

APPEAL, CLOSED, LC-5

**U.S. District Court  
U.S. District Court for the Northern District of Oklahoma (Tulsa)  
CIVIL DOCKET FOR CASE #: 4:02-cv-00244-TCK-SAJ**

Wilkens v. Shoecraft, et al  
Assigned to: Judge Terence Kern  
Referred to: Magistrate Judge Sam A Joyner  
Demand: \$0  
Case in other court: Tulsa Cty Dist Ct, CF-98-02173  
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 04/02/2002  
Date Terminated: 11/05/2007  
Jury Demand: None  
Nature of Suit: 530 Habeas Corpus (General)  
Jurisdiction: Federal Question

**Petitioner**

**April Rose Wilkens**  
#282399

represented by **April Rose Wilkens**  
#282399  
SCC-MABEL BASSETT  
Mabel Bassett Correctional Center  
29501 KICKAPOO RD  
MLOUD, OK 74851  
405-964-3020  
Fax: 964-3014  
PRO SE

**David Ray Blades**  
Armstrong & Lowe PA  
1401 S CHEYENNE  
TULSA, OK 74119-3440  
918-582-2500  
Fax: 918-388-0100  
Email: d blades@armstronglowe.com  
*TERMINATED: 05/22/2003*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Respondent**

**Vickie Shoecraft**  
*Sued as: Vicki Shoecraft*  
*TERMINATED: 10/12/2004*

represented by **Diane L Slayton**  
Office of the Attorney General (OKC-313)  
State of Oklahoma  
313 NE 21ST ST  
Oklahoma City, OK 73105  
405-521-3921  
Fax: 405-522-4534  
Email: fhc.docket@oag.state.ok.us  
*TERMINATED: 10/12/2004*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**William R Holmes**  
Office of the Attorney General (OKC-313)  
313 NE 21ST ST  
Oklahoma City, OK 73105

405-521-3921  
 Fax: 405-522-4534  
 Email: fhc.docket@oag.state.ok.us  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Respondent**

**Millicent Newton-Embry**

represented by **Diane L Slayton**  
 (See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**William R Holmes**  
 Office of the Attorney General (OKC-313)  
 State of Oklahoma  
 313 NE 21ST ST  
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**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
04/02/2002	<u>1</u>	PETITION FOR WRIT OF HABEAS CORPUS (fee status: pd) (file/J-sa) (lml, Dpty Clk) (Entered: 04/03/2002)
04/02/2002		FILING FEE PAID IN FULL by petitioner April Rose Wilkens on 4/2/02 in the amount of \$ 5.00 receipt # 101750 (fee status: pd) (lml, Dpty Clk) (Entered: 04/03/2002)
04/02/2002	<u>2</u>	BRIEF by petitioner April Rose Wilkens in support of petition motion PETITION FOR WRIT OF HABEAS CORPUS [1-1] (lml, Dpty Clk) (Entered: 04/03/2002)
04/04/2002	<u>3</u>	ORDER TO SHOW CAUSE by Senior Judge Thomas R. Brett re: PWHC [1-1] ; respondent has 30 days to resp and show cause why writ should not issue; petitioner to reply 30 days after (cc: all cnsl and Warden) (pll, Dpty Clk) (Entered: 04/04/2002)
04/11/2002	<u>4</u>	NOTICE of rcpt of cert mail green cards from AG, Warden re: show cause order (pll, Dpty Clk) (Entered: 04/15/2002)
05/07/2002	<u>5</u>	ATTORNEY APPEARANCE for respondent Vickie Shoecraft by Diane L Slayton (pll, Dpty Clk) (Entered: 05/07/2002)
05/07/2002	<u>6</u>	MOTION by respondent Vickie Shoecraft to dismiss for failure/exhaust state ct remedies (pll, Dpty Clk) (Entered: 05/07/2002)
05/07/2002	<u>7</u>	BRIEF by respondent Vickie Shoecraft in support of motion to dismiss for failure/exhaust state ct remedies [6-1] (pll, Dpty Clk) (Entered: 05/07/2002)
05/17/2002	<u>8</u>	RESPONSE by petitioner April Rose Wilkens to motion to dismiss for failure/exhaust state ct remedies [6-1] or alt... (pll, Dpty Clk) (Entered: 05/20/2002)
05/17/2002	8	... MOTION by petitioner April Rose Wilkens to amend petition and brf/spprt (pll, Dpty Clk) (Entered: 05/20/2002)
09/06/2002	<u>9</u>	MOTION w/brf by petitioner April Rose Wilkens to disqualify the ct (sac, Dpty Clk) (Entered: 09/07/2002)

