with the criminal justice system had a disparate impact on the jury because a higher percentage of that minority population have had contacts with the criminal justice system and there are fewer "non-disenfranchised" African-Americans available for jury service.

¶13 The trial court did not specifically rule on the "race-neutral" reasons offered by the State and did not specifically overrule defense counsel's objection to the disparate impact the State's exercise of peremptories had on the jury. However, *voir dire* continued, the alternate jurors were selected, and the record reflects the trial court accepted the prosecutor's stated reasons for removing these minority jurors and did not believe the reasons were pretexts for purposeful discrimination.

¶14 The reasons offered by the State for excusing Jurors Christian, Mann, Graham, and Mensah were

[3] The record of *voir dire* shows Juror Equigua was divorced and that the name Equigua originated from the "Basque region of Spain." This record does not show this juror was, in fact, a minority juror. It only shows her name originated from another country.

facially valid and do not reveal an intent to discriminate on the basis of race. *Short v. State,* 1999 OK CR 15, ¶ 15, 980 P.2d at 1092 ("[e]xcusal of a potential juror because of a prior criminal record or because of the criminal records of family members are legitimate reasons for removal"); *Harris v. State,* 2004 OK CR 1, ¶ 21, 84 P.3d 731, 743 (removal of juror because prosecutor believed she was not being truthful was not only race-neutral but plausible). "The critical question in determining whether a prisoner has proved purposeful discrimination . . . is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'" *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *citing Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995). Here, the trial court accepted the prosecutor's reasons for striking the four African-American jurors, and its "decision on the issue of discriminatory intent will not be overturned unless we are convinced that determination is clearly erroneous." *Short,* 1999 OK CR 15, ¶ 17, 980 P.2d at 1092, *citing Hernandez v. New York,* 500 U.S. 352, 369, 111 S.Ct. 1859, 1871-1872, 114 L.Ed.2d 395 (1991).

¶15 The record shows the prosecutor also exercised a peremptory challenge against a Caucasian juror because of his past contact with the District Attorney's office or the criminal justice system.[4] At least two African-American jurors were among those finally seated in this case. The record does not suggest the crimes prosecuted in this case

[4] The State exercised its second peremptory to excuse Juror McGaugh – a "white male" who was previously prosecuted for DWI and DUI.

were in any way racially motivated. As in *Short,* the record does not show the prosecutor was exercising the State's peremptory challenges to purposefully discriminate and exclude jurors on the basis of race, and the trial court's decision to accept the prosecutor's reasons for excusing the four African-American jurors was not clearly erroneous. *Black v. State,* 2001 OK CR 5, ¶ 31, 21 P.3d 1047, 1061, *denied,* 534 U.S. 1004, 122 S.Ct. 483, 151 L.Ed.2d 396 (2001) (review is only for clear error by the trial court and we review the record in a light most favorable to the trial court's ruling).

¶16 Defense counsel did not object to the prosecutor's exercise of peremptory challenge against Juror Equigua, and the State was therefore not required to give a race-neutral reason for her excusal. Because no objection was made at trial, our review is for plain error. *Wackerly v. State,* 2000 OK CR 15, ¶ 7, 12 P.3d 1, *7, cert. denied,* 532 U.S. 1028, 121 S.Ct. 1976, 149 L.Ed.2d 768 (2001). Coddington suggests Juror Equigua's excusal is "probative of a pattern of discrimination." We disagree. Coddington has not made a *prima facie* showing the peremptory challenge against Juror Equigua was made on the basis of race. The record does not establish that Juror Equigua was, in fact, a woman of a minority race. *See f.* 1 *supra.* We find no plain error.

¶17 In this case, the prosecutor's exercise of peremptory challenges against African-American jurors because of prior contact with the criminal justice system was a sufficiently, race-neutral reason to survive Coddington's *Batson* objections. The ratio of African-American jurors called at the beginning of *voir dire* (1:6) compared to those who remained and were seated on Coddington's jury (1:5) was about the same. Coddington has not shown he was

deprived of a jury composed of a fair cross-section of the community due to the excusal of minority jurors.

¶18 On the first day of witness testimony, during the examination of Scott Cox, defense counsel informed the trial court that Juror Muller appeared to be "nodding off and sleeping. She's about to fall out of her chair." Defense counsel asked the trial court to watch the juror and, at break, to talk to her. Assistant District Attorney Reid also noted the same conduct. The trial court watched the juror and a short while later, the trial court called the attorneys to the bench and stated "[s]he is nodding off . . . ". At defense counsel's request, the trial court spoke with Juror Muller in chambers. During this colloquy, Juror Muller told the trial court she was feeling strange and "not very well;" she thought it was something to do with her blood sugar. Juror Muller told the trial court she was having difficulty with her vision and walking.[5]

¶19 Juror Muller tested her blood sugar in the presence of the trial court, defense counsel and counsel for the State, and determined it was high. When asked if there was anything she could do to bring it down, she told the trial court exercise was all that she could do.

¶20 The trial court allowed the parties to question Juror Muller and her answers revealed she felt she had heard all of the questions asked and answers given, did

[5] Before opening statements, the trial court made the following statement: "Does anybody have any particular medical needs? Sometimes I have people that are diabetics and they have to eat candy or they have to take regular medications. Does anybody have any regular medication or anything that they need to take? Anything at all?" The record reflects no juror responded.

not think she had missed anything, and felt she could remain on the jury and be alert and attentive. She admitted to defense counsel that, in addition to her sleepiness, she had an upset stomach and a little headache and that it had been "gradually getting worse today."

¶21 After the parties questioned Juror Muller, defense counsel asked the trial court to continue to observe her and then to "revisit the issue . . . at 1:30" to see how she was feeling. Defense counsel stated, "I think we ought to go on. I mean, let's keep putting witnesses on and if she starts nodding off again then we may have to stop it, Judge. . . ." The trial court again agreed to keep an eye on her.

¶22 Following cross-examination of the witness, court recessed for lunch and the jurors were asked to return at 1:30. When the jury returned, the trial court told the parties, "[I]nformally I spoke with Juror Muller. She insists that she's doing just fine." Defense counsel asked the trial court to continue to watch her. The record contains no further specific references to Juror Muller.

¶23 In Proposition Three, Coddington contends the trial court's failure to replace Juror Muller with an alternate juror deprived him of his right to a fair trial by a jury of twelve. Coddington submits the trial court had the statutory authority to remove a sick juror and to replace that juror with an alternate and suggests his failure to use that authority *sua sponte* was an abuse of discretion.

¶24 A criminal defendant charged with murder is entitled to a trial by a jury composed of twelve people. Okla. Const. art. II, § 19; U.S. Const. amends. VI, XIV. "In a capital murder case in which the jury found guilt and set punishment at death, the participation of a juror who

"dosed (sic) during parts of the trial" is an unacceptable degradation of due process which requires reversal." *Spunaugle v. State,* 1997 OK CR 47, ¶ 34, 946 P.2d 246, 253, *overruled on other grounds in Long v. State,* 2003 OK CR 14, ¶ 18, 74 P.3d 105.

¶25 Juror misconduct must be proven by clear and convincing evidence. *Spunaugle,* 1997 OK CR 47, ¶ 33, 946 P.2d at 253. "A trial judge has inherent power to substitute a juror for good cause." *Miller v. State,* 2001 OK CR 17, ¶ 23, 29 P.3d 1077, 1082. 22 O.S.2001, § 601a provides for the use of alternate jurors to replace jurors who are sick or who have died; however, the trial court's discretion to substitute jurors is not limited to cases of sickness or death. *Miller,* 2001 OK CR 17, ¶ 23, *n.* 5, 29 P.3d at 1083. This discretion ought to be exercised with great caution, especially in capital cases. *Id.*

¶26 The trial court could have exercised its discretion and properly removed Juror Muller and replaced her with an alternate juror because she was obviously sleepy due to a blood sugar problem. We found the trial court's belief that the juror in *Miller* was ill was a sufficient basis for her dismissal. *Id.,* 2001 OK CR 17, ¶ 26, 29 P.3d at 1083. However, in this case, defense counsel did not request Juror Muller's removal due to illness and did not object when the trial court did not remove her.

¶27 The trial court acted within its discretion by keeping Juror Muller on the jury, and no plain error occurred. First, defense counsel specifically *did not* request the trial court to remove Juror Muller; rather, defense counsel stated the trial "ought to go on" and asked the trial court to continue to watch her. Second, the record does not conclusively show Juror Muller was sleeping; she

stated she had not missed any of the questions asked or answered and felt she could continue as an alert and attentive juror. Third, nothing further appears in the record which would indicate her sleepiness due to illness continued to be a problem after the lunch recess on the first day of trial testimony.

