ORIGINAL

Case No. F-2017-1104

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOSEPH JOHNSON,

Appellant

vs.

THE STATE OF OKLAHOMA,

Appellee.

Appeal from the
District Court of Tulsa County

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

This brief is submitted on behalf of Joseph Johnson, the defendant in Tulsa County District Court, who will be referred to by name or as Appellant. Appellee is referred to as the State or as the prosecution. Numbers in parentheses refer to page citations in the original record (O.R.), preliminary hearing transcript (P. Tr.), motions *in limine* hearing transcript (Hrg. Tr.), jury trial transcript (Tr.), and sentencing hearing transcript (S. Tr.).

STATEMENT OF THE CASE

Appellant, Joseph Johnson, was charged by Amended Information in Tulsa County District Court Case No. CF-2016-5475, with Count I: first degree murder, in violation of 21 O.S.Supp.2015, § 701.7(A). (O.R. 29-33) A preliminary hearing was held on January 20, 2017, before the Honorable James Keeley, Special Judge, and Mr. Johnson was bound over for trial. (P. Tr. 40)[1]

Tulsa County Assistant District Attorneys, Kevin Keller and Mary Knopp, prosecuted the case. Brian Boeheim and Ciera Freeman represented Mr. Johnson at trial. The Honorable Doug Drummond, District Judge, presided over the jury trial.

On August 30, 2017, a jury convicted Mr. Johnson of first degree murder, in violation of 21 O.S.Supp.2015, § 701.7(A). (Tr. 554; O.R. 187) The same day, the jury assessed punishment at life imprisonment without the possibility of parole in the Oklahoma Department of Corrections. (Tr. 554; O.R. 187) On October 16, 2017, the District Court imposed judgment and sentence in conformity with the jury's

[1]Although the Amended Information included a page of further allegations of prior felony convictions (O.R. 32), at Mr. Johnson's preliminary hearing, the State announced, "[T]he State of Louisiana has indicated no records exist, and so we'll just be proceeding on the straight Felony Information without a second page." (P. Tr. 6)

assessment. (S. Tr. 6-7; O.R. 201-03)[2] From that judgment and sentence, Joseph Johnson takes this appeal.

STATEMENT OF FACTS

On October 10, 2016, Quavis Cato, known as "Trae," was fatally shot in the driveway of a duplex located at 1240 S. 73 E. Ave. in Tulsa County, Oklahoma. (Tr. 241, 329, 351, 360, 463) At Joseph Johnson's trial, the State sought to prove he had shot and killed Mr. Cato during a dispute over the ownership of a car. (Tr. 550) Defense counsel conceded Mr. Johnson had shot and killed Mr. Cato, but argued he did so in self-defense. (Tr. 236-38, 523-30)

Mr. Johnson did not testify. (Tr. 474-75) However, the jury heard testimony from three eyewitnesses to the events immediately leading up to the shooting: Ashley Porter, Sarah Farris, and Shannon Cage. Ms. Porter was Mr. Cato's girlfriend or fiancée (Tr. 241, 312, 340); Ms. Farris was Ms. Porter's best friend (Tr. 312); and Mr. Cage was Mr. Johnson's best friend (Tr. 326). Mr. Cage lived at the location where Mr. Cato was shot. (Tr. 327-28, 333; State's Ex. 2)

On October 10, 2016, around 1:30 p.m., Ms. Porter drove herself and Ms. Farris in a gray Hyundai to 1240 S. 73 E. Ave., the duplex where Nathaniel Washington, Joseph Johnson's cousin, lived. (Tr. 241-43, 264-65, 312)Mr. Cato, or "Trae," drove to Mr. Washington's duplex separately in a white Grand Marquis. (Tr. 266, 312, 364) Ms. Porter, Ms. Farris, and Mr. Cato went there to remove a black Mercedes from the property. (Tr. 241, 312) They parked both cars in the driveway, where the Mercedes was also located. (Tr. 333; State's Ex. 2)

Ms. Porter was the first eyewitness to testify. She testified that the Mercedes was her car, and that Mr. Cato had bought it for her. (Tr. 241-42, 258)

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[2]The Judgment and Sentence incorrectly states that the jury found Mr. Johnson guilty of prior crimes in Louisiana. (O.R. 201) As explained in footnote 1, the State did not ultimately charge Mr. Johnson with any previous convictions. (P. Tr. 6)

Approximately one month before October 10, 2016, they gave the Mercedes to Mr. Washington in a trade for his Avalanche. (Tr. 242) According to Ms. Porter, she and Mr. Cato traded the Mercedes because they learned it did not have a title and there was a lien on it. (Tr. 242, 259-60) She testified that after they traded it, they realized it was a stolen vehicle. (Tr. 260) Ms. Porter testified that on September 3, 2016, Mr. Washington had sent her text messages. (Tr. 260-63; State's Ex. 1) Ms. Porter testified, "[H]e was saying state was messing with him about the car being on the lawn, or whatever. I guess they had moved out of that place over there. So we were supposed to go pick the car up." (Tr. 261; State's Ex. 1)

Ms. Porter testified that when she, Ms. Farris, and Mr. Cato arrived at Mr. Washington's home, Mr. Johnson was not there. (Tr. 266) According to her, only Mr. Cage was there. (Tr. 266)[3] Ms. Porter testified that when they arrived, she immediately took a crowbar and broke the windows of the Mercedes, because they did not have the key and the key was broken. (Tr. 241, 243, 255-56, 266-67; State's Ex. 5) According to Ms. Porter, the group wanted to take the rims off the car and call a tow truck to tow the rest to sell to salvage. (Tr. 243-44, 269) She testified Mr. Cato pulled up the front hood of the Mercedes, because the alarm kept sounding after she had broken a window, and he was trying to turn it off. (Tr. 256, 268) She testified, "We couldn't find a way to take the alarm off the car." (Tr. 268) According to Ms. Porter, Mr. Johnson then arrived. (Tr. 269)

Ms. Porter testified that Mr. Johnson and Mr. Cato started arguing. (Tr. 244) Mr. Johnson "pretty much said that his cousin said we couldn't take the car." (Tr. 246) Ms. Porter testified she was "trying to describe to him that [she] had rights to take the car" and "to have a logical conversation with him." (Tr. 269) According to Ms. Porter, "I even said, I'll show the message in my phone." (Tr. 246) Mr. Johnson

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[3]Mr. Cage lived in a duplex across from Mr. Washington's; they shared a driveway. (Tr. 264-65, 327-28, 333; State's Ex. 2)

"declined to see the messages." (Tr. 246) According to Ms. Porter, it was not a heated conversation, but was reasonable at that point. (Tr. 269)

Ms. Porter testified that after this conversation, Mr. Johnson left in a burgundy Chevy Tahoe. (Tr. 246-47) He was gone for approximately five to ten minutes. (Tr. 245) When he returned, he parked his car in the driveway, a little behind the Mercedes. (Tr. 248) Ms. Porter testified Mr. Johnson "hops out the car with two guns" in his hands, tucked under his arms. (Tr. 245, 273, 279) Ms. Porter testified one gun was an all chrome 38 revolver and the other was all black and looked like a 9-millimeter semiautomatic. (Tr. 246, 251)

According to Ms. Porter, Mr. Johnson "had the guns up under his arms at first when I tried to talk him down." (Tr. 245, 273, 279) "Trae was still standing by his car and Joe was pretty much by his car." (Tr. 245)[4] After Ms. Porter "tried to talk him down, pretty much Trae told me to shut up, stop trying to . . . get into grown men's business." (Tr. 245, 269-70) Mr. Cato gave her "[a] little bit" of a shove when he said that. (Tr. 270) Mr. Cato also told Ms. Porter something like, "You don't have to explain anything to him." (Tr. 270) According to Ms. Porter, Mr. Cato told Mr. Johnson that Mr. Cato did not have to listen to Mr. Johnson or "do anything" and Mr. Cato was "gonna take what's mine." (Tr. 270)

Ms. Porter testified that "after arguing and stuff, [Mr. Cato] turned around like he was getting ready to get in his car to leave." (Tr. 248-49, 270) She saw him open the door, but then he did not get in the car. (Tr. 271, 283)[5] Instead, Mr. Cato and Mr. Johnson started arguing again, and "that's when [Mr. Cato] walked to the back of the car." (Tr. 271-72, 280-83) He was at the back of his car by the rear lights,

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[4]"Joe" is Mr. Johnson.

[5]Officers later photographed the Grand Marquis's open door. (Tr. 271; Defendant's Ex. 2)

behind the back bumper. (Tr. 256-57, 273; State's Ex. 2)[6] Mr. Johnson then extended his arms. (Tr. 273, 279) Mr. Cato said, "He keeps waiving [sic] them M-f'ing guns like he's gonna use 'em." (Tr. 246, 279-80) According to Ms. Porter, at some point when Mr. Johnson's arms were extended, he said, "I'm ready to catch a body." (Tr. 280)[7]

According to Ms. Porter, Mr. Johnson then "led off" with the small gun first, which "looked like a chrome 38." (Tr. 246, 251)[8] She testified the first shot hit Mr. Cato toward the back of his head. (Tr. 249) She testified that he seemed to fire that gun until it was empty, and "then after he was done with the 38, [Mr. Johnson] walked up on [Mr. Cato] with the 9-millimeter and spent all the bullets that was in there." (Tr. 249, 251-52) According to Ms. Porter, Mr. Johnson shot Mr. Cato while he was on the ground. (Tr. 249) However, "he didn't quite stand over him, he was a little further from [Mr. Cato] when he was on the ground." (Tr. 250) "He was closer than probably two-feet away." (Tr. 250-51)

Ms. Porter testified that Mr. Cato did not have anything in his hands when he was shot. (Tr. 248) According to Ms. Porter, Mr. Cato did not have a gun on him; she and Mr. Cato owned a 9-millimeter gun, but at that time it was at their apartment. (Tr. 252, 274) She admitted that when Mr. Cato was in and around the neighborhood, he carried his gun sometimes. (Tr. 274) She testified that before the shooting, she knew Mr. Johnson "a little bit." (Tr. 257)

The second eyewitness, Sarah Farris, was Ms. Porter's best friend. (Tr. 312) Unlike Ms. Porter, Ms. Farris testified that when they arrived at the duplex, not just

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[6]Defense counsel argued that Mr. Johnson believed Mr. Cato intended to retrieve a gun from the trunk. (Tr. 519)

[7]She testified it was "[n]ot that long" after Mr. Johnson made that statement and pointed the guns that he fired his first shot. (Tr. 280)

[8]When he shot Mr. Cato, Mr. Johnson "wasn't that far" from him. (Tr. 248) Mr. Johnson was "closer to the street." (Tr. 257)

Mr. Cage, but both Mr. Cage and Mr. Johnson were present. (Tr. 313) She also testified, contrary to Ms. Porter, "Instead of it being a calm ordeal, Ashley kind of popped off at the mouth and got rowdy with Joseph." (Tr. 313) Ms. Farris testified that "[Mr. Johnson] was just standing there talking to [Mr. Cage]. They were just hanging out, a normal day." (Tr. 314-15) Ms. Porter "hopped out of the car rowdy and was like, We're coming to take our car. We're taking our car from you, there's nothing you can do about, [sic] gun play and all. Directed towards Joseph." (Tr. 314) According to Ms. Farris, when Ms. Porter did that, Mr. Johnson "just simply told her that . . . they weren't coming to take the car because he had not talked to the property owners yet." (Tr. 315) She testified that when Ms. Porter was arguing with Mr. Johnson, Mr. Cato was "just kind of backing Ashley [Porter] up, you know? Telling Joseph the same thing, We're coming to take the car, but he wasn't so much as argumentative as Ashley [Porter] was." (Tr. 315) Mr. Johnson "more so kept his conversation with [Mr. Cage] more so than argue back with them. He just told them that . . . they weren't taking the car." (Tr. 315-16)

Like Ms. Porter, Ms. Farris testified that after this initial conversation, Mr. Johnson left in a car and was gone for "maybe ten minutes at the most." (Tr. 316) When he returned, he "jumped out of the truck" with two guns in his hands, under his arms, which were crossed. (Tr. 317)