09/09/2002	<u>10</u>	ORDER by Senior Judge Thomas R. Brett granting motion to disqualify the ct [9-1]; Judge Brett recuses, to be randomly reassigned (cc: all counsel) (pll, Dpty Clk) (Entered: 09/10/2002)
09/10/2002	<u>11</u>	MINUTE ORDER by Court Clerk : This case is hereby reassigned to Chief Judge Terry C. Kern. The new case number is 02-CV-244-K(J). (cc: all counsel) (pll, Dpty Clk) (Entered: 09/10/2002)
10/17/2002	<u>12</u>	SUPPLEMENTAL BRIEF by petitioner April Rose Wilkens in support of PETITION FOR WRIT OF HABEAS CORPUS [1-1] (crp, Dpty Clk) (Entered: 10/18/2002)
01/13/2003	<u>13</u>	SECOND SUPPLEMENT by petitioner April Rose Wilkens to brf in supp of PETITION FOR WRIT OF HABEAS CORPUS [1-1] (crp, Dpty Clk) (Entered: 01/14/2003)
01/30/2003	<u>14</u>	3RD SUPPLEMENT by petitioner April Rose Wilkens re PETITION FOR WRIT OF HABEAS CORPUS [1-1] (pll, Dpty Clk) (Entered: 01/31/2003)
02/06/2003	<u>15</u>	ORDER by Chief Judge Terry C. Kern, by 2/26/03 ptr may submit an amd pet containing only exhausted claims; finding the motion to dismiss for failure/exhaust state ct remedies [6-1] moot (See ord for further details) (cc: all counsel) (crp, Dpty Clk) (Entered: 02/06/2003)
02/06/2003	<u>16</u>	LETTER from petitioner April Rose Wilkens re status (sac, Dpty Clk) (Entered: 02/07/2003)
02/24/2003	<u>17</u>	NOTICE by petitioner April Rose Wilkens of intention to pursue State Court remedies (sac, Dpty Clk) (Entered: 02/25/2003)
02/27/2003	<u>18</u>	ORDER by Chief Judge Terence Kern finding the motion to amend petition [8-1] moot ; CASE STAYED ; cnsl 4 petr shall file stat rpts (cc: all counsel) (sac, Dpty Clk) (Entered: 02/27/2003)
03/05/2003	<u>19</u>	MOTION by petitioner April Rose Wilkens for ptr to be gr permission to act as her own cnsl (crp, Dpty Clk) (Entered: 03/05/2003)
03/06/2003	<u>20</u>	FIRST STATUS REPORT by petitioner April Rose Wilkens of efforts to obtain state ct rlf for unexhstd clms (sac, Dpty Clk) (Entered: 03/07/2003)
04/11/2003	<u>21</u>	APPEARANCE ( pro se ) for petitioner April Rose Wilkens (sac, Dpty Clk) (Entered: 04/14/2003)
04/28/2003	<u>22</u>	STATUS REPORT by petitioner April Rose Wilkens of efforts to obtain st ct rlf for unexhausted clms (sac, Dpty Clk) (Entered: 04/29/2003)
05/07/2003	<u>23</u>	MOTION by petitioner April Rose Wilkens to withdraw attorney David R Blades (o/j) (sac, Dpty Clk) (Entered: 05/07/2003)
05/22/2003	<u>24</u>	ORDER by Chief Judge Terence Kern granting motion to withdraw attorney David R Blades [23-1] for April Rose Wilkens; granting motion for ptr to be gr permission to act as her own cnsl [19-1]; case remains stayed (cc: all counsel) (sac, Dpty Clk) (Entered: 05/23/2003)
06/25/2003	<u>25</u>	THIRD STATUS REPORT by petitioner April Rose Wilkens re ptr's efforts to obtain state court relief from unexhausted claims (crp, Dpty Clk) (Entered: 06/26/2003)
08/28/2003	<u>26</u>	FOURTH STATUS REPORT by petitioner April Rose Wilkens (sac, Dpty Clk) (Entered: 09/02/2003)
10/27/2003	<u>27</u>	FIFTH STATUS REPORT by petitioner April Rose Wilkens (sac, Dpty Clk) (Entered: 10/28/2003)
12/24/2003	<u>28</u>	SIXTH STATUS REPORT OF PETITIONER'S EFFORTS TO OBTAIN STATE COURT RELIEF FROM UNEXHAUSTED CLAIMS by petitioner April Rose Wilkens (crp, Dpty Clk) (Entered: 12/29/2003)
02/25/2004	<u>29</u>	SEVENTH STATUS REPORT by petitioner April Rose Wilkens of efforts to obtain state court relief for unexhausted claims (crp, Dpty Clk) (Entered: 02/26/2004)