¶28 Alternatively, Coddington argues his trial counsel was ineffective for failing to request the trial court to remove this juror. While the trial court might properly have removed Juror Muller if the record conclusively showed she was sleeping or was too ill to continue, defense counsel specifically stated the trial "ought to go on" and did not request the trial court to remove her as a matter of trial strategy. In hindsight, it may appear to Coddington that his defense counsel's decision to give this juror another chance was not appropriate, but that is not sufficient to meet the test for ineffective assistance of counsel established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court does not evaluate trial strategy in hindsight. *Woodruff v. State,* 1993 OK CR 7, ¶ 16, 846 P.2d 1124, 1133, *cert. denied,* 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993). Further, the record does not establish this juror missed any of the testimony due to inattentiveness or illness and Coddington has not shown he was prejudiced by his trial counsel's failure to request her removal from the jury. Proposition Three does not warrant relief.

FIRST STAGE ISSUES

¶29 In Proposition One, Coddington claims his in custody extra judicial confession should not have been

admitted, because his waiver of *Miranda*[6] rights was "unknowing and involuntary." First, he argues that because he was read his *Miranda* rights in relation to the robbery investigations, but not in relation to the homicide investigation, his subsequent confession to the homicide was made in violation of his Fifth and Fourteenth Amendment rights against self-incrimination and right to counsel, and in violation of Okla. Const. art. 2, § 21. Secondly, he argues that he was incapable of knowingly and voluntarily waiving his rights at all, because he was "high, sleep deprived, hungry and suicidal" at the time of the interrogation. Coddington therefore claims the admission of his confession violated his Fifth and Fourteenth Amendment rights under the federal constitution and corresponding provisions of the Oklahoma Constitution.

¶30 During a hearing to determine the admissibility of Coddington's statements,[7] former Oklahoma City police officer Smart testified he advised Coddington of his *Miranda* rights after robbery detectives arrested him as a suspect in a string of armed robberies. They were standing outside of Coddington's apartment when Coddington began making voluntary statements. Smart immediately read him his *Miranda* rights. He stated Coddington said he understood his rights, waived them, and continued to make statements. He also signed a search waiver for his apartment. He said Coddington did not appear to be drunk

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[6] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[7] *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) established a defendant's right to an *in camera* hearing on the voluntariness of a confession.

or high on drugs; he walked normally and was coherent of his environment.

¶31 Former Oklahoma City police detective Despain interviewed Coddington at the police department a couple of hours later. Despain did not re-advise Coddington of his *Miranda* rights because Coddington had already been read and waived those rights. Coddington told Despain he remembered being so advised. Despain said Coddington did not appear to be under the influence; he was talkative, rational and alert. Despain's interview with Coddington was videotaped.

¶32 Coddington does not dispute that he was read his *Miranda* rights or that he waived those rights at the time of his arrest for the armed robberies. In fact, at trial, Coddington admitted that he waived his rights and voluntarily talked to the detectives on this case. Coddington now complains that he was not readvised of those rights when the interrogation turned towards his involvement in the homicide. Because the invocation of one's *Miranda* rights is non-offense specific, Coddington argues the opposite must also be true – a knowing and voluntary waiver of *Miranda* cannot occur unless the suspect is advised of what crime or crimes he is a suspect. In effect, he argues that his waiver of *Miranda* and resulting statement was compelled in violation of the Fifth Amendment, because he waived his rights without being informed he would be questioned about crimes for which he was not arrested.

¶33 This argument "strains the meaning of compulsion past the breaking point." *Colorado v. Spring,* 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987). Voluntariness of a confession is judged by examining the

totality of the circumstances, including the characteristics of the accused and the details of the interrogation. *Van White v. State,* 1999 OK CR 10, ¶ 45, 990 P.2d 253, 267. The inquiry has two aspects – the relinquishment of the right must be voluntary in that it was a product of free, deliberate choice, rather than coercion, intimidation or deception; and, the waiver must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. *See Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410, 421 (1986). The trial court may properly find a valid waiver of *Miranda* rights where the totality of the circumstances show both an "uncoerced choice and the requisite level of comprehension. . . . " *Id.*; *see also Lewis v. State,* 1998 OK CR 24, ¶ 34, 970 P.2d 1158, 1170, *cert. denied,* 528 U.S. 892, 120 S.Ct. 218, 145 L.Ed.2d 183 (1999). We have never required the requisite level of comprehension to include being informed of every possible offense about which one might be questioned.

¶34 After hearing the officers' testimony at the *in camera* hearing, the trial court watched Coddington's videotaped confession and found Coddington appeared to be "in some sort of heightened state of intoxication." However, the trial court found, based on the videotape, that Coddington was not threatened, coerced or promised anything, and nothing indicated his statements were made against his will. After considering the totality of the circumstances, the trial court admitted the taped confession and the physical evidence derived from it. The question of the voluntariness of Coddington's waiver was a fact question to be resolved by the jury and the trial court instructed the jury accordingly. The trial court's ruling to admit the statement was supported by competent evidence

of the voluntary nature of the statement. *Bryan v. State,* 1997 OK CR 15, ¶ 17, 935 P.2d 338, 352, *cert. denied,* 522 U.S. 957, 118 S.Ct. 383, 139 L.Ed.2d 299 (1997).

¶35 Officer Smith testified he read *Miranda* warnings to Coddington, and Coddington indicated he understood his rights and waived them. At the beginning of the interview at the police station, Officer Despain said, "Ok (sic), again, I'm Sgt. DeSpain, this is Det. Wes Weaver, uh now I understand uh that Sgt. Smart advised you of your rights earlier and you signed a search waiver." Coddington responded, "Yeah." Sgt. Despain said, "You remember that." Coddington replied, "Yeah." Throughout the interview, Coddington was cooperative and did not appear to be coerced or threatened in any way. Further, after answering questions relating to the burglaries, Coddington said, "Uh, you need to get homicide down here." He then confessed to Hale's murder and willingly provided the detectives with details about the crime. At trial, Coddington testified he was read his rights and voluntarily waived them.

¶36 There is no question that Coddington was informed of his *Miranda* rights and waived them. He exhibited no reluctance in speaking with the detectives about the robberies or the homicide. In fact it was he who volunteered statements about the homicide and initiated the discussion about the homicide. The relevant inquiry is whether the suspect understands the rights at stake and the consequences of waiving them. *Colorado v. Spring,* 479 U.S. at 573, 107 S.Ct. at 857. His "awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Id.,* 479 U.S. at 577, 107 S.Ct. at 859. The trial court's decision to admit Coddington's

confession and let the jury determine whether it was knowingly and voluntarily made was proper and was supported by the record.

¶37 Coddington also argues he was "incapable of knowingly and voluntarily waiving his rights as he was high, sleep deprived, hungry and suicidal at the time of the interrogation." While the officers who testified at the *Jackson v. Denno* hearing both indicated Coddington appeared coherent and rational and neither thought he was under the influence of intoxicants, the trial court did not agree and specifically found that Coddington appeared to be in some "heightened state of intoxication." Coddington admitted he had been using cocaine for several days and had not eaten or slept. Still, his fatigue and hunger from drug usage do not render his waiver of *Miranda* involuntary.

¶38 "[S]elf-induced intoxication, short of mania, or such an impairment of the will and mind as to make the person confessing unconscious of the meaning of his words, will not render a confession inadmissible, but goes only to the weight to be accorded to it." *Moles v. State,* 1974 OK CR 57, ¶ 6, 520 P.2d 822, 824. Coddington gave specific details about both the robberies and the murder of Mr. Hale, and appeared to understand exactly what was going on. That he also confessed to crimes which could not be corroborated does not show he was so intoxicated that his *Miranda* waiver was not knowingly and voluntarily made. Further, from his prior contacts with law enforcement and prior convictions, we can assume he was familiar with and understood the "concepts encompassed in *Miranda*." *Smith v. Mullin,* 379 F.3d 919, 934 (10th Cir. 2004).

¶39 Coddington simply has not shown his *Miranda* rights waiver was not knowingly and voluntarily made. The admission of his confession and the physical evidence derived therefrom did not deprive Coddington of his state or federal constitutional rights. Proposition One is therefore denied.

¶40 In Proposition Four, Coddington argues the trial court's limitations on the testimony of Dr. J.R. Smith deprived him of his Fifth, Sixth, and Fourteenth Amendment rights to present a defense and confront the State's evidence. Prior to trial, the State filed a Motion in Limine to prohibit the defense expert from testifying that Coddington could not have formed the requisite intent of malice aforethought due to his cocaine intoxication. At trial, prior to the examination of the expert defense witness, the trial court sustained the State's Motion in Limine, "keeping in line with *White v. State*," and instructed defense counsel that its expert could "suggest the inferences the jury should draw from the application of his specialized knowledge . . . as long as he refrained from merely telling the jury what result to reach." Following the trial court's ruling, defense counsel argued that *Hooks v. State* and *White v. State*[8] were unconstitutional and violated the "Fourteenth Amendment fundamental fairness clause

[8] In *Hooks v. State*, 1993 OK CR 41, ¶ 16, 862 P.2d 1273, 1279, we said that when the defendant attempts to elicit expert testimony on the issue whether he possessed the requisite intent to commit the crime in question, that testimony should be excluded. In *White v. State,* 1998 OK CR 69, ¶¶ 14-15, 973 P.2d 306, 311, where the defendant sought to introduce expert testimony on whether his intoxication affected his mental state and prevented him from forming malice aforethought, we stated such evidence "was not prohibited by *Hooks*" even though it would have embraced an ultimate issue to be decided by the trier of fact.

and equal provisions in the Oklahoma state constitution." The defense made the following offer of proof in response to the trial court's ruling:

> If permitted to testify as to the effect of James Coddington's cocaine addiction and his ability to form malice aforethought Dr. Smith would testify that on 5 March in his opinion that to a reasonable degree of medical certainty James Coddington would not have been able to form the intent of malice aforethought and that he would have been experiencing the effects of the cocaine to such a degree that the brain would be unable to formulate that specific intent and we would propound that question and we would urge the grounds that we have made in the previous record.

