



IN THE DISTRICT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

DAVID ANTHONY WARE.)

Defendants.)

Case No. CF-2020-2889

DISTRICT COURT
FILED

MAR 03 2022

DAVID WARE'S COMBINED RESPONSE TO THE GOVERNMENT'S MOTIONS IN LIMINE

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

Comes now David Ware, by and through undersigned counsel and provides his combined response to the government's motions in limine. In support of this response, counsel shows the Court the following:

INTRODUCTION

Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court." *Chambers v. Florida*, 309 U.S. 227, 241.

Griffin v. Illinois, 351 U.S. 12, 17 (1956)

From the moment the affidavit for his arrest was drafted, the local criminal justice system has worked to deprive David Ware of his right to "*stand on an equality before the bar of justice*" and the state's three (3) motions in limine are a continuation of that effort.

The state of Oklahoma has turned over a victim impact statement for Kristi Johnson that they hope to have her read during the sentencing phase of the upcoming trial.

The statement begins **“Six hundred and forty three days. That is the number of days as of the start of the trial that we have been without Craig.”** the state is asking this Court to preclude¹ counsel for Mr. Ware from responding by pointing out that **“Eight hundred and eight-nine days. That is the number of days as of the start of the trial since Craig Johnson filed for a divorce from Kristi Johnson citing “a state of incompatibility”.”** (See Page 2, of Petition For Dissolution of Marriage and Application For Temporary Order in Tulsa County Case -Craig V. Johnson vs. Kristi Johnson, FD-2019-2509)

Under what theory of “Equal Justice Under Law” does the state imagine that it could put the estranged wife of Craig Johnson on the stand to read a “victim impact” statement about the impact that his loss has had on her life and that counsel would be precluded from pointing out that her estranged husband had left her and her two minor children, the youngest only one (1) year of age, for a younger woman?

Under what theory of “Equal Justice Under Law” does the state believe that counsel should be precluded from pointing out to the jury that while Kristi Johnson has been used by the local media and law enforcement community to raise over \$500,000 of donations (and create outrage against David Ware) that she had already “lost” her husband to a younger woman and was about to sign a divorce decree?

¹ See the *State's Second Motion in Limine and Brief in Support Evidence Regarding Personal “Circumstances”*

The state complains that “counsel for the Defendant inserted allegations of a personal nature”² into a pleading. Why is it acceptable for Craig Johnson’s younger girlfriend to boast about her affair (with a still married man) publicly on Facebook, but it is unacceptable for undersigned counsel to document the basis for the conflict was Craig Johnson’s affair with a public defender in his defense of his client, in a death penalty case? Why wasn’t the basis of the conflict already in the record? Why did counsel have to learn of this conflict outside of official sources. Counsel does not know what may become relevant in the future or what future counsel or courts may find it relevant.

In the *State’s Motion in Limine to Prevent the Defendant From Introducing Impermissible and Irrelevant Character Evidence* the state once again complains about a public Facebook post concerning one of their witnesses and attempts to characterize it as “impermissible character evidence”. The screenshot the state complains of Officer Zarkeshan’s Facebook profile that states that he “Works at Waste Management” along with a photograph of Officer Zarkeshan’s Tulsa Police Academy Class 2019-116”.

Unfortunately there are law enforcement officers joke that they are “garbage collectors”, “trash men” or “waste management”. It is these officer’s poor attempt at humor and exposes that they view some citizens as human waste and insignificant. This is relevant to these officers bias and motive to lie and essential to David Ware’s Sixth Amendment Right to Confront the witnesses against him (See *Olden v. Kentucky*, 488

² In response to the state’s personal attacks on counsel, he would like to remind the state of the following “Often, as in the case of Andrew Hamilton, Darrow, Bryan and Thurgood Marshall, a lawyer participates in a case out of a sense of justice. He may feel a sense of duty to defend an unpopular defendant and in this way to give expression to his own moral sense. These are important values, both for lawyers and clients,....” *Leis v. Flynt*, 439 U.S. 438, 451 (1979)

U.S. 227 (1988)). Officer Zarkeshan's bad attitude towards the public, specifically those he views as unworthy of his courtesy or respect, is very relevant in this case. In particular because Officer Zarkeshan told Sergeant Johnson that David Ware did not have insurance (which he did) and that Officer Zarkeshan and Sergeant Johnson were involved in an unlawful physical assault (kicking³ in the groin) of David Ware just moments before he shot them. During this encounter David Ware is screaming for help and begging the officers to stop and asking them why they are doing this to him. During the event, while Ware is crying out for help, Officer Zarkeshan appears to mute his body camera, approximately ten (10) seconds later the body camera belonging to Officer Zarkeshan loses sound. (at 3:22:59 A.M.)