04/26/2004	<u>30</u>	EIGHTH STATUS REPORT by petitioner April Rose Wilkens (sac, Dpty Clk) (Entered: 04/27/2004)
07/01/2004	<u>31</u>	NINTH STATUS REPORT by petitioner April Rose Wilkens of efforts to obtain state court relief for unexhausted claims (crp, Dpty Clk) (Entered: 07/02/2004)
08/16/2004	<u>32</u>	MOTION by petitioner April Rose Wilkens to proceed in forma pauperis (sac, Dpty Clk) (Entered: 08/17/2004)
08/18/2004	<u>33</u>	MOTION by petitioner April Rose Wilkens for permission to file suppl to amd brf (prop suppl attached) (sac, Dpty Clk) (Entered: 08/19/2004)
08/18/2004	<u>34</u>	NOTICE by petitioner April Rose Wilkens of state ct remedies... (sac, Dpty Clk) (Entered: 08/19/2004)
08/18/2004	<u>34</u>	...MOTION by petitioner April Rose Wilkens for permission to file amd brf in supp of pwhc (prop amd brf in supp atchd w/exhs) (oversized docs) (sac, Dpty Clk) (Entered: 08/19/2004)
08/25/2004	<u>35</u>	NOTICE (CLARIFICATION OF AMENDED BRIEF IN SUPPORT OF PWHC) by petitioner April Rose Wilkens (crp, Dpty Clk) (Entered: 08/26/2004)
08/27/2004	<u>36</u>	LETTER from petitioner April Rose Wilkens re status (copy of docket sheet sent) (crp, Dpty Clk) (Entered: 08/30/2004)
09/02/2004	<u>37</u>	MOTION by petitioner April Rose Wilkens for review of actual innocence claim (sac, Dpty Clk) (Entered: 09/03/2004)
10/12/2004	<u>38</u>	ORDER by Judge Terence Kern; stay lifted ; granting motion for permission to file amd brf in supp of pwhc (prop amd brf in supp atchd w/exhs) [34-1]; finding the motion to proceed in forma pauperis [32-1] moot; granting motion for permission to file suppl to amd brf (prop suppl attached) [33-1]; granting motion for review of actual innocence claim [37-1]; substituting respdnt; respdnt to show cause why writ shld not issue (cc: all counsel) (sac, Dpty Clk) (Entered: 10/13/2004)
10/12/2004	<u>39</u>	AMENDED BRIEF by petitioner April Rose Wilkens in support of PETITION FOR WRIT OF HABEAS CORPUS [1-1] (oversized doc) (sac, Dpty Clk) (Entered: 10/13/2004)
11/10/2004	<u>40</u>	MOTION by respondent Millicent Newton-Embry to change time to resp to pet an addtl 20 days (o/j) (sac, Dpty Clk) (Entered: 11/12/2004)
11/10/2004	<u>41</u>	ORDER by Judge Terence Kern granting motion to change time to resp to pet an addtl 20 days until 12/1/04 [40-1] [1-1] (cc: all counsel) (sac, Dpty Clk) (Entered: 11/12/2004)
11/18/2004	<u>42</u>	RESPONSE by petitioner April Rose Wilkens to [40-1] (sac, Dpty Clk) (Entered: 11/19/2004)
12/02/2004	<u>43</u>	MOTION by respondent Millicent Newton-Embry to change ddln to file resp to pet (o/j) (sac, Dpty Clk) (Entered: 12/03/2004)
12/08/2004	<u>44</u>	ORDER by Judge Terence Kern granting motion to change ddln to file resp to pet until 12/9/04 [43-1] [1-1] (cc: all counsel) (sac, Dpty Clk) (Entered: 12/09/2004)
12/10/2004	<u>45</u>	RESPONSE by respondent Millicent Newton-Embry to Petition for Writ of Habeas Corpus [1-1] (crp, Dpty Clk) (Entered: 12/22/2004)
12/22/2004	<u>46</u>	NOTICE (STATE COURT TRIAL RECORD) by respondent Millicent Newton-Embry (oversized doc) (6 volumes-transcripts of 4/12/99, 4/13/99, 4/15/99, 4/19/99, 4/21/99 and 4/23/99) (transcripts located behind file) (crp, Dpty Clk) (Entered: 12/22/2004)
12/22/2004	<u>47</u>	EXHIBITS A-3 by respondent Millicent Newton-Embry in support of notice [46-1] (oversized doc) (crp, Dpty Clk) (Entered: 12/22/2004)
12/22/2004	<u>48</u>	TENDER OF OMITTED EXHIBIT C by respondent Millicent Newton-Embry in support of exhibits [47-1] (crp, Dpty Clk) (Entered: 12/22/2004)