¶41 Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. 12 O.S.2001, § 2704. "Any properly qualified expert testifying in accordance with the standards governing admissibility of expert testimony may offer an opinion on the ultimate issue if it would assist the trier of fact." *Johnson v. State,* 2004 OK CR 25, ¶ 16, 95 P.3d 1099, 1104. The "otherwise admissible" language of § 2704 must be read in context with 12 O.S.2001, §§ 2403 (amended 2003), 2701, 2702 (amended 2002). *Romano v. State,* 1995 OK CR 74, ¶ 21, 909 P.2d 92, 109, *cert. denied,* 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996). "While expert witnesses can suggest the inferences which jurors should draw from the application of specialized knowledge to the facts, opinion testimony which merely tells a jury what result to reach is inadmissible." *Id.*; *see also Hooks v. State,* 1993

OK CR 41, ¶ 13, 862 P.2d 1273, 1278, *cert. denied,* 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994). "[W]here the normal experiences and qualifications of laymen jurors permit them to draw proper conclusions from the facts and circumstances, expert conclusions or opinions are inadmissible." *Gabus v. Harvey,* 1984 OK CR 4, ¶ 18, 678 P.2d 253, 255.

¶42 The normal experiences and qualifications of laymen jurors likely do not provide an understanding of the effects of cocaine intoxication on one's ability to control behavior, to think rationally, and to form an intent to kill. An expert's opinion on the effects of cocaine intoxication would have been helpful to the trier of fact. While Dr. Smith could not, under our case law, tell the jury what result to reach, Dr. Smith could properly have testified that, in his expert medical opinion, Coddington would have been unable to form the requisite malice. Such testimony would not "simply have told the jury what result to reach." Experts for the State routinely testify to conclusions drawn from their specialized knowledge even on ultimate issues. *See e.g. Lott v. State,* 2004 OK CR 27, ¶¶ 84-88, 98 P.3d 318, 342-343, *cert. denied,* 544 U.S. 950, 125 S.Ct. 1699, 161 L.Ed.2d 528 (2005) (State's expert on sexual assault could properly testify rape was result of non-consensual sex and conclude oral sodomy had occurred based upon her examination of physical evidence); *Abshier v. State,* 2001 OK CR 13, ¶ 116, 28 P.3d 579, 604, *cert. denied,* 535 U.S. 991, 122 S.Ct. 1548, 152 L.Ed.2d 472 (2002), *rev'd on other grounds by Jones v. State,* 2006 OK CR 17, 134 P.3d 150 (State's expert witness could testify that child was conscious and crying during beating from defendant based upon his experience and studies); *Welch v. State,* 2000 OK CR 8, ¶¶ 21-23, 2 P.3d 356, 368-369, *cert.*

denied, 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000) (Detective's testimony that victim's death was not self-inflicted or the result of auto-erotic behavior, that her death was not accidental but intentionally inflicted, and her wounds were not consistent with sexual asphyxiation was properly admitted and based upon his specialized knowledge of homicide investigations).

¶43 Here, Coddington raised sufficient evidence for the trial court to instruct the jury on his defense of voluntary intoxication. When a defendant raises the defense of voluntary intoxication, an expert may properly offer his or her opinion on whether the defendant's actions were intentional. *Malicoat v. State,* 2000 OK CR 1, ¶ 11, 992 P.2d 383, 395, *cert. denied,* 531 U.S. 888, 121 S.Ct. 208, 148 L.Ed.2d 146 (2000); *White,* 1998 OK CR 69, ¶ 15, 973 P.2d at 311. Dr. Smith could have properly testified that, in his opinion and based upon his specialized knowledge, he believed Coddington would have been unable to form the requisite deliberate intent of malice aforethought. The trial court erred and abused its discretion by sustaining the Motion in Limine and so limiting the expert witness' testimony. *See Davis v. State,* 2004 OK CR 36, ¶ 30, 103 P.3d 70, 79 (admission of evidence lies within the discretion of the trial court).

¶44 Coddington contends the trial court's limitation of Dr. Smith's testimony violated his fundamental right to present a defense, was prejudicial, and warrants reversal of his conviction. The State responds that Coddington's intoxication defense was "meritless," would not have been affected by the proposed testimony, and the limitation on Dr. Smith's testimony was harmless beyond a reasonable doubt. We disagree with the State's position that Coddington's jury was "erroneously instructed" on the defense of

voluntary intoxication. The trial court found sufficient evidence of intoxication and also noted the State itself had suggested it. The question is whether the proposed, excluded, testimony would have made a difference; we believe it would not.

¶45 Dr. Smith testified about Coddington's family history, his medical history, and his history of drug use. He testified about the properties of cocaine and about the effects of cocaine in general upon the body and the brain. He testified about cocaine addiction, how it happens quickly, and how certain people, like Coddington, are more vulnerable to it. He testified that Coddington was a cocaine addict. He testified how cocaine affects the part of the brain one thinks with, how it affects what one does, one's ethics, one's judgment, how one behaves, and how one makes decisions. Seemingly the only thing his testimony did not cover was how cocaine intoxication might have affected Coddington on March 5, 1997, based upon his examination of Coddington's medical and drug abuse history, upon his observation of the videotaped confession, and based upon his prior experience and studies of cocaine addicts and addiction. On one hand, the jury heard testimony from Dr. Smith which would have been helpful to its consideration of Coddington's voluntary intoxication defense; on the other hand, the absence of the expert's opinion on Coddington's ability to specifically intend to commit the homicide was notable.

¶46 "Defendants in criminal trials deserve to have their day in court, to require the State to meet its burden of proof through evidence presented in open court, to tell their stories, and to defend themselves against the crimes of which they have been charged." *Malone v. State,* 2002 OK CR 34, ¶ 5, 58 P.3d. 208, 209. A defendant's due

process right under the Fifth Amendment and to compulsory process under the Sixth Amendment includes the right to present witnesses in his or her own defense. *United States v. Dowlin,* 408 F.3d 647, 659 (10th Cir. 2005); *see also Washington v. Texas,* 388 U.S. 14, 18-19, 87 S.Ct. 1920, 1923, 18 L.E.2d 1019 (1967). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense. . . . This right is a fundamental element of due process of law." *Washington, id.*

¶47 To determine whether Coddington was denied this fundamental right, we must first determine whether the trial court erred in excluding the testimony. Then, to establish constitutional error, Coddington must show the evidence was material to the extent its exclusion violated his right to present a defense. *Dowlin, id.* To determine materiality, we examine the entire record and must ask "whether the evidence was of such an exculpatory nature that its exclusion affected the trial's outcome." (citations omitted) *Id.*

¶48 The trial court clearly erred by limiting the testimony of Dr. Smith on the issue of Coddington's ability to form malice and Coddington's conviction cannot stand unless we find the error was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Such testimony, while helpful to the jury and certainly material, was not exculpatory in the sense that it would have exonerated the defendant; but, if believed by the jury, the evidence certainly might have reduced the degree of homicide for which Coddington was convicted.

¶49 The exclusion of Dr. Smith's expert opinion testimony relating to Coddington's specific ability to form

the requisite intent for malice murder did not prevent Coddington from putting forth significant evidence relating to cocaine intoxication. Dr. Smith testified extensively about the effects of cocaine addiction and intoxication on the brain, on decision-making and behavior. The evidence in this case was overwhelming, and we find, beyond a reasonable doubt, that Dr. Smith's expert opinion on the ultimate issue of whether Coddington could form the requisite malice would not have made a difference in the jury's determination of guilt. We find the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

¶50 In Proposition Five, Coddington argues he was denied due process, a fair trial and a reliable sentence because improper victim impact evidence was admitted during the first stage of trial. First, he complains that Ron Hale's unsolicited testimony that his brain disorder "got worse" when "my dad died" was irrelevant, prejudicial and constituted improper victim impact evidence. Secondly, he complains that the introduction of a photograph of the deceased while alive was irrelevant, prejudicial, denied him of a reliable sentence, and violated *ex post facto* principles.