Especially considering the events reflected in the video, counsel can understand why the elected district attorney would not want the jurors or the citizens of this community to know that a rookie officer fresh out of the police academy harbored these types of attitudes, but these are the facts of this case and those facts are vital to David Ware's defense of this case which will be vigorous.

Before counsel fully addresses the state's motion in limine request, counsel believes this would be a good time to make a record about some of the things that have

³ During the video Sergeant Johnson can be seen standing at the the edge of the Mr. Ware's open driver's door, Sergeant Johnson takes a step back and kicks Mr. Ware in the groin/stomach area as Mr. Ware sits sideways in the driver's seat of his car. (at approximately 03:22:26 A.M.) The second kick or stomp comes less than a minute later at approximately 03:23:12 A.M.. The second kick or stomp occurs approximately ten (10) seconds before Mr. Ware fires the first shot. (at approximately 03:23:22 A.M.) For a complete description of the events of that video See SUPPLEMENTAL MOTION TO STRIKE ORDER PREVENTING UBLIC RELEASE OF INFORMATION filed July 20, 2020.

gone on in this case so that this Court and all future courts will be aware of them in making their decisions. Even if this Court finds these arguments unpersuasive, counsel believes it is important to make sure the record is clear for any future court.

Some of the Efforts to Deprive David Ware of Equality Before the Bar of Justice

I. Affidavit for Arrest

On June 29, 2020 a Tulsa Police Officer swore under oath that “After Sgt. Johnson is down from being shot. **Ware stands over him and fires three more times into Sgt. Johnson.**” That was a provably false statement made under oath as shown by body cameras and dash cam videos in this matter.

Title 21 O.S. § 491 defines Perjury as:

Whoever, in a trial, hearing, investigation, deposition, certification or declaration, in which the making or subscribing of a statement is required or authorized by law, makes or subscribes a statement under oath, affirmation or other legally binding assertion that the statement is true, when in fact the witness or declarant does not believe that the statement is true or knows that it is not true or intends thereby to avoid or obstruct the ascertainment of the truth, is guilty of perjury. It shall be a defense to the charge of perjury as defined in this section that the statement is true.

No charges were ever filed against that officer and to counsel’s knowledge there was not even an internal affairs investigation. The state has attempted to explain that the officer was simply “mistaken”. Of course for an officer to make a knowingly false claim in a sworn affidavit would be a *Giglio* violation and would require disclosure to defense counsel in all future cases in which that officer testified in front of jury. See *Giglio v. United States*, 405 U.S. 150 (1972), counsel does not believe that has been done either.

II. The Press Conference and False Statements by the Chief of Police

As explained in *Supplemental Motion to Strike Order Preventing Public Release of Information*, filed on July 20, 2020, the Chief of Police of this community made provably false statements in a press conference and has **never** publicly acknowledged the falsity of those statements. As written on page four (4) of the above described motion:

Within hours of the filing of charges against Mr. Ware in this matter the Tulsa Police Department began spreading a false narrative concerning the facts of this case as shown in the video. Counsel will address the two (2) falsehoods the Tulsa Police have been widely publicly disseminated in this case, there are other issues that counsel may choose to address at a later time or simply may save for trial. These false narratives are: one (1) “After Sgt. Johnson is down from being shot. **Ware stands over him and fires three more times into Sgt. Johnson.**” (See Exhibit A, Paragraph Seven (7) of the Finding of Probable Cause Affidavit) and two (2) after the shooting that David Ware “slowly walked away”.

(See page 4 of *Supplemental Motion to Strike Order Preventing Public Release of Information*, filed on July 20, 2020)

As the video clearly shows Mr. Ware never stood over Sgt. Johnson firing three more times into Sgt. Johnson and despite what the chief of police told the public, while standing next to Mr. Kunzweiler, David Ware ran away screaming in panic and did not “slowly walk away”.