Ms. Farris testified that after Mr. Johnson returned, "it had simmered down a little bit." (Tr. 322) "[Mr. Johnson] didn't pull [the guns] immediately. He told [Mr. Cato] and [Ms. Porter] again that they were not taking the car." (Tr. 317) Mr. Cage stepped in between Mr. Johnson and Mr. Cato and "kind of calmed them down." (Tr. 317-18) "He still didn't pull the guns. And then when [Mr. Cage] moved, [Mr. Johnson] pulled the guns and pointed them at [Mr. Cato]." (Tr. 317-18) Ms. Farris testified Mr. Johnson "was still calm." (Tr. 318) Contrary to Ms. Porter's testimony that Mr. Johnson said, "I'm ready to catch a body" (Tr. 280), Ms. Farris

testified that while he pointed the guns, he was not saying anything other than "they're not taking the car." (Tr. 318) Mr. Cato kept telling Mr. Johnson he was going to take the car, and he continued to get tools out of his car so he could get the Mercedes off the property. (Tr. 318, 322)

Ms. Farris testified that at some point, Mr. Johnson shot Mr. Cato, more than three times. (Tr. 319) She testified when Mr. Cato was shot, he was "turned a little bit" away from Mr. Johnson "to go back into his car." (Tr. 319) Ms. Farris testified he was shot at the driver's side door of the Marquis. (Tr. 323) Unlike Ms. Porter, Ms. Farris did not recall whether all the shots were when Mr. Cato was standing or whether he was on the ground for any portion. (Tr. 319) To her recollection, Mr. Cato did not have anything in his hands when he was shot. (Tr. 319)

Ms. Porter and Ms. Farris both testified that they had pending criminal cases against them and had not received any "consideration" in those cases in exchange for their testimony in Mr. Johnson's. (Tr. 277-78; 321-22) Ms. Porter's pending case was for domestic assault with a dangerous weapon (a firearm). (Tr. 277-78)

The final eyewitness, Mr. Cage, testified that on October 10, 2016, he was "hanging out" at his duplex with Mr. Johnson, his best friend. (Tr. 325-26, 338) This duplex was "right across" from Mr. Washington's; they shared a driveway. (Tr. 327-28, 333; State's Ex. 2) At some point, Mr. Johnson left. (Tr. 339) After he left, around 10:30 a.m., Ms. Porter and Ms. Farris "pulled up, they talking about, . . . we coming to get our car." (Tr. 328, 339)[9] Ms. Porter was "[w]ound [up] to the fullest." (Tr. 339) Ms. Porter and Ms. Farris left before Mr. Johnson returned. (Tr. 339)

Mr. Cage testified that around 1:30, Ms. Porter and Ms. Farris returned with Mr. Cato. (Tr. 326, 339-40) Mr. Cage "guess[ed] they went and got reinforcements," i.e., Mr. Cato. (Tr. 339-40) Ms. Porter "drove up in the driveway" "all fast and

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[9]Mr. Cage testified the car belonged to Mr. Washington, because "they traded that car fair and square." (Tr. 337)

sidewards." (Tr. 333-34) According to Mr. Cage, she said, "[W]e fixing to get our car." (Tr. 329-30, 340) Mr. Cage testified that they "bust[ed] that window and pop[ped] that hood and started jacking that car up before [Mr. Johnson] got back." (Tr. 330, 340) Contrary to Ms. Porter's testimony that she alone broke the windows, Mr. Cage testified, "It was Trae. Trae had that tire tool. It was all – [i]t was Trae." (Tr. 340) Mr. Cage's impression was that they were doing it in a hurry. (Tr. 340) Approximately eight minutes after Ms. Porter, Ms. Farris, and Mr. Cato arrived, Mr. Johnson pulled up in a burgundy Tahoe. (Tr. 330, 340-41) He got out of his car "so casual with his hands folded up behind his arm," and asked what they were doing. (Tr. 335-36, 341) They said they were getting their car. (Tr. 330, 341) At that time he unfold [sic] his hand and – Let me call my cousin and if my cousin . . . say you can get the car, . . . y'all can take the car." (Tr. 335-36)

According to Mr. Cage, Ms. Porter started talking to Mr. Johnson first. (Tr. 341) She was still "pretty wound up," and she was winding Mr. Cato up; "she had him . . . like, I'm gonna get my old lady's car." (Tr. 341) Mr. Cage testified that for Mr. Johnson, "it wasn't about giving up the car. . . . [T]he point was just let me call my cousin and if he say y'all can get this car, take this car." (Tr. 342) According to Mr. Cage, the group did not give Mr. Johnson a chance to call. (Tr. 342) At some point, Mr. Cato pushed Ms. Porter out of the way and told her she did not have to explain anything to Mr. Johnson. (Tr. 342-43)

Unlike Ms. Porter and Ms. Farris, Mr. Cage did not testify that Mr. Johnson ever left the duplex during the dispute. At some point, Mr. Cage saw Mr. Cato turn and go toward his Marquis, "but . . . that's when it's time for me to get on down." (Tr. 343) Mr. Cage testified, "[W]ell, I'm thinking he's going to the trunk, but that's what he was looking like, he was going to the trunk or the back door, one. I don't know." (Tr. 344) Mr. Cage did not see Mr. Cato try to open the trunk of his car, but Mr. Cage admitted that once he saw things "getting heated," he turned away. (Tr.

335) He was "fixing to get on down because I know something's . . . gonna happen." (Tr. 335) Mr. Cage testified that he did not see Mr. Johnson shoot because "I'm trying not to get shot," but "I hear some shooting. I'm gone. . . . I'm looking for cover, I'm out." (Tr. 331) Mr. Cage ran "a little." (Tr. 332) Mr. Cage did not see anyone with a gun that day. (Tr. 335)

Mr. Cage testified that toward the end of "this ordeal," he was in fear of being shot. (Tr. 346) He specified that he was not afraid of Mr. Johnson. (Tr. 346) His concern for his well-being was "[Mr. Cato] getting to that car" because "I'm pretty sure there was a weapon in there." (Tr. 346) He "ain't seen it, but during the neighborhood – during other days, both of them got one." (Tr. 346) He assumed Mr. Cato was going to get a weapon; he did not see him get it, but he knew to "get on down." (Tr. 347) He clarified that it was not an assumption, but an "educated guess." (Tr. 348)

After Mr. Johnson shot Mr. Cato, Mr. Johnson left in his car. (Tr. 252, 320) He called Mr. Cage's cell phone. (Tr. 332) Mr. Cage told Mr. Johnson it looked like Mr. Cato was dead. (Tr. 332)[10] Mr. Johnson asked, "[R]eally?" (Tr. 332)

After the shooting, Ms. Porter stayed with Mr. Cato and tried to stop the bleeding with her shirt. (Tr. 253) Emergency personnel arrived while Ms. Porter, Ms. Farris, and Mr. Cage were still there. (Tr. 253, 331)[11]

Detective Justin Ritter, of the Tulsa Police Department, testified that based on interviews and information gathered at the scene, he developed a suspect, Mr. Johnson. (Tr. 419) He learned Mr. Johnson was from Baton Rouge, Louisiana, and

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[10]Mr. Cage testified that Mr. Johnson was lying "where those cones" are located in State's Ex. 2. (Tr. 333-34) The cones, which are evidence markers, are located by the left rear or Mr. Cato's Grand Marquis. (State's Exs. 2, 3)

[11]Ms. Farris testified she flagged down an officer who was passing by. (Tr. 320) Contrarily, Officer Cole Butler, of the Tulsa Police Department, testified that a black male flagged him down. (Tr. 351, 357) In closing, defense counsel argued Ms. Farris lied about flagging down an officer because she "needed to account for what she was doing in that time" (Tr. 515-16), suggesting she was hiding Mr. Cato's gun.

contacted the police department there. (Tr. 420) Mr. Johnson was arrested in Baton Rouge two days later, on October 12, 2016. (Tr. 399, 406)[12]

Sergeant Robert Soileau, of the Louisiana State Police, testified Mr. Johnson told him he had used a 9-millimeter gun. (Tr. 405, 408) Sergeant Soileau believed Mr. Johnson had said it was silver or chrome with a black handle. (Tr. 406) He believed Mr. Johnson said that he left the scene and drove to his house where he left his pickup truck, and that he left on foot and another individual picked him up and drove him to Baton Rouge. (Tr. 406)

Officers found 9-millimeter cartridge casings on the ground at the scene. (Tr. 417) The State showed photographs of thirteen casings to the jury. (Tr. 374; State's Exs. 18-31) Bullet fragments and jacket fragments were also located. (Tr. 377-78, 417; State's Exs. 32-41) There was a bullet strike to the concrete and a human tooth. (Tr. 380-81, 417; State's Ex. 42) Detective Ritter testified there was at least one mushroom projectile that appeared to hit the concrete and flatten, which is significant because it shows the bullet was going at a downward angle. (Tr. 417-19) Officers did not find any bullet strikes or casings "in or about" the vehicles in the area. (Tr. 365-66) Sergeant Marcus Harper, of the Tulsa Police Department, testified that generally, the casings were consistent with a "somewhat stationary shooter," meaning that "whoever fired the gun stayed in . . . a close proximity of what they were shooting at." (Tr. 377)[13]

Sergeant Harper testified that officers looked inside the Grand Marquis, the Hyundai, and the Mercedes. (Tr. 364-65; State's Ex. 8) They were looking for "several things," including firearms. (Tr. 365) However, to his knowledge, no

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[12]Based on this evidence, the court gave a flight instruction. (O.R. 176)

[13]The physical evidence described in this paragraph, as well as bloody clothing, was located near the left rear of the Grand Marquis. (Tr. 373-75, 377-78; State's Exs. 2, 3, 9-13, 15, 18-42)

officers searched the trunk of the Grand Marquis. (Tr. 387) Sergeant Harper could not tell if the Grand Marquis's trunk was ajar. (Tr. 386) Looking at a photograph of the trunk, he admitted the chrome "appears not to match more on the . . . right side." (Tr. 386-87; Defendant's Ex. 3)

The medical examiner, Dr. Joshua Lanter, performed Mr. Cato's autopsy. (Tr. 441) He determined that the cause of death was multiple gunshot wounds, and the manner of death was homicide. (Tr. 463)[14] He testified that there were ten entrance wounds to the head area, one to the neck, and three to the left shoulder. (Tr. 445, 453, 458; State's Exs. 44-49, 52) All entrance wounds to the head were on the right side, and the exit wounds were on the left side. (Tr. 445, 468, 457-58; State's Exs. 50-51) There were two exit wounds in his back. (Tr. 461-62; State's Ex. 55) Dr. Lanter testified about stippling near one wound to the head, which is "injuries that surround the entrance wound, which gives me an idea of how far away the weapon was from the skin." (Tr. 447-48, 456-57; State's Ex. 49) He testified that typically, "if a handgun's anywhere from a centimeter to . . . two feet away, you'll see stippling." (Tr. 448) He could not determine which wound occurred first. (Tr. 468)

Dr. Lanter testified about pseudo-stippling on Mr. Cato's arm, which is "dots and scratches [that] are likely secondary to small fragments, either of something hard like . . . projectile, like, bursting." (Tr. 458-61; State's Exs. 52-54)[15] Dr. Lanter also noted abrasions or scratches to the left forehead region, but could not tell what caused them. (Tr. 453) He noted numerous loose teeth, which are common with gunshot wounds to the face. (Tr. 462)

Dr. Lanter testified that Mr. Cato had methamphetamine and amphetamine

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[14]According to the autopsy report, Mr. Cato died at Saint John Medical Center at 2:20 p.m. on October 10, 2016. (P. Hrg., State's Ex. 1)

[15]He clarified that the pseudo-stippling on the arm was not indicative of distance to the shooter. (Tr. 468-69)

(a biproduct of methamphetamine) in his system. (Tr. 469-71) The amount of methamphetamine was "below their threshold of being able to quantify it." (Tr. 470-71)

Additional facts will be discussed where pertinent to the issues.

PROPOSITION I

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED CHARGE OF FIRST DEGREE MANSLAUGHTER, WHICH WAS SUPPORTED BY THE EVIDENCE, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

Even if the State's evidence was sufficient to negate Mr. Johnson's self-defense claim, the jury should have had the opportunity to convict him of first degree manslaughter, under a heat of passion theory or an imperfect self-defense theory. 21 O.S.Supp.2015, §§ 711(2) and (3). At the close of evidence, the trial court properly issued instructions on the defense of self-defense. (Tr. 487-88; O.R. 163-70) Defense counsel also requested that the jury be instructed on first degree (heat of passion) manslaughter. (Tr. 493-95) Although the evidence supported this theory, the trial court denied these instructions. (Tr. 497-98) The trial court additionally failed to instruct the jury on first degree manslaughter based on imperfect self-defense, which was also supported by the evidence; defense counsel's failure to request such instructions is addressed in Proposition III(A)(3).