¶51 During direct examination, because Ron Hale had obvious difficulty answering the prosecutor's questions, the prosecutor asked him if he suffered from a brain disease which made it difficult for him to come up with certain words. Hale answered,

> Yes. It's called Pick's disease. I lose simple words on the left side of my brain and it's because – even things that you say I know what you're talking about, but I can't hardly say them sometimes.

> Because this went way back in time to the day my dad died and that's when it got worse.

Upon defense counsel's announcement that it would not cross-examine Hale, the witness said, "Okay. I do have something that me and my sister and my brother would like to say down the road if we can . . . There's something else I would like to say." Coddington complains this testimony was not only irrelevant and prejudicial but also that it constituted impermissible victim impact evidence. The State responds that the testimony relating to Pick's Disease was necessary to explain the witness' difficulty testifying; the State agrees Hale's last statement was inappropriate, but so innocuous that it did not amount to error warranting relief.

¶52 There was no objection to Hale's testimony and our review is for plain error. *Lott,* 2004 OK CR 27, ¶ 70, 98 P.3d at 340 (failure to object to witness testimony or to cross-examine witness waives all but plain error with regard to witness testimony). While the victim's son's neurological problem was not relevant to or probative of any issue to be proved at trial, the State elicited this testimony to explain to the jury why this witness had obvious difficulty expressing himself and answering the State's questions. We have no problem with its admission. Hale's testimony that his condition got worse after his father died called the jury's attention to the effect of his father's murder on him. This testimony was not solicited and no further attention was called to it by either the State or the defense. While it is improper for the prosecutor to ask jurors to have sympathy for the victim(s) and improper to introduce victim impact evidence during the first stage of trial, Hale's testimony relating to the aggravation of his disease following the death of his father was

not solicited and was not so prejudicial to warrant relief. We find no plain error.[9] Review of this witness's testimony reflects a number of non-responsive and/or confusing answers and it is unlikely the jury was at all affected by Hale's spontaneous, unsolicited statement.

¶53 Coddington also complains the admission of a single, pre-mortem photograph of the victim was irrelevant, prejudicial, denied him of a reliable sentence, and violated *ex post facto* principles. Coddington argues that when the legislature amended Section 2403, it created a *per se* rule of relevancy for pre-mortem photographs in homicide cases.

¶54 Title 12 O.S.Supp.2003, § 2403 provides:

> 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. *However, in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.*

(emphasis added). Prior to its amendment in 2002, this Court interpreted the former Section 2403 to favor the

[9] We also find trial counsel was not ineffective for failing to object to Hale's unsolicited statements. His decision not to call the jury's attention to the statement could be considered sound trial strategy. *Strickland,* 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (defendant must be able to overcome the presumption that counsel's actions could not be considered sound trial strategy).

admission of relevant evidence, but repeatedly held the admission of pre-mortem photographs of a homicide victim were inadmissible unless the photograph(s) was/were "relevant to some material issue" and its "relevancy outweighs the danger of prejudice to the defendant." *Thornburg v. State,* 1999 OK CR 32, ¶ 23, 985 P.2d 1234, 1244; *see e.g. Tilley v. State,* 1998 OK CR 43, ¶ 32, 963 P.2d 607, 615; *Valdez v. State,* 1995 OK CR 18, ¶ 64, 900 P.2d 363, 381, *cert. denied,* 516 U.S. 967, 116 S.Ct. 425, 133 L.Ed.2d 341 (1995); *Staggs v. State,* 1991 OK CR 4, ¶ 7, 804 P.2d 456, 458; *Cargle v. State,* 1985 OK CR 77, ¶ 82, 909 P.2d 806, 830. In *Hogan v. State,* 2006 OK CR 19, ¶ 60, ___ P.3d ___, this Court recognized that these pre-2002 amendment cases have been superceded by statute.

¶55 Coddington argues the placement of the amendatory language in the statutory provision which sets forth the balancing test for the exclusion of otherwise relevant evidence and the use of the words "shall be admissible" suggests the Legislature did not intend for the balancing test to apply to this whole category of evidence. *See Lenion v. State,* 1988 OK CR 230, ¶ 3, 763 P.2d 381, 382 ("shall" is generally considered mandatory and not permissive). By this amendment, the Legislature effectively overruled those cases where this Court required the live photograph to be "relevant to some material issue" and its relevancy to outweigh "the danger of prejudice to the defendant." Coddington proposes that the trial court can no longer exercise its discretion to exclude this whole category of evidence and it will be admitted without regard to its relevance and without regard to whether the evidence would unfairly prejudice the defendant. He argues it violates his statutory rights under the Oklahoma Evidence

Code and deprives him of procedural and substantive due process.

¶56 We disagree.

> The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Thomas v. State,* 404 P.2d 71, 73 (Okl.Cr. 1965). "A statute should be given a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." *Jordan v. State,* 763 P.2d 130, 131 (Okl.Cr. 1988).

Wallace v. State, 1996 OK CR 8, ¶ 4, 910 P.2d 1084, 1086. Unlike Oregon and Utah which have similar statutes mandating the admissibility of pre-mortem photographs[10], Oklahoma's amended § 2403 requires admission of an "appropriate" photograph of the homicide victim. The requirement that the photograph be "appropriate" preserves the trial judge's discretion in determining the admissibility of this evidence.[11] If the trial court determines the photograph is not appropriate – that 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

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[10] *See* OR. REV.STAT. § 41.415 (2001) and UTAH CODE ANN. § 77-38-9(7) (1999).

[11] While Oklahoma, Oregon and Utah are among the *few* States which require the admission of pre-mortem victim photographs offered by the prosecution in homicide cases, a majority of States for many years have held such photographs to be admissible when relevant. *See e.g. State v. Broberg,* 342 Md. 544, 556-557, 677 A.2d 602, 607-608 (1996) (citing other jurisdictions upholding admissibility of in-life photographs).

evidence, or unfair and harmful surprise – the photograph can and should be excluded. See 12 O.S.Supp.2003, § 2403. The amended statute does not deprive a defendant of the statutory principles of admissibility set forth in the Oklahoma Discovery Code.

¶57 The pre-mortem photograph of the victim was properly admitted. The photograph the State originally sought to introduce was of the deceased holding a small child, presumably a grandchild. The defense objected that the statute did not contemplate a photograph of anyone but the deceased and objected that the photograph was more prejudicial than probative.[12] The State offered to "cover up" the child with a Post-It note. The trial court ruled the Post-It note cover up was not sufficient and agreed to admit the photograph only after the State redacted the child from the picture. State's Exhibit 87 was thereafter admitted and it pictures only the deceased. The trial court's action in this case demonstrates his exercise of discretion and the application of the probative value/unfair prejudice balancing test allowed by the amended statute.

¶58 In *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. The introduction of a single pre-death photograph of the victim was appropriate to show his general

[12] Defense counsel also objected that the statute should not apply to Coddington because it was not in effect at the time he committed the offense. (Tr.III 8-9)

appearance and condition prior to his death. It did not inject passion, prejudice, or other arbitrary factors into the sentencing stage more than any other relevant victim impact evidence. We find the trial court did not abuse its discretion when it admitted the photograph, the statute is not unconstitutional on its face or as applied, and Coddington was not deprived of a fair trial or a fair sentencing proceeding as a result of its admission.

¶59 Section 2403, as amended, also does not run afoul of *ex post facto* principles. The prohibition against *ex post facto* law requires the finding of two elements: that the law was enacted after the conduct to which it is being applied and that it must disadvantage the offender affected by it. *Gilson v. State,* 2000 OK CR 14, ¶ 97, 8 P.3d 883, 914, *cert. denied,* 532 U.S. 962, 121 S.Ct. 1496, 149 L.Ed.2d 381 (2001). In *Neill v. Gibson,* 278 F.3d 1044 (10th Cir. 2001), the Tenth Circuit rejected a claim that Oklahoma's victim impact evidence statute violated the *Ex post Facto* and Due Process clauses. In *Neill,* the appellant advanced the same argument as that raised by Coddington – that application of the statute, not in effect at the time of his crime, implicated the

> fourth category of *ex post facto* legislation recognized in *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798) – "[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender."

Id. at 1051. Neill relied on *Carmell v. Texas,* 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000), arguing the Supreme Court reaffirmed the fourth category of *Calder* and noting the state court (this Court) rejected his claim

below without addressing this category of *ex post facto* violations. Rejecting Neill's claim, the Tenth Circuit said, "Oklahoma's victim impact statute does not change the quantum of evidence necessary for the State to obtain a death sentence, nor does it otherwise subvert the presumption of innocence. *Id.* at 1051, *citing Carmell,* 529 U.S. at 530-34, 120 S.Ct. 1620, and *Thompson v. Missouri,* 171 U.S. 380, 387, 18 S.Ct. 911, 43 L.Ed.2d 204 (1898). *See also Pennington v. State,* 1995 OK CR 79, ¶¶ 78-80, 913 P.2d 1356, 1372, *cert. denied,* 519 U.S. 841, 117 S.Ct. 121, 136 L.Ed.2d 72 (1996). Further, the "fourth criterion" set forth in *Calder* does not prohibit the application of new evidentiary rules in trials for crimes committed before the evidentiary changes. *See e.g. Collins v. Youngblood,* 497 U.S. 37, 43, *f.* 3, 110 S.Ct. 2175, 2719, *f.* 3, 111 L.Ed.2d 30 (1990).