Despite the false statements made in the affidavit that was released to the media by the state, false statements made to the media while Mr. Kunzweiler stood next to the Chief of Police, the state has accused defense counsel of trying this case in the media. It has been all counsel can do to try and combat the false narrative created in the media by the prosecution and law enforcement in this case as fully described in the *Supplemental Motion to Strike Order Preventing Public Release of Information*, filed on July 20, 2020

III. AFTER THE STATE PARTICIPATED IN THE DISSEMINATION OF A FALSE NARRATIVE; THEY GOT AN EX PARTE ORDER TO SEAL THE VIDEO

On July 2, 2020 Assistant District Attorney Kevin Gray files *State's Motion to Prevent Release of Video Evidence*, despite not being represented by counsel, Mr. Ware was never given a copy of this motion nor given an opportunity to object.

On July 6, 2020, without notice to Mr. Ware, or having anyone appointed to speak on his behalf, Special Judge David Guten signed an order preventing the release of the video for 6 months. At the time the prosecution persuaded a judge to seal the release of the video the state knew that the story told to the public on June 29, 2020 by the chief of the police was false, the prosecution had disseminated the affidavit with false statements to the media and no one was there to tell the judge about it or object on behalf of Mr. Ware.

Some would describe what occurred on July 6, 2020 as a cover-up.

IV. THE COURT MINUTE OF 7-13-2020

The Court minute of July 13, 2020 reads as follows:

JUDGE DAVID GUTEN: DEFENDANT PRESENT, IN CUSTODY AND KEVIN ADAMS APPOINTED AS COUNSEL OF RECORD. ARRAIGNMENT HELD. DEFENDANT WAIVES READING OF THE INFORMATION AND FURTHER TIME TO PLEAD. DEFENDANT ENTERS A PLEA OF NOT GUILTY. PRELIMINARY HEARING SET FOR 09-02-2020 @ 9 AM IN ROOM 329. BOND HOLD WITHOUT BOND. DEFENDANT REMANDED TO CUSTODY.

After meeting with Mr. Ware on July 15, 2020 undersigned counsel learned that Mr. Ware had never appeared via video or otherwise , and had never even been advised of the charges he was facing.

In twenty years of practicing law, counsel knows of no other case in which a court minute reflected a defendant appeared for an arraignment and the defendant had not. To his knowledge counsel has never represented a client that was not informed by the Court what his charges were at the time he was arraigned.

We are charged with reviewing the cases of those who are convicted in Oklahoma to ensure that they received a fair trial and were afforded their constitutional rights, especially in capital cases because the death penalty is different from all other penalties in its severity and finality. *Salazar v. State*, 1993 OK CR 21, ¶ 38, 852 P.2d 729, 739.

Wood v. State, 158 P.3d 467, 478 (Okla. Crim. App. 2007)

After undersigned counsel entered the case he took steps to ensure Mr. Ware was actually arraigned on this matter.

THE STATE'S LIMINE MOTIONS

1. Officer Zarkeshan's Public Proclamation that he "Works at Waste Management"

United States District Court Judge Claire Eagan is known to remark "all evidence is prejudicial to one side or the other", (otherwise that evidence would not be relevant).

The test under Title 12 O.S. § 2403 is not whether or not the evidence is prejudicial, the test is whether or not "its probative value is substantially outweighed" by its prejudicial value. Officer Zarkeshan's public proclamation that he views his job as a police officer as "waste management" is highly relevant to Mr. Ware's defense.

The defense's theory of this case is that Officer Zarkeshan was an overzealous rookie, hyped up that morning looking for some action, listening to heavy metal music and viewed Mr. Ware as a piece of garbage. As shown by the video Officer Zarkeshan escalated this traffic stop, told his boss he wanted to "search the car to". During the trial Mr. Ware's defense will introduce evidence that Officer Zarkeshan lied to his supervisor about why he had stopped Mr. Ware, lied to his supervisor about David Ware not having insurance and that Officer Zarkeshan muted his body camera intentionally to prevent the recording of proof that he was violating David Ware's rights (this occurred while David Ware was pleading for someone to "help" him).

While out of an abundance of caution counsel listed the information as potentially being introduced through Investigator Morton, it is almost certainly going to come in through the cross-examination of Officer Zarkeshan that might look something like this:

Q. "Officer Zarkeshan, isn't it true that when you stopped Mr. Ware and saw his criminal history that you viewed David Ware as a "piece of garbage" ?"