"In a criminal prosecution, the trial court has the duty to correctly instruct on the salient features of the law raised by the evidence without a request by the defendant." *Atterberry v. State*, 1986 OK CR 186, 731 P.2d 420, 422-23 (reversing for new trial where due process right was denied by court's overbroad instruction). *See also* U.S. Const. amends V, XIV; Okla. Const., art. II, §§ 7, 20; *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980); *United States v. Zimmerman*, 943 F.2d 1204, 1214 (10th Cir. 1991) (jury must be instructed so as to preclude possibility conviction rests on incorrect legal basis). In *Shrum v. State*,

1999 OK CR 41, 991 P.2d 1032, 1036, this Court held all lesser forms of an offense are necessarily included and instructions on lesser forms of a charged offense should be administered if they are supported by the evidence. Where there is any evidence tending to reduce the crime charged from murder to a lesser degree of homicide, the trial court should "give the defendant the benefit of any doubt" and instruct the jury on the law of each degree the evidence tends to prove, whether requested or not. *Tarter v. State*, 1961 OK CR 18, 359 P.2d 596, 601.

A. Heat of Passion Manslaughter

At the close of evidence, defense counsel requested that the jury be instructed on first degree (heat of passion) manslaughter. (Tr. 493-95) The trial court denied this request, ruling, "[T]here has to be evidence of these elements in the record and I'm not seeing it even in the light most favorable to the defendant." (Tr. 497-98) Because defense counsel requested these instructions, this Court should review this claim for an abuse of discretion.

The elements of heat of passion manslaughter are: 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage, or resentment; 3) the homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion, and homicide. *Barnett v. State*, 2012 OK CR 2, 271 P.3d 80, 86-87 (citations omitted); Instruction No. 4-97, OUJI-CR (2d). "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney v. Wilbur*, 421 U.S. 684, 704, 95 S. Ct. 1881, 1892, 44 L. Ed. 2d 508 (1975). Assuming for the sake of argument that Mr. Johnson's belief in the need for deadly force was unreasonable – or that, for any other reason, the elements of self-defense were not met – the evidence supports that he was in a heat of passion at the time of the homicide.

This Court has long recognized that "passion resulting from fright or terror may be sufficient to reduce a homicide from murder to manslaughter and such a

killing may be closely akin to a killing in self-defense." *Wood v. State*, 1971 OK CR 232, 486 P.2d 750, 752 (citations omitted). This Court has long recognized:

> [W]hen a defendant is charged with first-degree, premeditated murder, and he counters the charge with a claim of self-defense, the facts may be such as to warrant a conviction on a lesser form of homicide, particularly heat-of-passion manslaughter. The fear of being injured or killed, such as might justify using deadly force in self-defense, is a kind of "passion" contemplated by the offense of heat-of-passion manslaughter.

McHam v. State, 2005 OK CR 28, 126 P.3d 662, 668.

Even if the jury did not find that all elements of self-defense had been met, the jury could have found Mr. Johnson was in a heat of passion at the time of the homicide. Each of the elements of heat of passion manslaughter was met. First, there was adequate provocation, which is "any improper conduct of the deceased toward the defendant which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in the position of the defendant." *Washington v. State*, 1999 OK CR 22, 989 P.2d 960, 968 n.4; Instruction No. 4-98, OUJI-CR(2d). The evidence showed that Mr. Cato came onto Mr. Johnson's cousin's property, uninvited, with a tire tool and was breaking the windows of a car. (Tr. 241, 312, 340) He and Mr. Johnson argued. (Tr. 244) Mr. Cato had methamphetamine in his system, which could have affected his behavior. (Tr. 470-71) Mr. Cato told Mr. Johnson that Mr. Cato did not have to listen to Mr. Johnson or "do anything" and Mr. Cato was "gonna take what's mine." (Tr. 270) Mr. Cato shoved his girlfriend or fiancée, Ms. Porter, in front of Mr. Johnson during the dispute. (Tr. 270) After arguing with Mr. Johnson, Mr. Cato "turned around like he was getting ready to get in his car to leave," but then he did not get in the car. (Tr. 248-49, 270-71, 283) Instead, Mr. Cato and Mr. Johnson started arguing again, and "that's when [Mr. Cato] walked to the back of the car." (Tr. 271-72, 280-83) Mr. Cage thought Mr. Cato was going to the trunk, and Mr. Cage was "pretty sure there was a weapon in there" because "during the neighborhood – during other days, both of them got one." (Tr. 344, 346) Ms. Porter confirmed that Mr. Cato owned a 9-millimeter gun, and admitted that when he was around the neighborhood, he

carried his gun sometimes. (Tr. 252, 274) Finally, throughout this chaotic ordeal, a car alarm was ringing. (Tr. 256, 268) Given all these circumstances, Mr. Cato's movement toward his trunk would have naturally or reasonably caused fear in a reasonable person in Mr. Johnson's position. This meets the adequate provocation element of this lesser offense.

Second, Mr. Johnson was acting under the influence of fear and terror. Again, Mr. Cato had methamphetamine in his system, had just shoved Ms. Porter, had a tire tool, had told Mr. Johnson he was "gonna take what's mine," owned a gun and carried it in the neighborhood, was arguing with Mr. Johnson, and approached his trunk. Mr. Johnson did not testify, but Mr. Cage, an eyewitness, testified that toward the end of "this ordeal," he was in fear of being shot, specifically by Mr. Cato. (Tr. 346) Mr. Cage was, in fact, so scared that he once he saw things "getting heated," he turned away "because I know something's . . . gonna happen." (Tr. 335) The defendant's passion "need not have been such as would entirely overcome reason, or be so overpowering as to destroy free exercise of choice." Instruction No. 4-99, OUJI-CR (2d). The situation Mr. Johnson found himself in would have affected his ability to reason and render his mind incapable of cool reflection.

Third, under the facts of this case, there was no time for Mr. Johnson's passion to cool. The events happened in quick succession. Mr. Cage testified that Mr. Cato and Mr. Johnson "exchanged words. Next thing you know, I hear some shooting. I'm gone." (Tr. 331)

Finally, there was a causal connection between the provocation, the passion, and the homicide. Mr. Cato came onto Mr. Johnson's cousin's property with two other people and broke into a car thereon, leading to the series of events described above. After Mr. Johnson learned from Mr. Cage that Mr. Cato appeared dead, Mr. Johnson asked, "Really?" (Tr. 332) This homicide was not the result of a cool and calculated deliberate intent to kill on the part of Mr. Johnson. Accordingly, the trial court abused its discretion in failing to issue this requested instruction.

B. Manslaughter by Resisting Criminal Attempt Under an Imperfect Self-Defense Theory

Mr. Johnson recognizes that although trial counsel did request instructions on first degree (heat of passion) manslaughter, his request did not cover instructions on manslaughter by resisting criminal attempt under an imperfect self-defense theory of manslaughter.[16] Despite the lack of a specific request, however, the trial court's failure to *sua sponte* instruct on all lesser included offenses supported by the evidence is subject to review on appeal under a plain error analysis. *McHam*, 126 P.3d at 670. To be entitled to relief under the plain error doctrine, Mr. Johnson must prove: "1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State,* 2006 OK CR 19, 139 P.3d 907, 923. This Court will correct plain error only if it "'seriously affect[s] the fairness, integrity or public reputation'" of the proceedings "or otherwise represents a 'miscarriage of justice.'" Id. (Citations omitted.) The court's failure to give these required lesser included instructions constitutes plain error.

The right to self-defense is characterized as "perfect" when the defendant makes a *prima facie* showing of each of the basic elements of self-defense: (1) that he did not initiate the conflict, (2) that he believed he was in imminent danger of death or great bodily harm, and (3) that he had reasonable grounds for that belief. The doctrine of "imperfect" self-defense recognizes that where the defendant cannot satisfy all of the requirements of a "perfect" self-defense claim to justify an outright acquittal, the circumstances at least partially mitigate the crime. This Court has long recognized the concept that an imperfect self-defense claim will mitigate murder to manslaughter:

> A homicide may be reduced from murder to manslaughter where the killing was done because the slayer believed that he was in great danger, even if he was not warranted in such belief or where the slayer

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[16]Defense counsel's failure to request instructions on manslaughter by resisting criminal attempt is addressed in Proposition III(A)(3).

although acting in self-defense was not himself free from blame. *Wood*, 486 P.2d at 752 (citations omitted). Thus, the doctrine of imperfect self-defense reduces a crime from murder to manslaughter in two situations: (1) where every element of self-defense is established except that the defendant's honest belief that force was necessary was not objectively reasonable; and (2) where every element of self-defense is established except that the defendant was not entirely free from fault. 2 Wayne R. LaFave, Substantive Criminal Law, § 15.3 (2d ed. 2003).[17]

The State urged the jury to reject Mr. Johnson's self-defense theory because of legal infirmities in the defense – in essence, that Mr. Johnson's beliefs and actions were not reasonable under the circumstances. If the jury believed this argument by the State, it had no choice but to convict Mr. Johnson of first degree murder. Had the court instructed the jury on first degree manslaughter under a theory of imperfect self-defense, it could have acquitted Mr. Johnson of first degree murder and convicted him of manslaughter. Unfortunately, the jury was not given a mechanism by which to give effect to the imperfect self-defense theory.

The proper manslaughter instruction in imperfect self-defense cases is manslaughter "by resisting criminal attempt" under 21 O.S.Supp.2015, § 711(3). Manslaughter by resisting criminal attempt is committed when a homicide is "perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed." *Davis*, 2011 OK CR 29, 268 P.3d 86, 116; Instruction No. 4-102, OUJI-CR (2d). The term "unnecessarily" as used in the statute is equivalent to "unlawfully" or "without legal justification." Committee Comments to Instruction No. 4-102, OUJI-CR (2d).

An "unnecessary" killing constituting first-degree manslaughter would

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[17]Other situations might also fall within the rule of imperfect self-defense, such as where the defendant used more force than reasonably necessary under the circumstances, *see, e.g., Swann v. United States*, 648 A.2d 928 (D.C. App. 1994), or where the defendant lost the right of self-defense by virtue of being a trespasser. *See, e.g., Commonwealth v. Cyr*, 679 N.E.2d 550 (Mass. 1997). In every situation, however, the legal requirements of self-defense are substantially met but for one legal infirmity. Thus, the doctrine of imperfect self-defense acts as an ameliorative rule to the requirements for self-defense under Oklahoma law, recognizing that there can be something in between not guilty by reason of self-defense and guilty of first degree murder.

> thus be found under circumstances where the defendant did not initiate the difficulty, yet honestly but unreasonably believes either that he is in danger of injury, or that slaying is the only way to prevent injury. The defendant's unreasonableness disallows the defense of self-defense, yet the fact that his honest, albeit erroneous, beliefs negate malice aforethought indicates that his crime is first degree manslaughter.

Id. (Citations omitted.)

Here, the instruction was warranted based upon evidence that Mr. Johnson shot Mr. Cato in resisting his attempt to commit – at a minimum – assault and battery upon him. The evidence showed Mr. Johnson thought Mr. Cato was retrieving a gun and reacted to this perceived threat. If the jury believed that he unreasonably believed he was in danger, or that he was not entirely free from fault,[18] the jury still should have been able to consider Mr. Johnson's actions in terms of whether they would rise to the level of a partial defense.

If the jury held reasonable doubts as to any element of first degree murder or any of the legal technicalities of self-defense, it was unable to assess Mr. Johnson's actions in the terms of imperfect self-defense. Had the jury been properly instructed, the jury likely would have acquitted Mr. Johnson of murder in favor of first degree manslaughter.