¶60 Like victim impact evidence, the admissibility of a single Section 2403 "live photograph" does not change the quantum of evidence necessary for the State to obtain a conviction and also does not subvert the presumption of innocence. Application of the amended Section 2403 in Coddington's case does not violate the *ex post facto* principles set forth in either the federal or our state constitution. U.S.Const. art. I, § 9; Okla.Const. art.II, § 15.

¶61 In Proposition Six, Coddington complains three prosecution witnesses[13] testified to the details of the crime scene and to the victim's condition. He argues the presentation of this cumulative evidence during the first stage of trial unfairly prejudiced him and resulted in an unfair

[13] The prosecution witnesses were EMTs Jeff Hanlon and Richard Archer, and police officer Scott Cox.

trial and sentencing determination in violation of his Fifth, Eighth, and Fourteenth Amendment rights.

¶62 Trial counsel did not object to the first two witnesses – Hanlon and Archer. Both were first-responder EMTs and each testified about what he saw at the crime scene and described the victim's condition at that time. All but plain error with regard to the cumulative nature of this testimony is waived by trial counsel's failure to object. Admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *See e.g. Williams v. State,* 2001 OK CR 9, ¶ 94, 22 P.3d 702, 724, *cert. denied,* 532 U.S. 1092, 122 S.Ct. 836, 151 L.Ed.2d 716 (2002). Allowing two witnesses to testify about the murder scene and the victim's condition was not an abuse of discretion and we find no plain error.

¶63 When counsel did object to the third witness's description of the crime scene, the trial court acknowledged the testimony was somewhat cumulative and instructed the prosecutor to lay a brief foundation for introduction of the photographic evidence. Thereafter, the witness testified sufficiently to lay the foundation for photographic evidence, and certain photographic evidence was admitted.

¶64 Coddington submits the trial court erred by allowing three witnesses to testify about the "same" thing and to allow the admission of photographic evidence depicting the information contained in the testimony. We disagree. When trial counsel objected, the trial court properly instructed the prosecutor to "lay a brief foundation" for the introduction of the photographic evidence. Thereafter, State's Exhibits 1, 3, 4, 23, 28 and 67 were identified and admitted into evidence *without* objection.

The photographs were properly admitted during the testimony of Scott Cox and were not so cumulative or prejudicial as to be inadmissible and no error occurred. Accordingly, we will not find Coddington was prejudiced by cumulative testimony, or deprived of his fundamental rights to a fair trial and due process of law.

¶65 In Proposition Seven, Coddington contends the State did not present sufficient evidence to sustain his conviction for First Degree Murder. Coddington specifically challenges the sufficiency of the State's proof on the element of malice aforethought. At trial, and now on appeal, Coddington submits he did not intend to kill Hale. He argues that all of the evidence of the element of malice aforethought was circumstantial and suggests that, under the reasonable hypothesis standard, the evidence was insufficient to exclude every reasonable hypothesis but guilt on this element.

¶66 In *Easlick v. State,* 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559, we abandoned the "reasonable hypothesis" test and adopted a unified standard of review for direct and circumstantial evidence in claims of insufficient evidence. Prior to *Easlick,* we looked to the evidence as a whole in determining which standard of review to apply – not just the type of evidence offered in support of a single element. *Bland,* 2000 OK CR 11, ¶ 23, 4 P.3d at 713; *see also Davis v. State,* 2004 OK CR 36, ¶ 27, 103 P.3d 70, 79. Accordingly, we will review Coddington's claim challenging the sufficiency of the evidence by determining whether, in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State,* 1985 OK CR 32, ¶ 7, 709 P.2d 202, 203-204; *Easlick,* 2004 OK CR 21, ¶ 15, 90 P.3d at 559.

¶67 Hale's neighbors, Jeff Pence and Nathan Kirkpatrick, each testified he saw a gray Honda parked in Hale's driveway in front of the garage between 5:30 and 6:30 p.m. on the day Hale was murdered.[14] Kirkpatrick also testified he saw a white male driving the Honda. Greg Brewer, owner of the Honda Salvage Yard and Coddington's employer, testified that he loaned Coddington a 1984 gray Honda the day before Hale's murder. Former Oklahoma City police detective Robert Smart testified he and several other police officers recovered a "rough-in" hammer from the place where Coddington said it would be – from a creek over the fence just west of Coddington's apartment. Former Oklahoma City police officer Glen Despain interviewed Coddington after his arrest at the police station. During the interview, after admitting to his involvement in a string of robberies, Coddington himself turned the conversation towards the homicide. Coddington confessed to killing Hale by hitting him in the head with the hammer. Coddington told officer Despain where the hammer was that he used to kill Hale; officer Despain was also among the officers who recovered the hammer from the location where Coddington said it would be. The Chief Medical Examiner for the State of Oklahoma testified that Hale died from blunt force head trauma – probably three or four blows to the head and also had defensive wounds on his hands. One skull injury suggested a direct blow and was in the shape of a cross.

¶68 At trial, Coddington's expert witness on symptoms of cocaine intoxication and addiction (Dr. Smith) said

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[14] Pence testified he saw the Honda parked there around 5:50 p.m.; Kirkpatrick testified he saw the car parked there between 5:30 and 6:30 p.m.

Coddington told him he knew he had done wrong by killing, admitted he hit Hale three or four times and took money from him when he realized what he had done. Dr. Smith testified he was able to describe the attack in great detail; he knew what clothes he wore, the denominations of bills he removed from Hale's pocket, and what part of the hammer he hit Hale with.

¶69 Coddington testified and admitted he went to Hale's house around 5:00 p.m. on March 5, 1997, intending to borrow money from Hale to buy more cocaine. He watched television with Hale for one and a half to two hours and smoked cocaine in Hale's bathroom during that time. Coddington testified Hale knew he was using, asked him what was wrong, and told him to get back into treatment. When Coddington asked Hale to borrow some money, he refused and told Coddington to leave. Coddington testified as he approached the door with Hale behind him, he saw a hammer on the dishwasher, grabbed it and hit Hale with the weapon. Although Coddington testified he did not go there intending to kill or harm Hale, he admitted on cross-examination that he struck Hale three times even though Hale was no threat after the first blow. He testified he did not call the police because he did not want to get caught.

¶70 The evidence in this case consisted of both circumstantial and direct evidence.[15] While Coddington denied having the intent to kill Hale, the circumstances

[15] Coddington's own testimony constituted direct evidence of the crime as he admitted killing Hale. *See Hooks v. State,* 2001 OK CR 1, ¶ 8, *f* 7, 19 P.3d 294, 305 (a defendant's testimony does not provide direct evidence of a crime unless he includes actual direct evidence of the crime).

surrounding his murder suggest it was committed with intent. Coddington attacked Hale after Hale refused to give him money for drugs. He hit Hale with the hammer three times; Hale had defensive wounds, and there was significant blood spatter. Malice, the deliberate intention to take the life of another without justification, may be formed in an instant. *Ullery v. State*, 1999 OK CR 36, ¶ 31, 988 P.2d 332, 347. "A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed." 21 O.S.2001, § 702. This Court will accept all reasonable inferences and credibility choices that tend to support the verdict. *Bland,* 2000 OK CR 11, ¶ 24, 4 P.3d at 713. Here, the jury obviously did not find Coddington's denial of malice to be credible. In a light most favorable to the State, the evidence presented was sufficient for a rational trier of fact to find the essential elements of first degree murder beyond a reasonable doubt. *Spuehler, id.* Proposition Seven does not warrant relief.

SECOND STAGE ISSUES

¶71 In Proposition Eight, Coddington argues he was deprived of the right to a constitutionally sound capital sentencing proceeding when the trial court precluded the admission of the videotaped statement of his mother. Prior to trial, the defense filed an Application to Take Testimony of Out of State Witness. Coddington sought a video-taped statement from his mother, Gayla Hood, to preserve her testimony for the second stage of trial.[16] At the time of the

[16] In support of the Application, Coddington averred Hood was an "essential punishment state (sic) witness," would testify extensively about child abuse suffered by Coddington, suffered from cardiac failure

(Continued on following page)

Application, Hood was incarcerated at the Federal Medical Center Penitentiary at Carswell Air Force Base in Fort Worth, Texas, suffering from serious heart problems which made death likely and imminent.