12/23/2004	<u>49</u>	MOTION by petitioner April Rose Wilkens for leave to file rply re pwhc (sac, Dpty Clk) (Entered: 12/27/2004)
12/27/2004	<u>50</u>	REPLY by petitioner April Rose Wilkens to response to PETITION FOR WRIT OF HABEAS CORPUS [1-1] (sac, Dpty Clk) (Entered: 12/27/2004)
12/29/2004	<u>51</u>	ORDER by Judge Terence Kern granting motion for leave to file rply re pwhc [49-1] (cc: all counsel) (sac, Dpty Clk) (Entered: 12/30/2004)
05/25/2005	<u>52</u>	NOTICE of Tender of Omitted Exhibits by Millicent Newton-Embry (kjp, Dpty Clk) (Entered: 05/25/2005)
06/22/2005	<u>53</u>	MOTION to Supplement <i>record</i> (Re: <u>1</u> Petition for Writ of Habeas Corpus) by April Rose Wilkens (tjc, Dpty Clk) (Entered: 06/22/2005)
01/09/2006	<u>54</u>	LETTER <i>requesting copy of the docket sheet (copy sent 1/10/06)</i> by April Rose Wilkens (s-kjp, Dpty Clk) (Entered: 01/10/2006)
10/18/2006	<u>55</u>	NOTICE of Change of Address by William R Holmes by on behalf of Millicent Newton-Embry (Holmes, William) (Entered: 10/18/2006)
10/18/2006	<u>56</u>	NOTICE of Change of Address by Diane L Slayton by on behalf of Millicent Newton-Embry (Slayton, Diane) (Entered: 10/18/2006)
03/26/2007	<u>57</u>	MOTION to Supplement (Re: <u>1</u> Petition for Writ of Habeas Corpus) by April Rose Wilkens (s-kjp, Dpty Clk) (Entered: 03/26/2007)
03/27/2007	<u>58</u>	ORDER by Judge Terence Kern, granting <u>53</u> Motion to Supplement, granting <u>57</u> Motion to Supplement (JLW, Chambers) (Entered: 03/27/2007)
04/12/2007	<u>59</u>	MOTION to Supplement <i>re: DNA Evidence</i> (Re: <u>1</u> Petition for Writ of Habeas Corpus) by April Rose Wilkens (s-tjc, Dpty Clk) (Entered: 04/12/2007)
04/12/2007	<u>60</u>	MOTION to Supplement <i>re: ruling by OCCA</i> (Re: <u>1</u> Petition for Writ of Habeas Corpus) by April Rose Wilkens (s-tjc, Dpty Clk) (Entered: 04/12/2007)
04/13/2007	<u>61</u>	RESPONSE in Opposition to Motion (Re: <u>59</u> MOTION to Supplement <i>re: DNA Evidence</i> ) by Millicent Newton-Embry ; (Holmes, William) Modified on 4/16/2007 to delete Shoecraft as a filer (sac, Dpty Clk). (Entered: 04/13/2007)
04/16/2007		NOTICE of Docket Entry Modification; Error: selected a termed filer; Correction: deleted Shoecraft as a filer (Re: <u>61</u> Response in Opposition to Motion) (sac, Dpty Clk) (Entered: 04/16/2007)
05/16/2007	<u>62</u>	MOTION to File Second Amendment to Petition for A Writ of Habeas Corpus (Re: Petition #1) by April Rose Wilkens (s-kjp, Dpty Clk) (Entered: 05/16/2007)
10/18/2007	<u>63</u>	LETTER <i>requesting copy of audio tape (responsive letter sent)</i> by April Rose Wilkens (s-tjc, Dpty Clk) (Entered: 10/23/2007)
10/23/2007	<u>64</u>	LETTER to April Wilkens (s-tjc, Dpty Clk) (Entered: 10/23/2007)
11/05/2007	<u>65</u>	OPINION AND ORDER by Judge Terence Kern ; dismissing/terminating case (terminates case) ; granting <u>59</u> Motion to Supplement; granting <u>60</u> Motion to Supplement; granting <u>62</u> Motion for Miscellaneous Relief; denying <u>1</u> Petition for Writ of Habeas Corpus (Documents Terminated: <u>1</u> Petition for Writ of Habeas Corpus, <u>60</u> MOTION to Supplement <i>re: ruling by OCCA</i> , <u>62</u> MOTION to File Second Amendment to Petition for A Writ of Habeas Corpus, <u>59</u> MOTION to Supplement <i>re: DNA Evidence</i> ) (JLW, Chambers) (Entered: 11/05/2007)
11/05/2007	<u>66</u>	JUDGMENT by Judge Terence Kern, dismissing/terminating case (terminates case), entering judgment in favor of Respondent against Petitioner (terminates case) (JLW, Chambers) (Entered: 11/05/2007)
11/05/2007		***Civil Case Terminated (see document number <u>66</u> ) (lml, Dpty Clk) (Entered: 11/06/2007)

11/26/2007	67	NOTICE OF APPEAL to Circuit Court (Re: <u>65</u> Opinion and Order,,, Dismissing/Terminating Case,,, Ruling on Motion to Supplement,,,,, Ruling on Motion for Miscellaneous Relief,,, Ruling on Petition for Writ of Habeas Corpus,, <u>66</u> Judgment, Dismissing/Terminating Case, Entering Judgment ) by April Rose Wilkens (s-tjc, Dpty Clk) (Entered: 11/26/2007)
11/26/2007	68	LETTER <i>requesting form (IFP form sent)</i> by April Rose Wilkens (s-tjc, Dpty Clk) (Entered: 11/26/2007)

DAVID R. BLADES  
ATTORNEY AT LAW

REC'D 07 JAN 2002 <sup>ARW</sup>  
SENT LETTER TO ZUHDI 08 JAN 2002 <sup>ARW</sup>  
CC: TO DAVID BLADES 08 JAN 2002 <sup>ARW</sup>

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1861 E. 15<sup>th</sup> Street  
Tulsa, Oklahoma 74104-4610  
Phone: (918) 747-4600

January 4, 2002

April Rose Wilkens  
No.: 282399 C. O. C. F. (CIB116)  
29501 Kickapoo  
McCloud, OK 74851

Dear April:

Work has begun on your case. However, I am attempting to procure your file from your previous appellate attorney. However, I have been unsuccessful up to this point. I recommend that you send Mr. Zuhiti a letter to indicating to him that your files should be released to my office as soon as possible and copy your correspondence to my attention. Your cooperation is appreciated.