C. Conclusion

An Oklahoma conviction may be set aside based on misinstruction of the jury where this Court finds "the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or

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[18]Although the State argued that Mr. Johnson was the aggressor, the jury easily could have found that Mr. Cato, not Mr. Johnson, was the aggressor: Mr. Cato came onto the property and broke into a car thereon and argued with Mr. Johnson. Only two of the eyewitnesses – Ms. Porter, Mr. Cato's girlfriend or fiancée; and Ms. Farris, her best friend – testified Mr. Johnson left and came back with guns. Both of these witnesses presumably had an interest in the outcome of the case, due to their relationships with Mr. Cato, and both had pending criminal charges against them. All three eyewitness testified Mr. Johnson had his hands under his arms; again, only Ms. Porter and Ms. Farris testified they saw guns in his hands. There was no testimony that Mr. Johnson approached Mr. Cato with the guns. According to Ms. Porter, Mr. Johnson did not extend his arms until Mr. Cato had gone to the back of his car. There was also no ballistic evidence to support his use of two guns as opposed to a single 9-millimeter.

statutory right." *See* 20 O.S.2011, § 3001.1. The manslaughter instructions would have provided a means for the jury to give effect to doubts as to malice aforethought and still provide an opportunity to convict Mr. Johnson of an appropriately serious crime. The trial judge deprived Mr. Johnson of a fair trial by not instructing on any lesser offenses despite that the evidence supported first degree manslaughter based on two theories: heat of passion and imperfect self-defense. Accordingly, Mr. Johnson's conviction and sentence must be reversed.

PROPOSITION II

PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

Prosecutorial misconduct occurred during the State's closing arguments, when it argued facts not in evidence, misstated the law of self-defense, compared Mr. Johnson's situation to that of Mr. Cato, and inflamed the passions and prejudices of the jury. Defense counsel objected to the State's argument of facts not in evidence (Proposition II(A)). However, it did not object to the rest of the prosecutorial misconduct alleged here (Proposition II(B-D)).[19] Therefore, with the exception of Proposition (II)(A), which should be reviewed for abuse of discretion, appellate review of this claim is subject to a plain error analysis.

A. Argument of Facts Not in Evidence

The State is prohibited from commenting on facts not in evidence or misstating the evidence presented. *See Miller v. Pate*, 386 U.S. 1, 6-7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *Coulter v. State*, 1987 OK CR 37, 734 P.2d 295, 302; *Tucker v. State*, 1972 OK CR 170, 499 P.2d 458, 461. In closing, the State argued, "Does 14 shots into a person, most of which were done when he was laying on the ground bleeding out, sound reasonable?" (Tr. 507) The State later made this same argument when it asked, "After that [first] shot, how big of a threat was he when

[19]This failure is addressed in Proposition III(A)(4).

he's lying on the ground bleeding out from his artery? . . . How about after the second shot?" (Tr. 532)[20] However, no evidence was presented about how many shots Mr. Cato sustained while standing versus on the ground. This improper argument prejudiced Mr. Johnson, as it was damaging to his claim of self-defense.

B. Misstatement of the Law of Self-Defense

Throughout its closing, the State misled the jury regarding the law on self-defense. This Court has repeatedly held, "Prosecutors should not misstate the law in closing argument." *Florez v. State*, 2010 OK CR 21, 239 P.3d 156, 158 (citing *Brewer v. State*, 2006 OK CR 16, 133, P.3d 892, 894; *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 316; *Hooks v. Workman*, 606 F.3d 715 (10th Cir. 2010); *Miller v. State*, 1992 OK CR 77, 843 P.2d 389, 390). "Prosecutors should not mislead jurors in closing argument, particularly when the misleading statements involve incorrect statements of law." *Id.* (Citations omitted).

In violation of this Court's longstanding law, the State repeatedly misled the jury as to the law of self-defense during its closing argument in Mr. Johnson's case. First, it implied that if the jury found Mr. Johnson intended to kill Mr. Cato, it could not acquit Mr. Johnson and instead must find him guilty of first degree murder. Certainly, that might have been the case if Mr. Johnson had not claimed self-defense and the jury had not received an instruction on it. The State argued:

> He tells you his client had no intent to kill. To that I respond, which one of these was an intent to wound? Which one of these was an intent to just make him stop, stop lying on the ground bleeding out? If you're going to not intend to kill someone when you're shooting them 14 times, then why does the ME diagram look like a pin cushion to his head? Your common sense, when you point a gun and you pull a trigger, if you want to kill someone, you shoot them in the heart, you shoot them in the head. Make no mistake about it, there were no

[20]The State asked this question about each of the fourteen shots. Defense counsel repeatedly objected to this line of questioning, based on "facts not in evidence." (Tr. 532-33) The court overruled the objections and told the jury "[B]oth closing arguments are for persuasive purposes only. You are the judges of facts." (Tr. 533) Instead, the court should have sustained the objection and admonished the jury to disregard the argument. Its failure to do so was an abuse of discretion.

> gunshots that went anywhere else besides around his body on the ground – which I'll get to – his head, his neck, his shoulders. These aren't shots in the foot. No intent to kill. If this isn't intent to kill, then there's – nothing is and nothing ever could be.

(Tr. 530) Contrary to the State's argument, Oklahoma's law of self-defense does not require a mere intent to wound as opposed to an intent to kill. Instead, this Court has held, "Self-defense is an affirmative defense which **admits the elements of the charge**, but offers a legal justification for conduct which would otherwise be criminal." *Davis*, 268 P.3d at 114 (emphasis added) (citations omitted). Thus, contrary to the State's argument, in claiming self-defense in a first degree malice aforethought murder case, a defendant admits not just an intent to wound, but an intent to kill, and offers a justification for it.

The State further misled the jury on the law of self-defense by implying Mr. Johnson had a duty to retreat:

> And if you're worried or in fear of some sort of immediate risk of death or great bodily injury that's objectively reasonable, why on earth are you standing there like this? Why on earth are you listening to everyone else when, I don't know, you had a car, you had a cell phone, you could have driven away at any moment?

(Tr. 537) The State went on to argue, "You don't get to draw guns and shoot people just because you didn't like what's happening. He could have left and because what did he do right after he shot him? Well, I don't know. He left." (Tr. 537-38) Contrary to this argument, the law in Oklahoma is that a "person who was not the aggressor has no duty to retreat, but may stand firm and use the right of self-defense." Instruction No. 8-52, OUJI-CR (2d). Although the jury received this instruction, "[j]urors' only frame of reference regarding the meaning of the instruction was the misstatement of law they had just heard." *Florez*, 239 P.3d at 159.

The State also inexplicably argued, "There's a difference between wanting to and having to to [sic] save your life, and our law makes a distinction. And it should make the distinction because we are a nation of laws. We don't live in the

wild west." (Tr. 537) The prosecutor did not explain to which laws he was referring. To Appellant's knowledge, the law does not in fact distinguish between "wanting to and having to save your life." If a defendant has a reasonable belief of imminent danger of death or great bodily harm, he is entitled to use deadly force because he wants or has to save his own life.

The State also improperly suggested to the jury that because Mr. Johnson's case did not fit the fact pattern of a particular hypothetical self-defense case, it could not be self-defense. The State argued, "This isn't a case where the victim is on top of the defendant and he is flailing on him so the defendant has to make one shot and angles up and then he calls 9-1-1, and the person, unfortunately, dies. This isn't that case." (Tr. 538-39) The State was correct; these were not the facts of Mr. Johnson's case. But it was misleading for the State to imply that because Mr. Johnson's was not "that case," it could not also be a case of self-defense.

Finally, the State improperly suggested to the jury that even if it believed Mr. Johnson's self-defense claim, it should not acquit him. In closing, the prosecutor argued:

> We are asking you to look at all the evidence. But don't get so confused and so tripped up by the back story that it somehow unravels into, Well, I guess it's okay for him to shoot [Mr. Cato] in the head ten times and four times in other places. No, that's not how it works. Thankfully.

(Tr. 542) To the contrary, that is exactly "how it works," if, when the jury considered all the evidence and the "back story," it found that the State had not proven beyond a reasonable doubt that Mr. Johnson did not kill Mr. Cato in self-defense. In that case, the jury was perfectly entitled – and in fact, was required by the law – to decide, "Well, I guess it's okay for him to shoot [Mr. Cato] in the head ten times and four times in other places." (Tr. 542) The State later argued, "Don't ever forget when you're back there that an argument about this, the car that couldn't move, with questionable ownership, where the city or the State is bugging

for it to get towed, should never ever lead to this." (Tr. 550) Again, this argument is misleading, as it is entirely acceptable, under the law, for that scenario to "lead to this," *if Mr. Johnson killed Mr. Cato in self-defense*, as he claimed. To suggest to the jury that there was no way to legally justify Mr. Johnson's actions is inconsistent with the law of self-defense.

In *Florez*, the State misled the jurors in closing by telling them that "under the 85% Rule [the defendant] would be freed before he served the full term of any sentence imposed." 239 P.3d at 158. As the Court held, this is contrary to the law, as "[t]he statute requires, rather, that a defendant must serve a mandatory minimum term of years before early release may be considered." *Id.* This Court found that the prosecutor "flatly misstat[ed] the law's intention and effect, and thus encourag[ed] jurors to misapply the law in considering an appropriate punishment." *Id.* Here, too, the State repeatedly misstated the intention and effect of the law of self-defense, and thus encouraged jurors to misapply the law. In *Florez*, the Court held that "[i]n another case this misstatement of law would require either reversal for resentencing or sentence modification," but that in this case, no relief was required, because "[g]iven the disparity between the possible maximum sentence and the sentence imposed, and the fact that jurors chose a sentence half as long as that which the prosecution requested, Florez fails to show he was prejudiced by this error." *Id.* at 159 (citations omitted). Unlike the defendant in *Florez*, Mr. Johnson was prejudiced by this error; he received the maximum sentence of life imprisonment without the possibility of parole.

C. Comparison of Mr. Johnson's Situation to That of Mr. Cato

In closing, the State improperly compared Mr. Johnson's situation with that of Mr. Cato. The State argued, "[Y]ou don't deserve to be back in our society. You don't deserve that 38 years and 3 months consideration. You deserve to die in prison because the victim got a death sentence and he was a human being. Don't

ever forget that." (Tr. 550) The State also argued, "He didn't give him the benefit of due process, he gave him a death sentence on sight." (Tr. 537) In fact, during its closing argument, the State referred to Mr. Cato's "death sentence" seven times (Tr. 534, 535, 536, 537, 541, 549, 550), and to his "execut[ion]" once (Tr. 541). The clear implication was that because Mr. Cato had not received due process and had received "a death sentence," Mr. Johnson should also receive the harshest available sentence, life imprisonment without the possibility of parole. The State argued:

> When you think about punishment, you should consider this, Mr. Cato got a death sentence and he was a human being. And in a murder case, you don't ever get to hear from the victim. Their lips are sealed from the grave because of the actions of the person in this courtroom. He will never face a parole board 38 years and 3 months from now, he'll still be dead . . . .

(Tr. 549) It was improper for the State to imply that because Mr. Cato could never receive due process or a parole hearing, Mr. Johnson should suffer the same fate.

This Court has repeatedly denounced this kind of argument. In *Short v. State*, 1999 OK CR 15, 980 P.2d 1081, 1105, the prosecutor commented "that it was not justice to allow the defendant three meals a day, a clean place to sleep, and visits by his friends while the victim's mother daily grieves for her only son." This Court found, "This type of argument has been repeatedly condemned by this Court." *Id.* (Citations omitted.)In *Powell v. State*, 2000 OK CR 5, 995 P.2d 510, 539, this Court found, "The prosecutor . . . argued improperly, 'Is there any rightness to her, where she's at, in the grave, allowing him to live in the sun, receive his meals every day, lay on clean sheets every night, think about ways to manipulate the system until his next visit or letter. Is that right.'" The Court(quoting *Duckett v. State*, 1995 OK CR 61, 919 P.2d 7, 19) held, "[T]hese kinds of comments cannot be condoned. There is no reason for them and counsel knows better and does not need to go so far in the future." *Powell,* 995 P.2d at 539 (internal quotation marks omitted). In *Malone v. State*, 2007 OK CR 34, 168 P.3d 185, 232-33, this Court overturned a death sentence due, in part, to a prosecutor's improper comparison of the defendant's limited human contact under a life sentence with his deceased

victim's complete absence of human contact. In *Malone*, this Court found, "[T]he prosecutor's comparison of Malone's situation . . . with that of his dead victim . . . is yet *another* version of the infamous, but ever-popular, 'three hots and a cot' argument that this Court has so strenuously, but unsuccessfully, sought to eliminate from the Oklahoma prosecutorial repertoire of favorite, death-seeking, closing argument incantations." *Id.* at 232 (emphasis in original.) *See also Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 316-17 & n.55 (condemning such arguments and listing in a footnote the numerous cases in which prosecutors have flagrantly ignored this Court's rulings). Although the cases cited here were death penalty cases and Mr. Johnson's case was not, the State was similarly using the relative circumstances of Mr. Johnson and Mr. Cato to argue that only the harshest punishment would be fair. The prosecutor's comments were, therefore, yet *another* variation of the impermissible "three hots and a cot" argument and should, likewise, be condemned.