¶72 A hearing on the Application was held May 4, 2000. There, defense counsel Spradlin stated

> . . . We wish to preserve her testimony in the event that she does pass away before our trial. And also in the event that if she is still living at the time of our trial, it is entirely possible her physicians would not let her travel because of her illness.
>
> I have verified in the past, by speaking directly with her doctor, that she does, in fact, have a heart condition. She has had several heart attacks, several angioplasties. She has serious heart problems which are prevalent in the family . . . So it is a serious issue at this point.
>
> And she contacted me last week and expressed that she was no longer able to have any further operations. Her condition continued to deteriorate and her doctor informed her that her heart was just giving out.
>
> So . . . what we are asking to do is propound interrogatories . . . provide a set . . . to the prosecution and then they, in turn, would provide their cross-interrogatories to us. Then we

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and her condition was inoperable and deteriorating. Accompanying the Application was a Notice filed by defense counsel stating Hood's physician indicated during an interview that Hood was "surviving past any medical reason" and "could and will probably die very soon."

> would submit those interrogatories to the Court for approval.
>
> And we would like to go to Ft. Worth to the Federal Medical Center at Carswell Air Force Base and take that testimony both by transcription and on videotape.

The trial court noted the attorneys had agreed to proceed through interrogatories and take a videotape and transcript of the interrogatories. "And then, at some point in time, if the State objects to the videotape we can argue that." Assistant District Attorney Lou Keel then stated "[t]he only disagreement, sir, we have got pertaining to the manner in which the testimony from this witness would be given to the jury at trial and whether follow-up questions to the interrogatories that are proposed will be appropriate. . . . " The parties agreed to appoint a commissioner to consider the interrogatories to be submitted. Defense counsel filed interrogatories for the witness and provided copies of those interrogatories to the District Attorney. The State did not present any interrogatories prior to the examination.

¶73 Gayla Hood was examined by defense counsel and assistant District Attorney Marny Hill on June 8, 2000, at the Federal Medical Center Penitentiary in Ft. Worth, Texas. Judge Bass administered an oath to Hood – that her sworn testimony would be the truth, the whole truth and nothing but the truth – by telephone. Counsel then asked her the questions previously filed of record as interrogatories, and the State's attorney cross-examined her. Her oath and testimony was recorded on videotape.

¶74 On the fourth day of trial, the State filed a Motion in Limine to prohibit the defense from playing the

videotape and sought an order requiring Hood's testimony be read to the jury if admitted at all. The State also requested the defense be required to redact "unresponsive answers." On the first day of second stage proceedings, Judge Bass heard lengthy arguments on the State's motion. The State, through assistant District Attorney Fern Smith, objected to the admissibility of Hood's testimony because it was "not in compliance with the law" and because it contained statements the State objected to. Defense counsels argued strenuously that Hood's answers to interrogatories had been videotaped pursuant to an agreed procedure, that everyone had notice of the interrogatories, that representatives from both parties were present, that the witness was properly sworn, that the State cross-examined Hood, that both parties knew the intent of the videotape was to preserve Hood's testimony because of her poor health, and that no court reporter was present by agreement of the parties. Defense counsel Wilson also argued that laches precluded the State from such a late objection to the manner in which this testimony was preserved.

¶75 While the trial court noted the statutes dealing with conditional examinations of witnesses in criminal cases had "not kept up with the times by any stretch of the imagination," after reviewing the transcript of the May 4, 2000 hearing, it determined there was no agreement to play the videotape during the trial as the State had reserved "its objections to any portions of the admissibility of this statement." After redacting certain responses upon the State's request, defense counsels offered the original videotape, the redacted videotape and the original transcript into evidence and argued there was a "distinction with a difference between reading from a transcript and

seeing someone's face and what they actually look like." The trial court admitted the videotapes for purposes of appeal only. Thereafter, Gayla Hood's responses to the interrogatories, recorded on the videotaped statement, were read into the record by defense counsel.

¶76 Coddington contends the trial court's decision to prohibit the playing of Hood's videotaped examination in its entirety based on strict adherence to the rules of evidence and to the procedures outlined at 22 O.S.2001, §§ 781 *et. seq.* deprived him of due process of law and a reliable capital sentencing hearing, in violation of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article II, § 7 of the Oklahoma Constitution. At a minimum, Coddington submits the redacted videotape should have been admitted and played for the jury.[17]

¶77 We agree. While the videotaped preservation of Hood's testimony did not strictly comply with the procedural requirements set forth in 22 O.S.2001, § 781, *et. seq.,* the record below indicates the State agreed to the procedure to be utilized and only had not agreed on the manner in which it would be presented to the jury.[18] For the State to object almost three years later to the admission of the videotaped examination, because the strict procedures set forth in the statute referenced in the Application to Take Testimony of Out of State Witness were not followed in

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[17] The videotapes, original and redacted, are contained in the appeal record as Defendant's Exhibits 25A and 25B.

[18] At the hearing in May of 2000, the assistant prosecutor reserved objections relating to the manner in which the testimony would be given the jury; any objection to "procedure," such as lack of a court reporter or otherwise should have been made at that time.

taking the statement, seems disingenuous. The State knew Coddington wanted and needed to preserve his mother's testimony for second stage mitigation evidence and we are not convinced by the prosecutor's eleventh hour claim that the State was not aware Coddington intended to offer the videotape rather than read the testimony.

¶78 Prosecutor Smith's argument that the applicable statutes only allowed for Hood's testimony to be read to the jury was not correct. The statutes referenced in the Application to Take Testimony of Out of State Witness, 22 O.S.2001, § 781 *et. seq.*, were adopted in 1910 and have not been amended since. The language of the statute dealing with how the "deposition" will be presented at trial only contemplates "reading", because there were no videotapes or recording devices in 1910. We note, however, the statute does not mandate the examination be read into the record. *See* 22 O.S.2001, § 793. ("Depositions taken under a commission *may* be read into evidence . . . ") As the trial court noted, these statutes have not kept up with the times by any stretch of the imagination.

¶79 The legislature has provided for the conditional examination of witnesses other than the non-resident material witnesses referenced in Section 781. Sections 761 through 771 of Title 22 also address depositions or the conditional examination of witnesses. These statutes contemplate those occasions where a witness is about to leave the state, a witness is incarcerated, or a witness is so sick or infirm that one could reasonably believe that the witness will be unable to attend the trial, and provide a mechanism to obtain and preserve the testimony of that witness. The procedures set forth in 22 O.S.2001, §§ 761 *et.seq.* and 781 *et.seq.* both reflect the legislature's intent to

provide a mechanism to obtain and preserve important testimony when the witness is or is anticipated to be unavailable at trial.

¶80 We note that the State's objection to the videotaped deposition was not based upon a claim that it was not a reliable preservation of the testimony. Rather, the State's objection was to the admissibility of Gayla Hood's testimony at all because the statute referenced in the motion was not followed.

¶81 Gayla Hood's videotaped examination should have been admitted. Having reviewed both the videotaped examination and the written examination, we note a compelling difference between seeing the witness testify to this valuable mitigation evidence and hearing someone read her testimony. Regardless of the statutory procedure for "commissions to take testimony outside state," under the facts of this case, the exclusion of the videotaped evidence constituted a violation of the Fourteenth Amendment. The exclusion of the videotaped examination was not based upon unreliability, but upon the strict application of an outdated statute dealing with reliable preserved testimony.

¶82 In *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), the Court said "[t]he hearsay rule may not be applied mechanistically to defeat the ends of justice." What happened in this case is similar to the mechanistic application of the rules of evidence the Supreme Court condemned in *Chambers*. *See e.g. Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151-2152, 60 L.Ed.2d 738 (1979) (exclusion of proffered reliable testimony which was highly relevant constituted a

violation of due process and denied petitioner a fair trial on issue of punishment).

¶83 In *Warner v. State*, 2001 OK CR 11, ¶ 15, 29 P.3d 569, 575, this Court recognized the importance of a mother's testimony as mitigating evidence in a capital trial "[T]he Constitution requires individualized sentencing, and mitigation evidence is an important factor in insuring this right." *Warner, id., quoting Fitzgerald v. State*, 1998 OK CR 68, ¶ 41, 972 P.2d 1157, 1173, *citing Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1979). In *Warner*, we found defense counsel ineffective for failing to follow the statutorily mandated procedure for requesting a continuance in order to secure the defendant's mother's presence for second-stage testimony. *Id.*, 2001 OK CR 11, ¶ 16, 29 P.3d at 575. Because counsel did not comply with the statute, his request for continuance was denied and he was forced to present this valuable mitigation witness's testimony in the form of a five sentence stipulation. *Id.* at ¶ 15, *f.* 10, 29 P.3d at 575.

¶84 In this case, while Coddington was not denied the opportunity to present his mother's testimony in written form, the jury was denied the opportunity to actually see and hear the witness when such nearly live testimony was available. The jury was denied the opportunity to judge this witness's demeanor and assess her credibility.