A. "No, that is not true"

Q. "Isn't it true you listed you occupation as "Waste Management" on your Facebook page ?"

As Justice Black wrote in *Pointer*:

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Pointer v. Texas, 380 U.S. 400, 405 (1965)

Or Justice Stewart wrote in *Turner v Louisiana*:

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel

Turner v. Louisiana, 379 U.S. 466, 472-73 (1965)

Counsel is not arguing that the Court must look to Mr. Ware's constitutional rights and determine that they override Oklahoma's evidentiary code⁴, Oklahoma's evidentiary code supports the introduction of the evidence Mr. Kunzweiler is asking the Court to exclude. The Oklahoma evidentiary code recognizes the "accused" person's Sixth Amendment Right to Confront, it is written straight into the code. The evidence Mr. Kunzweiler is attempting to deny Mr. Ware is clearly admissible under Oklahoma's evidence code.

Title 12 O.S. § 2404 (A) reads:

⁴ Even though there are plenty of instances where that occurs, See *Holmes v. South Carolina*, 547 U.S. 319 (2006) and *Rock v. Arkansas*, 483 U.S. 44 (1987) for two examples.

A. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

1. Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same;
2. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or

Title 12 O.S. § 2404 (B) reads:

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

Officer Zarkeshan's own statement about himself is admissible under the Oklahoma evidentiary code provisions 12 O.S. § 2404 (A)(1)(2) and (B) and would be admissible otherwise because of David Ware's Sixth Amendment Right to Confront the witnesses against him.

Officer Zarkeshan's statement reflects his own prejudice⁵ against certain members of the public as reflected by his own Facebook post. This is relevant to the jury's determination of what occurred on June 29, 2020. Just consider for example someone charged with a hate crime, wouldn't their self-proclaimed statement reflecting their prejudice be admissible? It is not even a close call, especially in a death penalty case.

See Merriam-Webster "2. ...preconceived judgment or opinion"

2. Sergeant Johnson's Affair with a Young Public Defender

The moment Craig Johnson's, estranged wife, Kristi Johnson takes the witness stand to offer her "victim impact statement"; Craig Johnson's affair with his younger girlfriend becomes relevant. Why? Because the state has opened the door.

David Ware has a constitutional right to confront the witnesses the state seeks to use in their pursuit of his execution. The same applies the statement the state seeks to introduce by Connor Johnson. It is relevant because the state has made it relevant by seeking to introduce that evidence in the first place.

The state is seeking to introduce an untruth and mislead the jury. Saying **"Six hundred and forty three days. That is the number of days as of the start of the trial that we have been without Craig."** Is misleading without understanding that "we have been without Craig" does not mean he was living at home with his family, it means that he was living outside the home with a younger woman.

Kristi Johnson has already been used by the local law enforcement to create a false narrative in this community regard what the state likes to refer to as "personal circumstances". Did the members of the public who donated over half a million dollars to the Johnson-Zarkeshan Family Fund understand Sergeant Johnson was estranged from his wife Kristi Johnson and had left his two young children and family home?

In a July 8, 2020 Tulsa World article titled "More than half a million dollars donated for families of slain Tulsa Police Sgt. Craig Johnson, wounded Officer Aurash Zarkeshan" Tulsa Police Officer Jon Grafton is quoted as saying:

“For the families, obviously they’re struggling emotionally and spiritually and physically,” Tulsa Police Officer Jon Grafton said. “This little bit? Give a penny, and it helps.”

Grafton spent the hours before his shift Wednesday helping collect donations. Grafton said the money will help see Johnson’s and Zarkeshan’s families through some of their financial uncertainties in the wake of the shootings.

(July 8, 2020 Tulsa World article cited “More than half a million dollars donated for families of slain Tulsa Police Sgt. Craig Johnson, wounded Officer Aurash Zarkeshan”)

Did Officer Grafton not know the “personal circumstances” when he made that statement to the public through the Tulsa World article? Because some would think that statement was designed to create a false narrative in order to increase donations.

What is wrong with the truth? Sergeant Johnson was divorcing his wife at the time of his death. Defense counsel has sat by for almost two (2) years and let this false narrative spread.