The argument comparing the situation of the defendant to that of the alleged victim was particularly egregious in this case. In part, the State argued, "He didn't give him the benefit of due process, he gave him a death sentence on sight." (Tr. 537) The implication was that because Mr. Cato had not received "the benefit of due process," Mr. Johnson should not either. To the contrary, due process is a fundamental right guaranteed to defendants by the Fifth and Fourteenth Amendments to the United States Constitution, and Article 2, Sections 7 and 20, of the Oklahoma Constitution.

This Court has remanded other cases based on improper arguments by prosecutors regarding defendants' exercise of their constitutional rights. Recently, in *Barnes v. State*, 2017 OK CR 26, 408 P.3d 209, 213-14, this Court vacated the defendant's sentences and remanded for resentencing, due to improper comments by the State during closing. This Court found, "The prosecutor's commentary on Appellant's decision to exercise his right to trial, rather than plead guilty, is nothing short of alarming." *Id.* at 214. This Court held:

> [A] criminal defendant possesses an *absolute* constitutional right to

> plead not guilty and be tried before a jury, and should not and cannot be punished for exercising that right. . . . To this end, a defendant's decision to exercise this constitutionally protected right is a fact which cannot be used against him at trial to influence the jury in their guilt or sentencing determinations.

Id. (Citations omitted; emphasis in original.) The Court called the State's argument "nothing less than an assault on Appellant's decision to exercise his constitutional right to trial." *Id.* at 214-15. The Court held, "This type of argument is constitutionally impermissible and cannot be condoned." *Id.* at 215 (citing *Darden*, 477 U.S. 168, 182, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d. 144, 158 (1986) (prosecutorial misconduct during closing argument may infect trial with constitutional error when it "implicate[s] . . . specific rights of the accused"). In *Barnes*, the Court cited to its holdings in prior cases that "[i]t is error for the prosecutor to comment – either directly or indirectly – at any stage of trial – upon the defendant's right to remain silent." 408 P.3d at 214 (citations and internal quotation marks omitted).

This Court should find that it was improper for the State to suggest that because Mr. Cato did not have the "benefit of due process," Mr. Johnson also should not get that benefit. Just as a defendant has an absolute constitutional right to be tried by a jury and to remain silent, a defendant has an absolute constitutional right to due process. As this Court has found it to be error for the State to comment on a defendant's rights to a jury trial and to remain silent, it should find that it is error for the State to comment on a defendant's right to due process, as the State did here.

It was wholly improper for the State to compare the situations of Mr. Cato and Mr. Johnson at all. It was particularly improper for the State, in so doing, to suggest that Mr. Johnson was not entitled to due process. As a result, Mr. Johnson's judgment and sentence should be reversed.

D. Inflaming the Passions and Prejudices of the Jury

Although the jury was appropriately instructed not to "let sympathy, sentiment or prejudice enter into [its] deliberations" ((O.R. 155); Instruction No.

10-8, OUJI-CR (2d)), the State improperly appealed to the jurors' emotions during its closing argument, in violation of the instruction and longstanding Oklahoma law. This Court has held, "It is well established that . . . the prosecutor cannot make comments expressly designed to appeal to the jury's emotions." *Capps v. State*, 1984 OK CR 8, 674 P.2d 554, 557. In *Ward v. State*, 1981 OK CR 102, 633 P.2d 757, 759, this Court found, "Even in light of the overwhelming evidence of the appellant's guilt, the prosecutor's remarks are so prejudicial as to require this Court to reverse. We will not tolerate arguments grossly unwarranted and calculated solely to inflame the passions and prejudices of the jury." *Id.* at 759-60.

In this case, the State made multiple arguments that were "calculated solely to inflame the passions and prejudices of the jury." *Id.* In Proposition II(B), Mr. Johnson argued about the impropriety of the State's comments comparing the relative situations of Mr. Cato and Mr. Johnson. In addition to Mr. Johnson's complaints above regarding these comments, he adds here that these comments – the State's repeated references to Mr. Cato's "death sentence" or "execut[ion]," and to the fact that Mr. Cato did not get due process and would never have the opportunity to face a parole board – were also designed to inflame the passions of the jury.

In addition to these arguments complained of above, the State argued in closing, "That's not self-defense, that's murder. That's annihilation." (Tr. 533) The State later argued:

> There are cases where there are [sic] one shot where life's appropriate. But when you try to annihilate somebody as they're laying on the ground languishing, probably hanging by a thread when you try to annihilate them and make sure they're wiped clean off the face of this earth, you don't deserve to be back in our society.

(Tr. 549-50) The State also argued, "So off this planet goes Mr. Cato because defendant wanted to." (Tr. 537) The State's repeated use of the word "annihilate," and its argument that Mr. Johnson tried to "make sure [Mr. Cato was] wiped clean off the face of this earth" or "planet" were designed to appeal to the jurors' emotions. These comments by the State deprived Mr. Johnson of his fundamental

right to a fair and impartial trial.

In *Hager v. State*, 1980 OK CR 51, 612 P.2d 1369, 1373, this Court found that the appellant was denied a fair and impartial trial because "[f]rom a careful reading of the closing arguments, one can only conclude that the prosecuting attorneys intentionally set their arguments on an emotional level in order to insure a conviction. . . ." Similarly, the arguments by the State in this case – that Mr. Johnson gave Mr. Cato a death sentence without due process, that Mr. Cato would never have a chance to face a parole board, and that Mr. Johnson tried to annihilate Mr. Cato and wipe him off the face of the earth – were set on an emotional level. They were entirely irrelevant to the State's case and improperly allowed.

E. Conclusion

Even though defense counsel failed to object or to request that the jury be admonished, the trial court had an obligation to ensure the State's argument to the jury was kept within "proper, accepted bounds." *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220. This Court has reversed cases where "the combined effect of the improper prosecutorial comments 'was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings.'" *Id.* (Citations omitted.) "If it appears that unfair tactics and not the evidence standing alone, may have resulted in the conviction, we cannot hold that a fair and impartial trial has been accorded the defendant." *Gossett v. State*, 1962 OK CR 75, 373 P.2d 285, 289. Here, the trial court failed to keep the State's arguments within proper bounds and unfairly prejudiced Mr. Johnson, denying his right to a fair trial. In *Sykes v. State*, 1951 OK CR 154, 238 P.2d 384, 388, this Court noted that "where the state has made an error and there is any doubt at all as to whether improper argument has affected the trial, the benefit of the doubt should be given to the accused." Even if Mr. Johnson would have been convicted regardless of the State's improper arguments, they likely impacted the jury's decision to give him the maximum sentence. Because there was plain error depriving Mr. Johnson of his right to a fair trial, his conviction must be reversed and his sentence vacated.

PROPOSITION III

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

The Sixth Amendment guarantees a criminal defendant the reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687,694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674 (1984). To make out a claim of ineffective assistance of counsel, Mr. Johnson must show that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Id.* at 687. Deficient performance means counsel's representation fell below an "objective standard of reasonableness." *Id.* at 687-88. Prejudice is shown by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The reasonable probability standard does not require a showing of prejudice beyond a reasonable doubt, by clear and convincing evidence, or even by a preponderance of the evidence; rather, it merely requires a showing "sufficient to undermine confidence in the outcome." *Id.* at 694-95; *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389(2000) (O'Connor, J., concurring); *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002). Otherwise competent counsel may nevertheless render ineffective assistance if he makes critical errors that prejudice his client. *Williamson v. Reynolds*, 904 F. Supp. 1529, 1552 n.9 (E.D. Okla. 1995), *aff'd in part, rev'd in part Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) (on other grounds). As shown below, Mr. Johnson's trial counsel, Brian Boeheim and Ciera Freeman, provided ineffective assistance of counsel by failing to present expert testimony, failing to adequately cross-examine Shannon Cage, failing to marshal the evidence in closing argument, failing to request a first degree manslaughter instruction based on a theory of imperfect self-defense, and failing to object to prosecutorial misconduct.

A. Deficient Performance

1. Failure To Properly Utilize Available Evidence

The Sixth Amendment imposes on counsel certain basic duties, including "a

duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. Even before *Strickland*, this Court indicated that it was counsel's duty to investigate and use relevant evidence helpful to the defendant. In *Smith v. State*, 1982 OK CR 143, 650 P.2d 904, 906-08, counsel inexplicably failed to call an available witness in support of the defendant's insanity defense. In response to this omission, this Court quoted the American Bar Association Standard for Criminal Justice, Defense Function 4-4.1, which states that, "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and *to explore all avenues leading to facts relevant to the merits of the case* and the penalty in the event of conviction. (Emphasis added)." *Id.* at 907-08 (internal quotation marks omitted). This Court has found a violation of the Sixth Amendment right to counsel when counsel has failed to investigate or utilize important impeachment evidence, exculpatory evidence, or a well-founded defense. *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597, 601; *Wilhoit v. State*, 1991 OK CR 50, 816 P.2d 545, 546-47; *Jennings v. State*, 1987 OK CR 219, 744 P.2d 212, 214-15; *Galloway v. State*, 1985 OK CR 42, 698 P.2d 940, 941-42.

a. Failure to Utilize Available Extra-Record Evidence by Presenting Expert Testimony

Mr. Johnson has filed an Application for Evidentiary Hearing on Sixth Amendment Claim ("Application") concurrently with this brief, in accordance with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), in which he alleges that trial counsel were ineffective for failing to present the testimony of an available expert, Dr. Benjamin Silber, Ph.D.. This extra-record claim (Application, Claim One) should be considered with the remainder of Mr. Johnson's claims in order to determine whether counsel's representation, as a whole, fell below minimal constitutional standards of effective representation.

In response to Mr. Johnson's self-defense claim, the State argued that Mr. Johnson's fear was not reasonable, and emphasized that he shot Mr. Cato fourteen

times.[21] It was critical for the defense to present an expert to show how Mr. Johnson's fear was, in fact, reasonable, and how he could have been acting in self-defense for all fourteen shots. Dr. Silber, a clinical psychologist with a forensic psychology practice, could have shed light on this by testifying about Mr. Johnson's extensive psychological background, which includes symptoms and/or diagnoses of PTSD, autism, bipolar disorder, and cognitive impairment or deficits. At Mr. Johnson's formal sentencing, the trial court told Mr. Johnson, "[S]ir, in the time that I've been up here in this criminal justice system, this is one of the most senseless killings I've seen." (S. Tr. 6-7) Mr. Johnson's psychological background was the key to explaining this case to the jury and judge, and defense counsel's failure to reveal this background to the jury constituted deficient performance.

The record shows that defense counsel were aware of Mr. Johnson's psychological issues, and that counsel's theory of the case was that those issues were critical to his claim of self-defense, particularly as they explained why Mr. Johnson shot Mr. Cato fourteen times. However, counsel inexplicably abandoned this theory during the trial, without ever presenting any evidence in support of it.

On Defendant's Discovery Material and Indorsement of Witnesses, Mr. Boeheim listed only one witness he intended to call in Mr. Johnson's defense: Courtney E. Salsberry. (O.R. 73-75) Mr. Boeheim wrote, "Ms. Salsberry is the Defendant's oldest sister. She will testify to the Defendant's learning disability and childhood diagnosis of autism." (O.R. 73-75) At the pre-trial hearing regarding motions *in limine*, the following exchange occurred:

> Mr. Keller: I didn't address this in my motions and I do apologize, but I caught it recently. I looked at defendant's witness list and they propose to call a person who is defendant's older sister to say that

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[21]The State argued, "Now, you also heard the judge read an instruction about self-defense. I want you to focus on the language of that self-defense instruction. It uses words like justified, reasonable, necessary. Does 14 shots into a person, most of which were done when he was laying on the ground bleeding out, sound reasonable? Sound justified? Sound necessary?" (Tr. 507)

the defendant has a learning disability and a childhood diagnosis of autism.