Sincerely,



David R. Blades

DRB/ta

**DAVID R. BLADES  
ATTORNEY AT LAW**

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1861 E. 15<sup>th</sup> Street  
Tulsa, Oklahoma 74104-4610  
Phone: (918) 747-4600

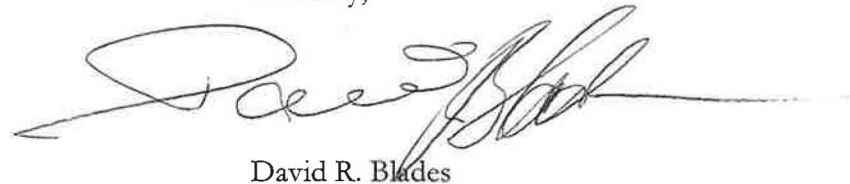
January 9, 2002

April Rose Wilkens  
No.: 282399 C. O. C. F. (CIB116)  
29501 Kickapoo  
McCloud, OK 74851

Dear April:

I have been in contact with Judge Eagan concerning your case. Given the fact that I am not certain that these correspondences remained confidential, I will not provide you with the details of our conversation except to say it was promising. However, I need for you to sign and return the enclosed document so that I can retrieve your legal file from Hall, Estill, Hardwick, Gable, Golden & Nelson, PC. Please sign this document and return it to my office in the enclosed, self addressed, stamped envelope.

Sincerely,

A handwritten signature in black ink, appearing to read "David R. Blades", written over a horizontal line.

David R. Blades

DRB/ta  
Enclosure



COUNTY OF TULSA                    )  
  ) ss.  
STATE OF OKLAHOMA                )

AFFIDAVIT OF CLAIRE V. EAGAN

I, Claire V. Eagan, of sound mind, and of lawful age, do state upon personal oath the following:

1. In November 1996, I was an attorney licensed to practice in Oklahoma and a shareholder with the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. ("Hall Estill").

2. On or about November 13, 1996, Michael D. Cooke, another shareholder at Hall Estill, requested that I represent a business client of his, April Rose Wilkens, in an attempt to procure a protective order against her then-fiancé, Terry Carlton. Mr. Cooke represented that Ms. Wilkens had been severely beaten by Mr. Carlton while they were in Rome, Italy, and that she was returning from Rome immediately per his advice.

3. On November 15, 1996, I met with April Rose Wilkens in my office. I observed her obvious physical injuries to be: two blackened eyes, numerous bruises on her arms, face, and throat, as well as a red and swollen jaw. She also indicated that she had contusions of her shoulder, back, hip and pelvic area resulting from Mr. Carlton slamming her on the floor, up against the wall and in a door jamb. I accompanied her that afternoon to the Tulsa County Courthouse where we obtained an Emergency Protective Order (Case Number PO 96-3373) from Judge Allen Klein. A hearing date was set for November 26, 1996 for a permanent protective order.

4. On November 18, 1996, I spoke by telephone and met with April Rose Wilkens in my office regarding the upcoming hearing date. We discussed witnesses and documents necessary for the hearing. She gave me a detailed account of the history of her relationship with Mr. Carlton. She indicated that he had been physically violent towards her in the past, that this was aggravated by his use of alcohol and/or drugs, and that the violence would escalate whenever she would attempt to distance herself from him or terminate the relationship.

5. On November 18, 1996, Ms. Wilkens and I reviewed an audio tape recording of several phone conversations which occurred after the beating in Rome, but prior to Mr. Carlton's being served with the emergency protective order. The tape recording contains the following statements and/or admissions by Mr. Carlton regarding the Rome incident:

- (a) telling her prior to the beating that "this is Europe and I can do what I want to here";
- (b) "strangling the living shit" out of her;
- (c) that the beating was "drastic";
- (d) choking her, but only after she resisted his attempts to pick her up and throw her, naked, out of the hotel room; and
- (e) the possibility that alcohol and/or drugs "aggravated" his violence towards her.

He additionally admitted the following regarding incidents of violence which occurred prior to the Rome incident:

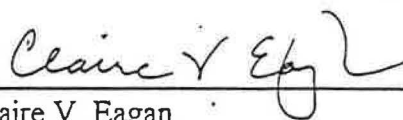
- (f) slamming her against the ground;
- (g) raping her; and
- (h) that obtaining counseling and learning to control his anger "may help the situation", but that his "anger builds and builds" and there is "no other way to address an issue" with her other than through violence.

6. On November 26, 1996, I appeared for the permanent protective order hearing, but Ms. Wilkens did not. I telephoned her to inquire why she was not present and she stated that she did not appear because Mr. Carlton had informed her the evening before, in violation of the existing emergency protective order, that he would be present the next morning with an attorney. Ms. Wilkens stated that she was fearful and too intimidated to appear.

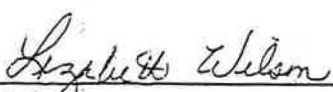
7. The preceding information which I acquired as a result of my representation of Ms. Wilkens was not available from any other source. The tape recording remained in my possession until I left the firm of Hall Estill in January 1998, at which time I left it in Ms. Wilkens' file at the firm.

8. At no time after the April 28, 1998 death of Mr. Carlton was I, Michael Cooke, or to my knowledge, my former employer, Hall Estill, ever contacted by anyone associated with April Rose Wilkens' trial defense team.

9. Had I been contacted by anyone regarding April Rose Wilkens in connection with the criminal charge for first degree murder in CF-98-2173, and trial in April 1999, I would have made myself available and willingly shared all information of which I was aware, including the information contained herein, upon authorization by Ms. Wilkens.

  
\_\_\_\_\_  
Claire V. Egan

Subscribed and sworn to before me this 20<sup>th</sup> day of March, 2002.