¶85 Courts routinely note the general preference for live testimony. For example, in cases where the declarant is unavailable, former sworn testimony is admitted as a substitute for live testimony because no better version of the evidence exists. *See United States v. Inadi*, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) (general

preference for live testimony noted); *State v. Nobles*, 357 N.C. 433, 437, 584 S.E.2d 765, 769 (N.C. 2003) (when two versions of the same evidence are available, longstanding principles of the law of hearsay favor the better evidence). It is apparent from reading the record that the trial court found Hood's examination testimony to be sufficiently reliable and admissible mitigation evidence; it simply did not admit the videotaped examination because the State insisted the statute required it to be read.

¶86 The best evidence, in this case, was Hood's videotaped examination, not a reading of her testimony. *See* 12 O.S.2001, § 3002. Videotaped confessions, rather than confessions in written form, are regularly admitted to show the jury the demeanor of a person and the circumstances under which confessions are made. Just as this Court determined in the 1950s that wire recordings and talking motion pictures were so common in use that the verity of their recordings and sounds were established enough to allow recorded confessions to be admissible rather than requiring admissibility of the transcription, *see Williams v. State*, 93 Okla.Crim. 260, 270, 226 P.2d 989, 995 (1951), we now hold that under the conditional examination statutes at issue in this case, set forth at 22 O.S.2001, §§ 781, *et. seq.* and set forth at 22 O.S.2001, §§ 761, *et.seq.*, when the examination of the person is conducted under such circumstances which show the recording is reliable, the actual videotaped examination may be received into evidence and viewed by the jury rather than read to the jury.

> . . . [I]n keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as of inestimable

> value to triers of fact in reaching accurate conclusions.
>
> "This particular case well illustrates the advantage to be gained by courts' utilizing modern methods of science in ascertaining facts. . . . When a confession is presented by means of a movietone the trial court is enabled to determine more accurately the truth or falsity of such claims and rule accordingly."

Williams, 93 Okla.Crim. at 270, 226 P.2d at 995, *quoting People v. Hayes*, 21 Cal.App.2d 320, 71 P.2d 321, 322.

¶87 While the jury heard this important mitigation testimony, it was wrongly prohibited from seeing this valuable witness. The humanizing effect of live testimony in the form of a mother testifying for her son as mitigation evidence in a capital murder trial cannot seriously be disregarded as irrelevant. *See e.g. Solomon v. State*, 49 S.W.3d 356, 366 (Tex.Crim.App. 2001) (recognizing humanizing effect of live testimony); *People v. Enis*, 194 Ill.2d 361, 414, 743 N.E.2d 1, 30, 252 Ill.Dec. 427, 456 (Ill. 2000) (noting live testimony of the affiants would have had more complete portrayal of the defendant). Coddington knew his mother would be unable to give live testimony on his behalf due to her extremely ill health and arranged for the next best thing – a videotaped examination while she was alive.

¶88 Civil courts in Oklahoma recognize the value of videotaped depositions. *See e.g. B-Star, Inc. v. Polyone Corporation*, 2005 OK 8, ¶ 17, 114 P.3d 1082, 1086 ("This Court understands that video presentation of evidence is a convenient and cost-effective tool."); *see also* 12 O.S.Supp.2004, § 3232(C). "The utilization of videotape is

nothing more than an updated visual version of preserving testimony." *Inhofe v. Wiseman*, 1989 OK 41, ¶ 7, 772 P.2d 389, 392. The fact finder "at trial often will gain greater insight from the manner in which an answer is delivered and recorded by audio-visual devices. Moreover, a recording, a video tape, or motion picture of a deposition will *avoid the tedium* that is produced when counsel read lengthy depositions into evidence at trial." *Carson v. Burlington Northern, Inc.*, 52 F.R.D. 492, 493 (D.Neb. 1971) (emphasis added), *citing* 8 Wright & Miller, Fed. Practice and Procedure 426 (1970). Here, while the statute contemplated reading the preserved examination testimony into the record, the legislature did not make "reading" the examination mandatory in its conditional examination statutes. 22 O.S.2001, §§ 770, 793 (statutes use the word "may" rather than "shall"). The trial court should have allowed the videotaped examination to be seen and heard by the jury; it was well within the trial court's discretion to allow the jury to experience her testimony in that form. 12 O.S.2001, § 2402 (all relevant evidence is generally admissible).

¶89 We afford great deference to jurors' determinations of witness credibility due to their unique ability to personally observe the demeanor of the witnesses at trial. *See Scott v. State*, 1995 OK CR 14, ¶ 15, 891 P.2d 1283, 1291; *Stanberry v. State*, 1981 OK CR 156, ¶ 12, 637 P.2d 892, 896. Personal observation of a significant mitigation witness would allow the jury to judge that witness's demeanor and aid in determining that witness's credibility and value as a mitigation witness. The "tedious" reading of Hood's testimony into the record hardly afforded Coddington's jury that opportunity in this case.

¶90 The sentencer in capital cases should not be precluded from considering any relevant mitigating evidence. *Skipper v. North Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986). Hood's videotaped examination showed her demeanor – it showed her distress and sadness she had for her son in a way that the cold reading of a transcript could not portray. The witness's demeanor in this case is exactly the type of evidence that might invoke sympathy for a defendant facing the death penalty. Sympathy is proper for the jury to consider in assessing punishment. *See Salazar v. State*, 1998 OK CR 70, ¶ 42, 973 P.2d 315, 328. Prohibiting the jury from receiving evidence in the form likely to invoke sympathy and achieve the purpose of this mitigation witness was improper. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). We cannot determine how the jury would have viewed Hood's testimony if it had actually seen her videotaped examination. However, the potential error would be of constitutional magnitude. The only proper remedy is to remand for a new sentencing hearing with an instruction that the new jury specifically be allowed to see Hood's videotaped examination.

¶91 The error identified in Proposition Fourteen also warrants discussion and contributes to our decision to reverse Coddington's sentence of death and remand for resentencing. In Proposition Fourteen, instructional error in the sentencing phase allowed the jury to disregard relevant mitigating evidence in violation of *Lockett v. Ohio* and its progeny. Upon the State's request, the trial court gave the Oklahoma Uniform Jury Instruction on impeachment of witness by former conviction. *See* OUJI-CR 2d. 9-22. Specifically listed in that instruction were defense witnesses Gayla Hood, Mike Hood, Tommy Coddington,

Walter "Duffy" Coddington, Ricky Coddington, and Kathy Johnson. Coddington relied upon these family witnesses and their own troubles with the law and addiction to help explain Coddington's background, addiction, and criminality. Defense counsel did not object to this instruction. The trial court's decision to give the impeachment instruction as it related to his family mitigation witnesses effectively recharacterized their testimony as impeachment evidence and precluded the sentencer from properly considering their testimony. We find plain error.

¶92 In *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964-65, the Supreme Court concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Here, the purpose the family witnesses during second stage was to show how Coddington came from a bad background where his family members were drug addicts and criminals. Contrary to the State's response, such evidence might be perceived as facts about Coddington's background that would call for a penalty less than death. This instruction might have led the jury to believe the evidence of these witnesses' prior convictions was offered for impeachment purposes and was not offered to explain Coddington's background. To that extent, under the facts presented here, the instruction might have prevented the jury from considering relevant mitigating evidence. *See Williams*, 2001 OK CR 9, ¶ 104, 22 P.3d 702, 726.

¶93 In *Williams*, we found any error in the language of the instruction did not have a substantial impact on the

outcome of second stage proceedings. *Id.* Here, we cannot so find. This error, in conjunction with the error identified in Proposition Eight, requires Coddington's death sentence be vacated and the case remanded for a new sentencing proceeding.

¶94 Because our remand for resentencing renders moot all other challenges to the second stage proceedings, the remaining propositions raising errors alleged to have occurred in the sentencing stage of trial need not be addressed. However, in Proposition Twenty, Coddington argues he received ineffective assistance of counsel in both stages of trial. Because we remand for resentencing, those complaints about counsel's second stage performance are moot. What remains is Coddington's complaints that his attorneys failed to make timely, specific objections, request admonishments or mistrial or take other appropriate action to preserve the issues raised in Propositions Three and Five.

¶95 To prevail on a claim of ineffective assistance of counsel, an appellant must show (1) that counsels' representation fell below an objective standard of reasonableness and (2) the reasonable probability that, but for counsels' errors, the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

¶96 Review of this record, in its entirety, shows two well-prepared, competent capital trial litigators represented Coddington. In Proposition Three, we found that trial counsel's failure to request that Juror Muller be removed and replaced by an alternate juror was likely a matter of trial strategy and Coddington had not

established his counsel's conduct constituted deficient performance. *Strickland, id.; Woodruff v. State,* 1993 OK CR 7, ¶ 16, 846 P.2d 1124, 1133, *cert. denied,* 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993) (this Court does not evaluate performance in hindsight). We reviewed the claims relating to Ron Hale raised in Proposition Five for plain error and determined no error warranting relief occurred. Had trial counsel imposed timely objections to the complained of testimony, the trial court might have admonished the jury to disregard the evidence. However, while objections to Hale's testimony might have been sustained and the jury admonished, we do not believe trial counsel's objections would have altered the outcome of the first stage proceedings and Coddington cannot show prejudice. *Humphreys v. State,* 1997 OK CR 59, ¶ 40, 947 P.2d 565, 578 (to show prejudice, an appellant must show a reasonable probability that but for counsel's errors the outcome of the proceeding would have been different). Failure to prove prejudice is fatal to Coddington's ineffective assistance of counsel claim. *Dodd v. State,* 2004 OK CR 31, ¶ 112, 100 P.3d 1017, 1049.