The Court: Yeah, basically, how's that relevant?

Mr. Boeheim: Well, it goes to self-defense. He – in his situation, you have an individual who's going to react slightly differently and it's his perception of the potential violent act. The – and if you will – well, let's, you know, like talking – . . .

The Court: Did they examine him or something?

Mr. Boeheim: It's his sister and he's – he has a medical diagnosis. . . . Part of the State's case is gonna be involving the number of shots fired involved in this particular process. And it's our argument that unlike – there are certain people, and my client is one of them, that once he starts a particular process he cannot but finish it. If he starts a puzzle, he's going to continue to finish the puzzle. He cannot stop, especially in a high-agitated state. That is an autistic sense. What we're asking Ms. Salsbury [sic] to come in and testify to is that she has observed in her brother this process where he needs to finish and complete projects.

(Hrg. Tr. 18-20) The trial court ruled, "I'd like to get a little bit more information on the case before I can make an educated decision on that. So I'll take that under advisement." (Hrg. Tr. 20) The trial court ruled that it would allow defense counsel "general questioning" about autism during voir dire. (Hrg. Tr. 22)

At the beginning of voir dire, the Court asked Mr. Boeheim if he wanted the court to read any witnesses' names to the jurors. (Tr. 17) Defense counsel responded, "Yes, Your Honor. Courtney Salsbury [sic]." (Tr. 17) Later that day, defense counsel noted that Ms. Salsberry "has raised her hand as my witness, talked with Mr. Keller." (Tr. 126) Counsel asked that the rule of sequestration not apply to Ms. Salsberry, as "her testimony would purely – is very narrow and has no direct tie or connection to any of the events of the day or any of his witnesses." (Tr. 126-27) The court granted that request. (Tr. 127) The next day, still during voir dire, the State requested to make a record on "my previous oral motion in limine for the autism issue." (Tr. 160-61) The prosecutor explained:

> I know that we had discussed and I did not object to limited questions on autism by the defense attorney in voir dire based on the recent jail

> call that the prosecutors have listened to where the mom of the defendant told the defendant to act autistic and not look people in the eye. We are starting to think that maybe this is not them – not the defense attorney's [sic] but the defendant himself being genuine about this issue.[22] So we would ask for the Defense to refrain to be able to talk about it during voir dire.

(Tr. 161) The trial court ruled:

> I am still gonna allow a couple of general questions about autism, albeit – I guess now you have, you know, some information that if they decide to go that route. I still haven't – just for purposes of the record, I still have not allowed this into trial. I'm still not quite sure why it's relevant but I'm gonna give them some latitude but certainly with this latest thing that you've told me, that will give them food for thought. But I'll allow him still to ask a couple of questions if he wants to.

(Tr. 161)

During voir dire, defense counsel did, as planned, ask prospective jurors whether they had any family members with autism, and if so, what traits they displayed. (Tr. 190-92) However, that was the last mention of autism at the trial. Inexplicably, defense counsel abandoned their theory of the case before the judge ever made a ruling on the admissibility of the evidence counsel planned to introduce in support of it: Mr. Johnson's sister, Ms. Salsberry. Although Ms. Salsberry was present at the trial (Tr. 17, 126-27), she was never called to testify.

At Mr. Johnson's formal sentencing, defense counsel again raised the issue:

> Also, I'd like to emphasize on the presentence investigation. The mental health information that we shared with the investigator, very clearly we – you know, we gave them the medical records for Mr. Johnson, you know, showing that he's diagnosed with bipolar disorder, panic disorder, and anxiety, autistic – and most importantly autistic disorder. These are all things that for several reasons didn't come out in trial. And though I believe have clear inference to the actions that my client took, not towards his innocence or guilt because, obviously, the State would argue and I believe the jury made their decision of the number, you know, life – life without patrol [sic] because of the

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[22]This argument, as transcribed by the court reporter, is confusing. Appellant believes it was transcribed with incorrect sentence breaks and should have been transcribed as follows: "I know that we had discussed and I did not object to limited questions on autism by the defense attorney in voir dire. Based on the recent jail call that the prosecutors have listened to where the mom of the defendant told the defendant to act autistic and not look people in the eye, we are starting to think that maybe this is not them – not the defense attorney's [sic] but the defendant himself being genuine about this issue."

> number of shots, number of wounds on the victim. The autistic behavior would account for that.

(S. Tr. 4) Thus, defense counsel remained aware of the criticality of this evidence. However, at sentencing, this argument was too late. The jury had already rejected Mr. Johnson's self-defense claim, never having heard the crucial evidence that supported it.

Defense counsel was ineffective in failing to present an expert to support their theory of the case – that Mr. Johnson's psychological issues contributed to his fear and actions in shooting Mr. Cato fourteen times. Even if defense counsel had ultimately attempted – as initially planned – to call Ms. Salsberry to the stand, the trial court likely would have deemed her proposed testimony irrelevant. Without the testimony of an expert to explain how Mr. Johnson's psychological issues could have contributed to his fear and actions, Ms. Salsberry's testimony would not have been relevant to Mr. Johnson's claim of self-defense.

Expert testimony regarding Mr. Johnson's psychological background was not only relevant to his claim of self-defense, but was critical to it. As the trial court correctly instructed the jury:

> A person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to prevent death or great bodily harm to himself or to terminate or prevent the commission of a forcible felony against himself. Self-defense is a defense although the danger to life or personal security may not have been real, if a reasonable person, **in the circumstances and from the viewpoint of the defendant**, would reasonably have believed that he was in imminent danger of death or great bodily harm.

(O.R. 164) (emphasis added); Instruction No. 8-46, OUJI-CR (2d). Without expert testimony, it was impossible for the jury to determine if a reasonable person, in the circumstances and from the viewpoint of Mr. Johnson, would reasonably have believed that he was in imminent danger of death or great bodily harm. This Court has clarified:

> While the instruction explicitly states that the fact finder **should**

> **assume the viewpoint and circumstances** of the defendant in assessing the reasonableness of his or her belief, i.e. subjective, it also requires the defendant's viewpoint to be that of a reasonable person, **in similar circumstances, and with the same perceptions**, i.e., objective. Thus, Oklahoma's standard is a hybrid, combining both the objective and subjective standards.

Bechtel v. State, 1992 OK CR 55, 840 P.2d 1, 11 (emphasis added). An expert, such as Dr. Silber, could have explained Mr. Johnson's subjective viewpoint and circumstances to the jury. Without his testimony, it was impossible for the jury to follow the law by assessing the objective reasonableness of the defendant's belief with respect to his subjective viewpoint and circumstances.

As explained in more detail in the Affidavit of Dr. Silber (attached to the Application as Exhibit 1), he would have testified that Mr. Johnson's school and medical records suggest he displays many symptoms of, and likely has, Posttraumatic Stress Disorder ("PTSD") and cognitive impairment or deficits; and that he has been diagnosed multiple times with autism and bipolar disorder. Dr. Silber would have testified about the various ways in which these issues would have contributed to Mr. Johnson's fear and reaction when he killed Mr. Cato.

This Court has previously deemed mental health evidence to be relevant to claims of of self-defense. In *Bechtel*, the appellant argued that "expert testimony regarding [Battered Woman Syndrome] is admissible to help the jury understand the battered woman, and, why Appellant acted out of a reasonable belief that she was in imminent danger when considering the issue of self-defense." 840 P.2d at 8. This Court agreed, finding:

> The key to the defense of self-defense is reasonableness. A defendant must show that she had a reasonable belief as to the imminence of great bodily harm or death and as to the force necessary to compel it. **Several of the psychological symptoms that develop in one suffering from [Battered Woman Syndrome] are particularly relevant to the standard of reasonableness in self-defense. One such symptom is a greater sensitivity to danger** . . . .

Id. at 10 (emphasis added). The Court continued:

> Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger, under other

> circumstances this would not be so. . . . Indeed, **considering her particular circumstances the battered woman's perception of the situation and her belief as to the imminence of great bodily harm or death may be deemed reasonable.**

Id. (Emphasis added.) Similarly, as explained in Dr. Silber's affidavit (App., Ex. 1), several of the psychological symptoms that develop in a person with PTSD, autism, bipolar disorder, and cognitive deficits are "particularly relevant to the standard of reasonableness in self-defense." *Id.* As in *Bechtel*, "[C]onsidering [Mr. Johnson's] particular circumstances," Mr. Johnson's "perception of the situation and [his] belief as to the imminence of great bodily harm or death may be deemed reasonable." *Id.*

In his concurrence in *Bechtel*, Judge Parks noted, "Allowing the jury to consider the circumstances from appellant's viewpoint in assessing reasonableness is not a novel concept . . . ." *Id.* at 15 (Parks, J., concurring in results). Judge Parks cited the following of this Court's cases and holdings:

> *Guthrie v. State*, [1948 OK CR 58], 194 P.2d 895 (1948)(Jury was correctly instructed that they must place themselves in the defendant's situation and view the circumstances as they reasonably appeared to defendant); *Murphy v. State*, [1941 OK CR 53], 112 P.2d 438 (1941) (Defendant's guilt turns upon the circumstances as they appeared to him); *Lary v. State*, [1931 OK CR 83], 296 P. 512 (1931) (The act of the defendant in slaying the deceased is to be viewed from his standpoint, as the circumstances at the time reasonably applied to him); *Fulton v. State*, [1927 OK CR 104], 254 P. 761 (1927) (Self defense requires a reasonable man, situated as the defendant was, seeing what he saw and knowing what he knew, to believe himself in danger); *Jamison v. State*, [1926 OK CR 389], 250 P. 548 (1926) (Circumstances and appearances relied upon as creating an apprehension of danger must be viewed from the defendant's standpoint and be sufficient to cause the defendant, situated as he was, as a reasonable person, an apprehension of danger); *Brown v. State*, [1923 OK CR 204], 216 P. 944 (1923) (In determining whether homicide was justified, circumstances must be viewed as they appeared to the defendant when he killed the deceased).

Id. at 15 (Parks, J., concurring in results).

As Battered Woman Syndrome is relevant to a claim of self-defense, so, too, are other psychological issues. This Court has held:

> It is generally accepted that evidence of PTSD, like battered woman and child syndromes, is relevant when the accused kills his or her abuser. . . . This Court has not addressed to what extent an accused's

> PTSD is relevant to prove the accused's belief was reasonable in a case where the accused and the aggressor/victim have no prior violent history. Other jurisdictions are divided on the admissibility of PTSD in first stage to support a claim of self-defense when the accused does not kill his or her abuser.

Perryman v. State, 1999 OK CR 39, 990 P.2d 900, 904 (citations omitted).[23] However, in *Mulkey v. State*, 1911 OK CR 41, 113 P. 532, this Court was clear: "It is a general rule that, in cases in which a *prima facie* case of self-defense is made out, evidence of **any facts or circumstances likely to show the condition of the defendant's mind as to the necessity of self-defense** is admissible." (Emphasis added.) In Mr. Johnson's case, the trial court held that a *prima facie* case of self-defense was made out. (Tr. 487-88) As a result, all evidence of the condition of Mr. Johnson's mind as to the necessity of self-defense was admissible. Defense counsel's failure to present this evidence, which was critical to its theory of self-defense, was not strategic.

In *Guthrie v. State*, 1948 OK CR 58, 194 P.2d 895, 896. 901, the defendant, who was blind, claimed he had acted in self-defense. On appeal, he argued the court erred in failing to give a particular instruction on self-defense; this Court did not find this claim meritorious, as the trial court had given a "lengthy statement of the law pertaining to the plea of self-defense." *Id.* at 901. This lengthy statement included the following: "It is not necessary to this defense that the defendant's danger should have been actual or real, all that is necessary is that the defendant, *from his standpoint*, under all the circumstances in the case had reasonable cause to believe and did honestly believe that fact." *Id.* at 902 (emphasis in original). The Court noted that "[i]n discussing this proposition, counsel dwells upon the handicaps of a blind person and states that he should not be treated as a person who has the sense of sight." *Id.* at 902. This Court held:

> We who have no physical handicaps, at least to the extent of being deprived of the sense of sight, find it difficult to place ourselves in the

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[23]Dissenting in *Bechtel*, then-Vice-Presiding Judge Lumpkin wrote, "While I agree that evidence of the Post-Traumatic Stress Disorder, which is accepted as a standard for diagnosis in the medical community, would be relevant evidence in a proper case to provide a jury with the medical and psychological diagnostic criteria required to determine the reasonableness of a defendant's actions, it is not relevant here." 840 P. 2d at 18 (Lumpkin, V.P.J., dissenting).