  
\_\_\_\_\_  
Notary Public

1-15-05  
\_\_\_\_\_  
My Commission Expires

JAMES D. BEDNAR  
EXECUTIVE DIRECTOR



FRANK KEATING  
GOVERNOR

STATE OF OKLAHOMA  
OKLAHOMA INDIGENT DEFENSE SYSTEM

***S. GAIL GUNNING***  
***APPELLATE DEFENSE COUNSEL***

January 14, 2002

April Rose Wilkens #282399  
Central Oklahoma Correctional Facility  
29501 Kickapoo  
McLoud, OK 74851

Re: April Rose Wilkens  
Tulsa County Case No. CF-1998-2173  
Court of Criminal Appeals Case No. F-1999-927

Dear Ms. Wilkens:

In response to your recent letter, all of the documents in your file, as well as the entire appeal record, were given to Mr. Zuhdi to be used in briefing your case. In non-capital cases, the original record and transcripts must be returned to the trial court, which would be in Tulsa. The reason is that the court fund paid for the transcripts and your appellate attorney was allowed to use the "defendant's copy."

Mr. Zuhdi could give you copies of the brief and the appellate court's Opinion. However, the law does not allow appellate counsel to give you the transcripts. If you need them for further pursuit of your case, you will need to obtain permission from the trial judge in Tulsa to check them out and then return them to the court at a later date. *See Tiger v. State*, 859 P.2d 1117, 1118 (Okla. Cr. 1993); 20 O.S. 2001, § 106(4); Rule 26, Rules for District Courts of Oklahoma.

I understand your frustration with this process. If it were up to me, every defendant would have copies of the transcripts. However, under the law stated above, appellate counsel cannot provide copies for you. I hope you are able to obtain some relief in your case.

Sincerely,

A handwritten signature in cursive script that reads "S. Gail Gunning".

S. Gail Gunning  
Appellate Defense Counsel

cc: Bill Zuhdi  
Zuhdi Law Office  
P.O. Box 1077  
Oklahoma City, OK 73101

JAMES D. BEDNAR  
EXECUTIVE DIRECTOR



FRANK KEATING  
GOVERNOR

STATE OF OKLAHOMA  
OKLAHOMA INDIGENT DEFENSE SYSTEM

***S. GAIL GUNNING***  
***APPELLATE DEFENSE COUNSEL***

February 13, 2002

April Rose Wilkens #282399  
Central Oklahoma Correctional Facility  
29501 Kickapoo  
McLoud, OK 74851

Re: April Rose Wilkens  
Tulsa County Case No. CF-1998-2173  
Court of Criminal Appeals Case No. F-1999-927

Dear Ms. Wilkens:

In response to your recent letter, I suggest that you have your current counsel contact Mr. Zuhdi directly. This office no longer has any of your records, since the case was contracted to Mr. Zuhdi.

Sincerely,

  
S. Gail Gunning  
Appellate Defense Counsel

**DAVID R. BLADES**  
**ATTORNEY AT LAW**

1861 E. 15<sup>th</sup> Street  
Tulsa, Oklahoma 74104-4610  
Phone: (918) 747-4600

April 9, 2002

April Rose Wilkens  
No.: 282399 C. O. C. F. (CIB116)  
29501 Kickapoo  
McCloud, OK 74851

Dear April:

Enclosed you will find a copy of the brief that was filed in your Habeas case along with the Court Order that was generated as a result of that brief. The Court Order will give you an idea of the time table that we face in continuing this litigation. It is important to note that the Court could have chosen to dismiss this claim without requiring a response from the state if they felt your case was meritless. However, simply because the Court has determined that there is a reason to hear your Petition doesn't change the fact that the odds are still against us for procuring you a new trial. I am more confident that the outcome will be in our favor after having spoken with the various witnesses that were excluded from your trial and reviewing the appropriate case law.

As you will note in the enclosed Order the government has thirty (30) days in which to file a response to your Writ of Habeas Corpus. Under these circumstances, little will be done in your case until that response is completed then this office will have to file a reply brief to their assertions. The state will make arrangements to have portions of the trial record sent to the federal Judge. After reviewing all of that information if the Judge believes that your case is worth a full evidentiary hearing we will go to Court to argue the legal issues. On the other hand, the Court could review the evidentiary material and determine that there was no ineffectiveness of counsel and dismiss your case. Should your case be dismissed there are other avenues available to attack this sentence. If you have any questions do not hesitate to write or have your mother call.

Sincerely,



David R. Blades

DRB/ta  
Enclosures

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

APRIL ROSE WILKENS )

Petitioner )

v. )

VICKI SHOECRAFT )

Respondent )

Case no.

**02C V244 B (J)**

**F I L E D**

APR 02 2002

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF  
HABEAS CORPUS**

**COMES NOW, APRIL ROSE WILKENS** by and through her attorney David R.

Blades and in support of her Application for a Writ of Habeas Corpus shows the court as

follows:

1. That the defendant was convicted in District Court of Tulsa County State of Oklahoma of first degree murder on April 23 1999
2. The defendant was sentenced to life imprisonment in the custody of the Oklahoma Department of Corrections.
3. That the defendant is currently being held at the Central Oklahoma Correctional Facility correctional center under the control of Vicki Shoecraft warden.
4. That the defendant filed a direct appeal with the Oklahoma Court of Criminal Appeals (OCCR).
5. That on April 3rd 2001 the OCCR affirmed the Petitioner's sentence.