DECISION

¶97 For the reasons set forth in this Opinion, Coddington's conviction and sentence for First Degree Robbery, in Oklahoma County District Court, Case No. CF 97-1500 (Count 2) is ***AFFIRMED***; Coddington's conviction for First Degree Murder (Count 1) is ***AFFIRMED,*** but his sentence of death is ***REVERSED AND REMANDED TO THE DISTRICT COURT FOR RESENTENCING.***

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY THE HONORABLE
JERRY BASS, DISTRICT JUDGE

APPEARANCES AT TRIAL

FERN SMITH
CHRISTY REID
ASST. DISTRICT ATTORNEYS
OKLAHOMA COUNTY COURTHOUSE
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

TAMRA SPRADLIN
TIM WILSON
ASST. PUBLIC DEFENDERS
OKLA. CO. PUBLIC DEFENDER'S OFFICE
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVENUE
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE DEFENDANT

APPEARANCES ON APPEAL

ANDREA DIGILIO MILLER
EMMA VICTORIA ROLLS
ASST. PUBLIC DEFENDERS
OKLA. CO. PUBLIC DEFENDER'S OFFICE
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVENUE
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH S. BRANHAM
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: C. JOHNSON, J.

CHAPEL, P.J.:	CONCURS
LUMPKIN, V.P.J.:	CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	SPECIALLY CONCURS

RB

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULT/DISSENT IN PART

¶1 I concur in the results reached in this case, but dissent in part. My vote is based upon the following reasons.

¶2 First, I cannot agree with the confusing analysis used concerning proposition four, i.e., expert testimony on the ultimate issue. The opinion's discussion of this issue and paraphrased summaries of *White v. State,* 1998 OK CR 69, 973 P.2d 306 and *Hooks v. State,* 1993 OK CR 41, 862 P.2d 1273 use dangerous wordplay that could dilute the applicable law. Paragraphs 9 through 11 of my specially concurring opinion in *White* provide a more thorough explanation of the applicable rules, rules that fully comply with the American Bar Association Standards for Criminal Justice.

¶3 For purpose of clarity, I reiterate here that Standard 7-6.6 of the *American Bar Association Criminal Justice Mental Health Standards* provides that "[o]pinion testimony, whether expert or lay, as to whether or not the defendant was criminally responsible at the time of the offense charged should not be admissible." Furthermore, the commentary to that standard provides that an "expert witness should not be permitted to express opinions on any question requiring a conclusion of law or a moral or social value judgment properly reserved to the court or to the jury." And later, that same commentary indicates that "[t]erms like *premeditation, malice,* and *provocation* have technical legal meanings concerning which mental health or mental retardation professionals can pretend no expertise."

¶4 Accordingly, I have no qualms with the trial court's *in limine* ruling that prevented the defense expert from testifying as to Appellant's inability to develop the requisite *mens rea.* That issue was ultimately for the jury to decide. In addition, psychological testimony is totally subjective and not provable with objective evidence. It is educated speculation at best. For that reason, we have previously limited such testimony to educating the jury regarding the nature of the proffered mental health issue from which the jury could then render its decision based on the facts of the crime. In this case, Appellant's ability to remember and relate the facts of the crime carry great weight in disproving that proffered opinion. In addition, Appellant admitted he knew what he had done and it was wrong.

¶5 Second, concerning the victim photograph issue raised in proposition five, the Court seems to abandon the clear legislative intent of 12 O.S.Supp.2002, § 2403 by applying the old rule applicable to such photographs, prior to 2002 amendments. The statutory amendment plainly means that a victim's photo is definitely admissible in a criminal homicide prosecution so long as it is an accurate representation of the victim at the time of the death and is not an attempt to play on the sympathy or sentiment of the trier of fact. The plain language of the current statute is clear and the Court should not employ an overall relevance balancing test under the former version of the statute.

¶6 Third, I agree with the opinion that the videotape of the mother should have been admitted. But I agree ***only*** because of the agreement of the parties and the fact the State made no objection to the use of the videotape at the time the agreement was made. There is

nothing unconstitutional about Oklahoma's statutory method for preserving witness testimony. There may be more modern ways to preserve such testimony, but that does not make the statute unconstitutional. Until the statute is changed we are bound to follow the statute even if the process is antiquated.

¶7 This Court has recently emphasized the importance of following a statutory provision even to the point it can be a structural error in a trial. *See e.g., Golden v. State,* 2006 OK CR 2, 127 P.3d 1150. But now the Court wants to brush away statutory provisions because it has conceived of new ways that might be better. This, of course, leads to inconsistencies. I cannot join in a result-oriented jurisprudence designed to ensure mothers always get to testify. Regardless of who they are, witnesses must comply with rules established by the Legislature. It seems the Court only wants to view statutes with the weight of "structural error" if the use of that view impedes the state.

¶8 I agree the Legislature should update our statutes on preserving witness testimony. But until the Legislature does, this Court is without authority to amend statutes. We can only interpret them and determine if they are Constitutional.

¶9 Fourth, there is no reason not to impeach family members who are offering mitigating evidence. *See* OUJI-CR 2d. 9-22. We cannot provide a defendant's family members a safe haven that deprives the triers of fact the truth of their own prior illegal activates [sic]. It is for the trier of fact to decide the credibility of the witnesses, and the trier of fact must be informed of the witnesses' character to make an informed finding.

LEWIS, JUDGE, SPECIALLY CONCURS:

¶ 1 I agree with the State that parts of the testimony by the defendant's mother should have been redacted; however, I concur with the opinion that prohibiting the defendant from playing the videotaped testimony to the jury denied the defendant relevant mitigating evidence.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES ALLEN CODDINGTON, Appellant,	)	
v.	)	Case No. D-2003-887
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING REHEARING AND DIRECTING ISSUANCE OF MANDATE

(Filed Sep. 22, 2006)

On September 5, 2006, Appellee, the State of Oklahoma, filed a Petition for Rehearing in the above-styled appeal, seeking reconsideration of this Court's decision remanding Appellant's case for a new capital sentencing proceeding. *See Coddington v. State*, 2006 OK CR 34, ___ P.3d ___ (Okl. Cr. August 16, 2006).

Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), provides that rehearing should not be sought as a matter of course, but only for two reasons:

1. Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
2. The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

In seeking rehearing, Appellee claims (1) our analysis of Proposition 8, which bore heavily on our decision to

remand for resentencing, is in conflict with *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), a case not previously called to the Court's attention; and (2) our analysis of Proposition 14 is in direct conflict with *Williams v. State*, 2001 OK CR 9, ¶ 106, 22 P.3d 702, 727. We disagree on both counts. We find *Parks* distinguishable on the legal principles at issue, and therefore not controlling.[1] As for *Williams*, Appellee's analysis ignores the difference in mitigation theories between that case and the case at bar. We determined *Williams* to be factually distinguishable in the Opinion; thus, *Williams* was not "overlooked" in our analysis.

Accordingly, we find that the Petition for Rehearing should be, and hereby is, **DENIED**. The Clerk of this Court is hereby directed to issue the mandate.

IT IS SO ORDERED.

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[1] As Appellee points out, *Parks* distinguishes the type of evidence that a capital defendant may present in mitigation of sentence from the ways in which a state may guide jurors' consideration of that evidence. *Parks* neither holds nor implies that any emotional component to a defense mitigation witness's testimony is irrelevant to the capital sentencing decision; it merely finds no fault with instructing the jury that its own decision should not be based solely on an emotional response ungrounded in the evidence presented to it. *See Parks*, 494 U.S. at 492-94, 110 S.Ct. at 1262-63. That distinction undermines Appellee's argument, and renders *Parks* inapposite. *See also California v. Brown*, 479 U.S. 538, 542, 107 S.Ct. 837, 840, 93 L.Ed.2d 934 (1987) ("By concentrating on the noun 'sympathy,' respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on *mere* sympathy. Even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase" (emphasis in original)).

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of September, 2006.

/s/ Charles S. Chapel
CHARLES S. CHAPEL,
Presiding Judge

/s/ Gary L. Lumpkin - concur in result
GARY L. LUMPKIN,
Vice-Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON,
Judge

/s/ Arlene Johnson
ARLENE JOHNSON,
Judge

/s/ David B. Lewis
DAVID B. LEWIS,
Judge

ATTEST:

Michael S. Richie
Clerk