> position of the defendant.... **The defendant had a legal right and the trial court allowed him to detail at length the various sensations which he sustained and the impressions which were made upon his mind which caused him to think he was about to be assaulted by the deceased.**

Id. at 902 (emphasis added). In that case, "The defendant was not convicted because the jury was improperly instructed. The jury just didn't believe the testimony of the defendant." *Id.*[24] This Court held:

> With some limited knowledge of these apparently uniform characteristics of the blind, of having the remainder of their senses more highly developed, we have endeavored to place ourselves in the position of the defendant at the time of the fatal difficulty and view the situation as it then appeared to him.... It was the function of the jury to determine this question.... [We] have endeavored to view the circumstances as best we could from his standpoint ....

Id. at 903. In Mr. Johnson's case, too, it was the jurors' function, "[w]ith some limited knowledge of these apparently uniform characteristics of" people with his combination of psychological issues, to "place [them]selves in the position of the defendant at the time of the fatal difficulty and view the situation as it then appeared to him." Due to defense counsel's failure to present expert testimony, the jurors were not given that opportunity.

Just as this Court found the physical handicap of the *Guthrie* appellant to be critical to the jury's analysis of his self-defense claim, it should find Mr. Johnson's psychological challenges to be critical to his self-defense claim. In his paper, *Individualizing the Reasonable Person in Criminal Law*, Professor Peter Westen correctly argues, regarding "a simple minded giant of a man like Lennie in John Steinbeck's *Of Mice and Men*":

> Just as it is unfair to blame a blind person for failing to perceive what only a sighted person can see, it is unfair to blame Lennie for failing to draw inferences that only a person of average intelligence can draw. To avoid blaming the blameless, the criminal law must be willing to make allowances for individual traits in assessing individual

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[24]The Court found, "Undoubtedly, his blindness caused them to find him guilty of the lesser offense of manslaughter instead of the more serious crime of murder." *Guthrie*, 194 P.2d at 902. Mr. Johnson's jury did not have that opportunity, as it 1) improperly was not instructed on manslaughter (*see* Proposition I) and 2) did not hear any evidence of Mr. Johnson's psychological background.

blameworthiness.

Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, Crim Law and Philos. 137, 143-44 (2008) (citations omitted). Any determination of Mr. Johnson's reasonableness must take into account his particular combination of psychological issues, as "[t]o assess an actor's individual blameworthiness by idealized standards that make no allowance for traits over which he has no control is to risk blaming the blameless." Westen, *supra*, at 143.

Dr. Silber's testimony could have shown that Mr. Johnson's belief that he was in imminent danger was reasonable, given his viewpoint and circumstances. For example, Dr. Silber would have testified that according to Mr. Johnson's records, he witnessed the murder of an uncle at the age of nine, and there were other instances in which he had feared for his life. (App., Ex. 1, ¶ 6) Due to past experience, people with PTSD are "more likely to be hypervigilant by constantly looking for threats," and as a result, "they see situations as more threatening than they are." (App., Ex. 1, ¶ 7) Dr. Silber would have explained:

> Research shows that people with traumatic experiences in their pasts will often have chronically higher levels of stress hormones in their bodies. . . . A person with PTSD is more likely to shift into fight or flight mode than someone without PTSD, which can result in a person with PTSD responding more quickly . . . than would someone without PTSD.

(App., Ex. 1, ¶ 7) Mr. Johnson "may have incorrectly viewed Mr. Cato as more threatening due to his hypervigilance and other symptoms of PTSD and he may have responded more quickly . . . than someone without PTSD would." (App., Ex. 1, ¶ 7) Dr. Silber would have testified that it appeared "Mr. Johnson had an unstable childhood, which can cause chronic stress and exacerbate PTSD symptoms." (App., Ex. 1, ¶ 9) Furthermore, people with bipolar disorder, with which Mr. Johnson has been diagnosed, have difficulty managing their emotions, and "[i]f Mr. Johnson was experiencing a manic state at the time of the shooting, he may

have had difficulty managing his emotions (such as fear)." (App., Ex. 1, ¶ 10) In addition, "Mr. Johnson may have some degree of cognitive impairment or deficits," which could have "impacted Mr. Johnson's perception of the events surrounding the alleged offense, his ability to interpret information communicated to him, and his capacity to process the available information in a rapid and accurate manner." (App., Ex. 1, ¶ 11) Furthermore, Mr. Johnson has been diagnosed with autism, and people with autism "often misinterpret the intentions of other people." (App., Ex. 1, ¶ 12-13) Therefore,

> While a person with autism may not have assumed Mr. Cato was retrieving a gun or otherwise posing a threat, this is not necessarily the case for a person with autism. A person with autism likely would have a difficult time predicting or guessing what Mr. Cato's nonverbal behavior meant.

(App., Ex. 1, ¶ 13) Dr. Silber would have testified that people with autism "are more likely to read threatening or malicious intent because of experiences in the past where they thought behavior toward them seemed neutral but they were wrong." ((App., Ex. 1, ¶ 14) Mr. Johnson "may have read threatening or malicious intent in Mr. Cato's behavior when someone without autism would not have, particularly given Mr. Johnson's past experiences of fearing for his life." (App., Ex. 1, ¶ 14) Given all these circumstances beyond Mr. Johnson's control, it was reasonable for him to believe that he was in imminent danger of death or great bodily harm. This evidence was not only relevant but critical to the jury's assessment of the reasonableness of his belief.

Dr. Silber also could have explained how it was possible for Mr. Johnson to shoot Mr. Cato fourteen times in self-defense, given his particular viewpoint and circumstances. Dr. Silber would have told the jury that "chronically higher levels of stress hormones in their bodies" can cause a person with PTSD to "respond to a much greater extreme than would someone without PTSD." (App., Ex. 1, ¶ 7) He

would have testified:

> This response might seem unreasonable to other people, and even to the person with PTSD at a later time, but at the time of the response, it seems reasonable to that person, who is often experiencing symptoms such as a pounding heart and stress hormones flooding the body. It is difficult for a person with PTSD to "turn off" these responses. Thus, if Mr. Johnson was experiencing PTSD at the time he shot Mr. Cato, . . . he may have responded . . . in a more extreme manner than someone without PTSD would.

(App., Ex. 1, ¶ 7) Dr. Silber would have testified:

> Mr. Johnson's shooting Mr. Cato fourteen times may be related to certain attributes of PTSD. Sometimes, people with PTSD have difficulty processing the degree of the threat in a normal way and identifying when the threat is over. For a person without PTSD, when the threat is gone, their body calms back down, they reassess the threat, and they adjust their behavior accordingly. Research shows that for some people, especially people with PTSD, when something threatening happens, they are not able to quickly calm back down. . . . In some cases, a victim will stab their attacker many more times than necessary, due to how overwhelmed they feel by the threat. If Mr. Johnson had PTSD, his perception of threat could have lasted considerably longer than that of most people, even remaining after he had begun shooting. . . . Some people in these circumstances shoot until they have no more bullets left.

(App., Ex. 1, ¶ 8) Dr. Silber also would have testified:

> Mr. Johnson's shooting fourteen times could be caused by a "meltdown." Usually, if a person without autism is doing something for a specific purpose, they stop after they have achieved their desired result. . . . However, when a person with autism is having a meltdown, the meltdown does not end if they have achieved their desired result. Instead, a person with autism will keep going until they are done. . . .It is very atypical for a person with autism to volitionally end a meltdown. Therefore, Mr. Johnson may have been unable to stop shooting Mr. Cato once he began.

(App., Ex. 1, ¶ 21) Thus, this evidence could have combated the State's argument that Mr. Johnson could no longer be acting in self-defense by the fourteenth shot.

Trial counsel had a fundamental obligation to pursue the presentation of expert testimony about Mr. Johnson's viewpoint and circumstances, which were critical to the jury's assessment of his self-defense claim. *See Smith v. State*, 2006 OK CR 38, 144 P.3d 159, 168-69 (finding that counsel was deficient in deciding to

forego the hiring of an expert in order to determine viability of Battered Woman's Syndrome defense in first degree murder case, and that if testimony of qualified expert was presented to jury, appellant might have been acquitted instead of convicted of the lesser offense); *Jennings*, 744 P.2d at 214-15 (finding counsel ineffective for failing to present available evidence, including expert testimony, corroborating defendant's claim); *Holder v. United States*, 2006 WL 1728133, *28-29 (E.D. Okla. 2006) (finding counsel ineffective for failing to consult with and employ an expert witness in an attempt to counter the government's forensic experts). *Id.* at *27. In *Bechtel,* this Court held, "Expert testimony in Oklahoma is admissible if it will assist the trier of fact in search of the truth and augment the normal experience of the juror by helping him or her draw proper conclusions concerning particular behavior of a victim in a particular circumstance or circumstances." 840 P.2d at 8 (citations omitted). In *Smith v. State*, 144 P.3d at 166, this Court found that "*Bechtel* and *Paine* [*v. Massie*, 339 F. 3d 1194, 1204] clearly indicate that when a battered woman presents a defense of self-defense at trial, defense counsel should present the testimony of an expert on [Battered Woman Syndrome] in order to 'equip the jury to properly assess the reasonableness of [the defendant's] fear.'" Similarly, defense counsel in Mr. Johnson's case should have presented the testimony of a psychologist in order to equip the jury to properly assess the reasonableness of Mr. Johnson's fear. Their failure to do so was constitutionally deficient.

This failure was also prejudicial, as it deprived Mr. Johnson of the full benefit of his self-defense claim. Dr. Silber's testimony could have helped explain what the trial court characterized as "one of the most senseless killings I've seen." (S. Tr. 6-7) At a minimum, the evidence would have impacted the jury's decision to give Mr. Johnson the maximum sentence of life without parole. It would have shown the jury that many factors beyond Mr. Johnson's control contributed to his actions during

this alleged crime. Finally, this evidence would have supported the necessity of instructions on imperfect self-defense, as the jury would have been more likely to find Mr. Johnson's fear to be honestly held, even if it somehow found it unreasonable.

b. Failure to Utilize Evidence Available in the Record to Effectively Cross-Examine Shannon Cage

Trial counsel were ineffective in failing to cross-examine Mr. Cage based on information in the original trial record. Defense counsel failed to present to the jury evidence that 1) Mr. Cato threatened to get a gun before Mr. Johnson shot him and 2) Mr. Johnson was remorseful after he shot him.

1. Evidence that Mr. Cato Threatened to Get a Gun

Defense counsel conceded Mr. Johnson had killed Mr. Cato, but argued he did so in self-defense. (Tr. 236-38, 523-30) However, defense counsel did not present any evidence that Mr. Cato verbally threatened to get a gun, even though such evidence existed. Mr. Cage had, in fact, testified repeatedly at Mr. Johnson's preliminary hearing that Mr. Cage said he was getting a gun as he went to his trunk, immediately before Mr. Johnson shot him. There is no plausible strategic reason for defense counsel's failure to bring out this invaluable evidence in support of Mr. Johnson's self-defense claim.

At trial, defense counsel sought to show that Mr. Johnson had a reasonable fear that Mr. Cato was going to his trunk to retrieve a gun. He argued that Mr. Cato told Mr. Johnson, "he's going to do whatever he wants to do, or words to that affect [sic]. He then turns and goes back to his vehicle – back to the white Marquis going to the trunk." (Tr. 518) Defense counsel continued:

> [Mr. Cage] turned away because he was afraid something was gonna happen. And . . . he clarified that he wasn't afraid of Mr. Johnson, he was afraid that Mr. Cato was going to his vehicle to get a gun. And if you listen real careful, the end of the statement he said, Because that's the way it is. Now, you can take that whatever way you want, I'm arguing that's the way it is in that neighborhood. It's not unreasonable

> to think that in an altercation like that Mr. Cato would be going to his trunk to get a gun.