6. That the Petitioner alleges that her right to a fair trial was violated in that she was denied effective assistance of counsel pursuant to the Sixth Amendment to the Constitution of the United States.
7. Specifically, the Petitioner alleges that trial counsel was ineffective in violation of the Sixth Amendment for failure to properly investigate her available defenses, and for trial counsel's failure to request that a lesser included offense instruction of first degree manslaughter be provided to the jury.
8. That because of the forgoing the Petitioner's request for Habeas Corpus relief pursuant to **28 USC 2254** should be granted and her conviction vacated.

#### STATEMENT OF FACTS

On the morning of April 28, 1998, between 9:00 a.m. Gaston ("Gaston") called the residence of Terry Carlton ("Carlton") whereabouts of her friend April.<sup>1</sup> To Gaston's surprise, April (Vol. VII, Tr. 1307, 1308). April told Gaston that Carlton was de him more than once (Vol. VII, Tr. 1309, 1310, 1311, 1335). There upon, Gaston called 911 and told the operator she believed there may have been a shooting (Vol. VII, Tr. 1311, 1312).<sup>2</sup>

At approximately 9:25 a.m., the dispatcher assigned Officer H.G. Lawson ("Lawson") a call in reference to a shooting at a house at 2272 East 38<sup>th</sup> Street in Tulsa County, Oklahoma (Vol. VII, Tr. 1344, 1345, 1346, 1359.) Officer Joe Gann ("Gann") heard the dispatch and had arrived at the location (Vol. VII, Tr. 1345, 1376, 1377, 1378, 1392, 1393). Officers Fadem and Forrester also arrived on the scene and approached the house with Officers Lawson and Gann (Vol. VII, Tr. 1374, 1348, 1414).

<sup>1</sup> Gaston and April had been friend since they were both age 13 (Vol. VII, Tr. 1303). In 1997, from June until December, Gaston had worked as office manager for April's business, Snyder's prosthetic and orthopedic center (Vol. VII, Tr. 1305).

<sup>2</sup> According to Gaston, April told her at some point during the conversation that she was going to call the police but asked Gaston not to call the police at that time (Vol. VII, Tr. 1312). April said she wanted to hug her son first. April gave no indication that she was trying to hide or conceal anything (Vol. VII, Tr. 1340).

*THESE FACTS  
ARE BOGUS -  
I'VE CORRECTED  
THEM IN MY  
P.C. APPLIC.*

The officers knocked on the front door and observed a female on the stairwell through the window of the door (Vol. VII, Tr. 1348, 1349, 1361, 1380, 1397, 1415). The female, April, came down and opened the door.<sup>3</sup> Officer Gann told April they were there responding to a shooting and at that point, Officer Lawson asked her “Did you shoot him.” April replied that she had.<sup>4</sup> In response to Officer Lawson’s questions, April also told the officer the gun and Carlton were downstairs (Vol. VII, Tr. 1349, 1351, 1402, 1416, 1457).<sup>5</sup> Officer Lawson had Officer Fadem take custody of April, then Officers Lawson, Gann, and Forester went downstairs to a game room where they observed a blue blanket covering a body. A gun was laying on the table. There was also narcotic paraphernalia laying on the table (Vol. VII, Tr. 1352, 1353, 1354, 1355, 1384).<sup>6</sup> Officer Lawson checked the body, which was ice-cold and was deceased (Vol. VII, Tr. 1355, 1356, 1369, 1383, 1406). Officer Gann saw a chair with handcuffs on it (Vol. VII, Tr. 1406). April told Officer Fadem there was no one else in the house (Vol. VII, Tr. 1417). When the officers came back upstairs, Officer Fadem, on the suggestion of Officer Forester, read April her rights under *Miranda* (Vol. VII, Tr. 1418, 1419). April was very cooperative (Vol. VII, Tr. 1420).

According to Officer Fadem, April told her she had just gotten out of Eastern State Hospital (Vol. VII, Tr. 1444). Very early in the morning of April 28, April decided to go roller-blading (Vol. VII, Tr. 1422, 1423).<sup>7</sup> At around 4:00 a.m., April walked over to Carlton’s house,<sup>8</sup> which was about a mile from her home. Carlton had opened the door holding a small handgun, apparently due to the early morning hour. Carlton wanted April to go upstairs with him, but she suggested they go downstairs because she did not want to get intimate with him. Once downstairs in the recreational room, Carlton prepared a

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<sup>3</sup> April looked ragged (Vol. VII, Tr. 1367).

<sup>4</sup> Officer Lawson admitted that he did not *Mirandize* April before asking her if she shot him (Vol. VII, Tr. 1360). Officer Gann testified that when they returned from the downstairs, he heard Officer Fadem reading April her rights (Vol. VII, Tr. 1386). Gann testified April said she understood her rights and agreed to talk to the officers (Vol. VII, Tr. 1387).

<sup>5</sup> April did not attempt to conceal or hide anything (Vol. VII, Tr. 1360, 1407).