The law enforcement community has created a false narrative to paint Sergeant Johnson as a “family man”, just doing his job at the time he was killed by this crazy “cold blooded killer” who stood over him and fired three shots and then just slowly turned and walked away.

The truth is at the time of his death that Sergeant Johnson had left his wife and two young children, he was living with a younger woman who worked as a public defender, he had hung out and drank so much alcohol with the other public defenders that the entire

Tulsa County Public Defender's Office had to recuse from the case⁶, that on the morning of his death the rookie officer Zarkeshan, who considered himself some sort of human "garbage collector" and was pumped up listening to heavy metal music, pulled David Ware over, lied to his Sergeant about why he stopped him, lied to his sergeant about David Ware not having insurance, and rookie Officer Zarkeshan and Sergeant Johnson were in the process of assaulting David Ware, as David Ware plead for someone to help him, and that shortly before the two officers were shot, Sergeant Johnson kicked David Ware in the groin (twice) and Officer Zarkeshan muted his body camera (the Ware Defense will argue it was hide David Ware's cries for help and the state will argue it was an accident) and that after David Ware shot Sergeant Johnson he ran away screaming in panic.

Whether or not what happened on that morning is first degree murder deserving of a death sentence, manslaughter or even self-defense will be a "question of fact for a jury." The state can argue the facts to the jury and argue what the jury's determination of the facts should be, but in a court of law, unlike the court of public opinion, the state and the law enforcement community doesn't just get to make them up.

3. Mitigation Limine Request

The United States Supreme Court has long held that an accused right to "establish a defense" is a "fundamental element of due process." *Washington v. Texas*, 388 U.S. 14, 19 (1967)

⁶ Counsel cannot understand why if it was a conflict to represent the man that killed him, why it would not also be a conflict to represent people Sergeant Johnson had arrested.

There are many different misconceptions regarding the death penalty in our society. The misconceptions that the jurors carry with them into the trial and ultimately the jury room effect the way the jurors see the case and reach decision. Evidence of preconceived notions do not have to be introduced by the state, they already exist in the mind of the jurors.

Some of these misconceptions related to lack of rehabilitation within the prison system, whether or not a life without parole sentence means the defendant will be released, and the costs of execution verses incarceration.

Oklahoma's jury instruction regarding mitigating circumstances reads:

OUJI-CR 4-78

DEATH PENALTY PROCEEDINGS -
JURY'S DETERMINATION OF MITIGATING CIRCUMSTANCES

Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

The second part of "mitigating circumstance" is "circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against

imposing the death penalty.” The OUJI’s do not limit what those circumstances are. And the state cites nothing to support a claim that these circumstances can not include evidence that people change and grow over time and that Mr. Ware may experience personal growth if the jury spares his life. What has the state cited that would support a claim that a circumstance which in “fairness...may lead jurors individually or collectively to decide against the death penalty” could not be found within the pages of the Report of the Death Penalty Review Commission?

It is absurd to think that one of the twelve members of a jury could not decide that as a society there are just too many problems with the death penalty to impose that penalty for the fact and circumstances of this case. The Tulsa County District Attorney, Steve Kunzweiler thought enough of the commission and the commissioners to participate in the study, but he is now asking the Court to exclude any evidence included within their report? The fact that Mr. Kunzweiler as an elected official thought it was important enough to would spend taxpayer resources to participate in the study may in and of itself persuade a juror that they agree with the commissioners recommendation that there should be a moratorium on the death penalty until the legislature fixes the problems identified in that report.

CONCLUSION

For the foregoing reasons counsel request that this Court deny the state’s motions in limine.

Respectfully Submitted,

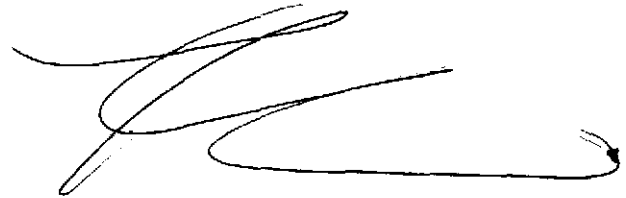


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CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was mailed on March 3, 2022 to the following:

Steve Kunzweiler
Tulsa County District Attorney
Tulsa County Courthouse
500 S. Denver
Tulsa, OK 74103



Kevin D. Adams