(Tr. 518-19) Defense counsel went to great lengths to argue that for various reasons, it was reasonable for Mr. Johnson to believe Mr. Cato was going to his trunk to get a gun. (Tr. 518-19, 524)

Had defense counsel been familiar with Mr. Cage's testimony at Mr. Johnson's preliminary hearing,[25] they could have elicited from Mr. Cage that immediately before Mr. Johnson shot Mr. Cato, Mr. Cato had explicitly said he was going to get a gun. At the preliminary hearing, Mr. Cage testified during his direct examination by the State:

> [Mr. Cato] didn't sit the tire tool down until he was proceeding to the back – he sit [sic] the tire tool down when **he said he was going to his car to get his gun**. That's the only time the tire tool was sat down. **And then when he said "gun," that's when the fire erupted. . . . He said he was going to go and get my gun.**

(P. Tr. 30) On cross-examination, defense counsel had the following exchange with Mr. Cage:

> Q: Okay. And then what happened after that?
> A: I don't know, Tre [sic] put the tire tool down – let me see, let me see. They was doing a whole lot – oh, Ashley [Porter] was – Ashley [Porter] jumped in between saying, don't do this, don't do this, don't do this. Babe, I can get my rims tomorrow, all this commotion. You know, **Tre [sic] said he was going to go get the gun, going to his car, and Joe wasn't going to let Tre [sic] get to that car, you know –**
> **Q: So let me ask you this, sir: You're saying that Tre [sic] said he's going to get a gun?**
> **A: Yeah, yeah. . . .**
> **Q: And did Tre [sic] go to his car and try to get a gun, or do you know?**
> **A: He didn't make it.**

(P. Tr. 35-36)

Due to defense counsel's failure to elicit this crucial testimony at trial, the State was able to argue in closing:

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[25]Mr. Johnson's trial counsel, Mr. Boeheim and Ms. Freeman, were not his attorneys at his preliminary hearing. Phillip Peak represented Mr. Johnson at his preliminary hearing.

> [T]here's nothing that Mr. Cato said that could ever warrant the death sentence this defendant gave him. There is nothing he said that to any reasonable person could ever think in their mind, Oh my God, if I don't shoot him now the imminent threat will not be stopped and I will die or I'll have great bodily injury.

(Tr. 534) The prosecutor reiterated:

> You don't even hear anything that the victim said being a threat. You hear him saying, Quit waiving [sic] those M f'ing guns around like you're gonna use them. . . . You hear stuff like that, kind of like a "shoe [sic] fly get out of my way" type thing. But that doesn't transform somehow into threats with the ability to carry them out in an instant. And if those aren't there, he doesn't get self-defense.

(Tr. 539) Contrary to this argument, explicit threats *were* there, but defense counsel inexplicably failed to present this evidence to the jury.

Evidence that Mr. Cato told Mr. Johnson he was getting a gun immediately before Mr. Johnson shot was critical to his self-defense claim. In fact, aside from the evidence of Mr. Johnson's psychological background (*see* Proposition III(A)(1)(A)), this was arguably the most critical piece of evidence in support of Mr. Johnson's self-defense claim. The State argued that Mr. Johnson's fear was unreasonable. It is much more likely the jury would have found his fear to be reasonable if it were based not just on Mr. Cato's movement toward his trunk, but his movement toward his trunk in conjunction with a threat that he was going to get a gun. Had the jury heard that Mr. Cato told Mr. Johnson he was getting a gun as he went to his trunk – and particularly had it heard this evidence in conjunction with expert testimony regarding Mr. Johnson's psychological background, as addressed in Proposition III(A)(1)(a) – the jury likely would have found his belief in imminent danger to be objectively reasonable and acquitted him based on a theory of self-defense, or at a minimum, given him less than the maximum sentence. This evidence also would have strongly supported defense counsel's argument for a heat of passion manslaughter instruction, which, not having heard this powerful evidence, the court denied.

2. Evidence that Mr. Johnson Felt Remorse

In addition, defense counsel failed to present available evidence that immediately after he killed Mr. Cato, Mr. Johnson felt sad, which would have supported his claim of self-defense. Again, had defense counsel been more familiar with the evidence presented at Mr. Johnson's preliminary hearing, they could have presented this evidence to the jury.

In closing, the State painted Mr. Johnson as a remorseless killer who had "annihilate[d] somebody as they're laying on the ground languishing" (Tr. 549), repeatedly highlighting his subsequent "flight" to Louisiana (Tr. 502-03, 542). These arguments supported the State's theory that Mr. Johnson had not shot Mr. Cato in self-defense.

Had defense counsel been adequately prepared for trial, they could have combated this harmful picture of Mr. Johnson. At Mr. Johnson's preliminary hearing, Mr. Cage testified:

> [H]e called me over the phone and said, what's going on? And I said, I think he dead. I think he dead, Joe. And he just went – you know, **he was sad, he went to moping**, he was – he was just like in a situation even though – he was just in a messed up situation that he didn't have no business being in.

(P. Tr. 31, emphasis added) The testimony that Mr. Johnson was sad and moping immediately after shooting Mr. Cato would have refuted the State's implication that he was remorseless, and countered its argument that he had shot Mr. Cato with malice aforethought and not in self-defense. At a minimum, this evidence would have impacted the jury's decision to give the maximum sentence.

2. Failure to Marshal the Evidence in Closing Argument

Defense counsel failed to marshal the evidence in closing argument. The closing argument has been recognized as "a basic element of the adversary factfinding process in a criminal trial." *Herring v. New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 2553, 45 L. Ed. 2d 593 (1975). Indeed, the closing argument is arguably

the most important part of the criminal trial:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Id. at 862. For the defendant, "closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt," and "a concise but persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment." *Id.* at 862, 863. Mr. Johnson's advocates failed to marshal the evidence – by highlighting an important gap in the State's evidence – during the closing argument.

A damaging piece of evidence to Mr. Johnson's theory of self-defense was testimony that Mr. Johnson shot Mr. Cato with two guns. In closing, the State repeatedly reminded the jury of this fact. (Tr. 504, 508, 509) Pointing to Mr. Johnson's use of two guns, the State argued, "I submit to you that's aggressive. He is the aggressor." (Tr. 508); and "I submit to you that for murder, [a gun] is an effective tool . . . it's even more effective if you bring two guns." (Tr. 509)

The only evidence that Mr. Johnson used two guns came from unreliable eyewitnesses, Ms. Porter and Ms. Farris. Both testified they saw Mr. Johnson with two guns under his arms. (Tr. 245, 273, 279, 317)[26] Ms. Farris did not know what type of guns they were, but Ms. Porter testified one gun was a chrome 38 revolver and the other was black and looked like a 9-millimeter semiautomatic. (Tr. 246, 251, 317) Ms. Porter testified that he shot both guns until they were empty. (Tr. 249, 251-52) Both Ms. Porter and Ms. Farris had a clear interest in the outcome of this case: Ms. Porter was Mr. Cato's girlfriend or fiancée, and Ms. Farris was Ms. Porter's best

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[26]The third eyewitness, Mr. Cage, did not see any guns. (Tr. 335)

friend. Furthermore, both had pending criminal charges at the time of trial.

Aside from this eyewitness testimony, there was no evidence corroborating that Mr. Johnson ever had two guns on that day. Sergeant Soileau testified that Mr. Johnson admitted to using a 9-millimeter gun to shoot Mr. Cato. (Tr. 405-06) Several officers and the medical examiner testified at trial. Officers found 9-millimeter cartridge casings on the ground at the scene; the State showed photographs of thirteen casings to the jury. (Tr. 374, 417; State's Exs. 18-31) The jury heard absolutely no ballistic or other physical evidence indicating that Mr. Johnson used any additional gun besides a 9-millimeter gun.

In its closing argument, defense counsel failed to marshal the fact that these unreliable witnesses' testimony that Mr. Johnson used two guns was wholly uncorroborated by other evidence. Defense counsel alluded to this when he argued, "He brought a gun. There's an argument of whether there's one or two. They want to keep holding on to two, but we've got testimony that says that's not necessarily the case. That's for you to decide. It's an issue of fact based on the testimony." (Tr. 526) However, defense counsel did not explain this to the jury.

The lack of evidence that Mr. Johnson used two guns was critical because it would have supported Mr. Johnson's claim of self-defense, as it combated the State's argument that he was the aggressor. Had defense counsel marshaled the evidence, he could have argued that Mr. Johnson had only one gun, which he kept in his hand under his arm until he saw Mr. Cato go to his trunk. Even if the jury did not believe Mr. Johnson had acted in self-defense, evidence that he had one gun instead of two likely would have impacted his sentence. It was crucial to remind the jury of the evidence that called these witnesses' harmful testimony into question.

3. Failure to Request Jury Instructions on First Degree Manslaughter Under Imperfect Self-Defense Theory

In Proposition I, Mr. Johnson argued that the trial court committed plain

error by failing to instruct the jury on the lesser included offense of first degree manslaughter. Defense counsel failed to request first degree manslaughter instructions based on a theory of imperfect self-defense. Although the trial court had a fundamental duty to afford Mr. Johnson the benefit of all appropriate instructions, whether requested or not, trial counsel also has a duty to vigorously advocate his client's interests, which includes requesting relevant jury instructions. Courts have long held that failure to request instructions supported by the evidence may constitute ineffective assistance. *See Wiley v. State*, 183 S.W.3d 317, 330-31 (Tenn. 2006)(finding trial counsel ineffective for failing to request instructions on second degree murder as a lesser included offense of felony murder and failing to preserve the issue for appeal); *State v. Cole*, 702 So. 2d 832, 835 (La. Ct. App. 1997); *Sharkey v. State*, 672 N.E.2d 937, 942 (Ind. Ct. App. 1996); *Waddell v. State*, 918 S.W.2d 91, 94-95 (Tex. Ct. App. 1996); *Pearson v. State*, 216 Ga.App. 333, 334, 454 S.E.2d 205, 206 (Ga. Ct. App. 1995); *State v. Wright*, 598 So.2d 493, 497-98 (La. Ct. App. 1992). Counsel's neglect of their duty to request the appropriate instructions on a theory of imperfect self-defense constituted deficient performance. There was no viable trial strategy in failing to request this instruction, which was consistent with the defense theory of the case.

4. Failure to Object to Prosecutorial Misconduct

Trial counsel were ineffective in failing to object to prosecutorial misconduct.[27] A failure to object may rise to the level of ineffective assistance of counsel. *Miller v. State*, 2013 OK CR 11, 313 P.3d 934,998-99 (citing *Williams v. Taylor*, 529 U.S. 362, 398, 120 S. Ct. 1495, 1516, 146 L. Ed. 2d 389 (2000)); *Aycox v. State*, 1985 OK CR 83, 702 P.2d 1057, 1058. Counsel's failure to object to damaging evidence constitutes ineffective assistance of counsel not only because it allows the

[27]*See* Proposition II.

jury to consider improper evidence, but also because it fails to preserve the error for review by this Court. *Collis*, 1984 OK CR 80, 685 P.2d 975, 977-78; *Dunkle v. State*, 2006 OK CR 29, 139 P.3d 228, 245 n.88. Defense counsel's failure to object fell below the level of representation required and was not sound trial strategy.

B. Prejudice

The standard of prejudice under *Strickland* is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In making its determination regarding prejudice, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 695-96. The facts of this case demonstrate a reasonable probability that the outcome of Mr. Johnson's trial would have been different, but for trial counsel's deficient performance. The defense strategy was to assert that Mr. Johnson shot and killed Mr. Cato in self-defense. However, as argued here and in the Application, counsel failed to utilize available evidence in calling and cross-examining witnesses that could have created reasonable doubt in the mind of at least one juror. They failed to marshal the evidence in closing argument, request all warranted jury instructions, and object to prosecutorial misconduct. Without these failures, there is a reasonable probability Mr. Johnson would have been acquitted on the theory of self-defense, convicted of first degree manslaughter, or at a minimum, received a lesser sentence than the life without parole sentence he received. Mr. Johnson received ineffective assistance of counsel, and his conviction should be reversed.

CONCLUSION

Based on the preceding errors, discussions of facts, arguments, and citations

of legal authority; the record before this Court; and any errors that this Court may note *sua sponte*, Mr. Johnson respectfully asks the Court to reverse the Judgment and Sentence imposed against him, favorably modify his sentence, or order any other relief as justice requires.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on May 22, 2018, a true and correct copy of the foregoing Brief of Appellant was mailed, via United States Postal Service, postage pre-paid, to Appellant at the address set out below, and a copy was served upon the Attorney General by leaving a copy with the Clerk of this Court.

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_____
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