<sup>6</sup> Along with the drug paraphernalia, a spoon, needles, and other items were present (Vol. VII, Tr. 1385).

<sup>7</sup> Officer Jane Masek (“Masek”) testified that at approximately 1:28 a.m. on April 28, she responded to a call that a lady was beating a car at the Executive Inn, she came in contact with April, who was rollerblading. Officer Masek interviewed April about a disturbance at the Executive Inn then gave her a ride home and watched her go into her residence (Vol. VII, Tr. 1282-1287, 1298, 1299).

<sup>8</sup> April told Officer Fadem that because of the violent history she and Carlton had, she wanted to make peace with him (Vol. VII, Tr. 1473). April had told Officer Fadem that she was fearful of Carlton, that in the past he had continually broken into her house (Vol. VII, Tr. 1474, 1475).



syringe of black tar heroin. April prepared a syringe of methamphetamine (which she mixed weak because she didn't want to be in an altered state)(Vol. VII, Tr. 1423). April finally agreed to go upstairs with Carlton where he told her that "now you're really going to see a beating," and then hit her a few times and cracked her neck. Carlton then pulled her pants and underwear down and had raped her on the bed.<sup>9</sup> Carlton ejaculated, but not inside of her. Carlton then asked April to go to the bathroom and douche<sup>10</sup> because he didn't want any evidence left.

They went downstairs where Carlton injected heroin again, but April did not inject methamphetamine again. April then told Carlton she had to go upstairs to use the bathroom. While upstairs, she took the gun Carlton had with him earlier out of the night stand drawer and put it in the back of her vest. April went back to the basement. Carlton had handcuffed her and pulled her over to the couch. April said Carlton turned away and if he turned back around with an angry look on his face, she was going to shoot him. Carlton turned back around with a mean look and April shot him, even though her hands were handcuffed in front of her (Vol. VII, Tr. 1424 - 1427, 1476, 1478, 1482, 1488). Officer Fadem testified April said the first shot hit Carlton in the neck.<sup>11</sup> According to Officer Fadem, April told her she was in shock, but kept shooting because she felt it was the merciful thing to do and Carlton wasn't dying. April told Officer Fadem she emptied the gun (Vol. VII, Tr. 1428, 1429, 1490).

Officer Fadem eventually took April to Hillcrest Hospital for a rape exam.<sup>12</sup> April had told Officer Fadem that when Carlton and she were downstairs and she was handcuffed, April made the comment that Carlton was going to rape her again (Vol. VII, Tr. 1436).<sup>13</sup> The rape exam revealed "an area of a tear in two different places" on April's vagina (Vol. VI, Tr. 1692, 1963).

The History between April and Carlton was recited by April when she testified. April testified she met Carlton in September or October, 1995, while looking for an

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<sup>9</sup> It sounded to Officer Fadem that the sex was forcible (Vol. VII, Tr. 1424, 1487).

<sup>10</sup> Carlton made April douche in front of him (Vol. XI, Tr. 2350).

<sup>11</sup> Officer Fadem said April told her that after the first shot, Carlton asked her to get an ambulance, that he was paralyzed (Vol. VII, Tr. 1428).

<sup>12</sup> The rape exam samples were introduced as "the rape kit," State's Exhibit No. 10 (Vol. VII, Tr. 1439).

<sup>13</sup> Officer Fadem recalled observing some type of possible red marks on the side of April's face (Vol. VII, Tr. 1436).

automobile.<sup>14</sup> She had been introduced to Carlton on her second or third visit to the Acura dealership.<sup>15</sup> Carlton had April's telephone number and began to call her (Vol. X, Tr. 1941, 1942, 1943, 1944). Eventually, April and Carlton began dating. Their dates included flying to Dallas to meet Carlton's friends, and a trip to Jamaica in early December 1995. April and Carlton became engaged on Christmas Eve in 1995. The two intended to be married in April (Vol. X, Tr. 1947, 1948).

April and Carlton did not get married. Things began to change after the engagement. There was serious incompatibility and April decided not marry Carlton (Vol. X., Tr. 1949). April began to see another side of Carlton, such as unpredictable fits of anger. Carlton became very critical of her (Vol. X, Tr. 1950-1952). April thought Carlton seemed like Dr. Jeckyll and Mr. Hyde. One minute everything was fine and the next minute it was not (Vol. X, Tr. 1952, 1953).

The first time Carlton laid hands on April was at his house in Tulsa in April, 1996. Carlton came at April with his hands and grabbed her throat (Vol. X, Tr. 1954, 1955). In the summer of 1996, April and Carlton were on a trip in Amsterdam. While in the hotel room, Carlton attacked her (Vol. X, Tr. 1958, 1959). Carlton hit April with a ball cap and pushed her back on the bed. Carlton ripped off April's pants, held her down, then had very rough sex with her. April was crying and felt like she'd been raped, but couldn't say that she was raped (Vol. X, Tr. 1960, 1961).

In November, 1996, while on another trip to Rome, Carlton became enraged at April. April had woken up Carlton when she had attempted to call her son from the hotel room. Carlton attacked April on the bed, placed his elbow into her eye socket, hit her on her side and twisted her arms. Carlton stopped when he heard pounding on the door (Vol. X, Tr. 1964, 1969).<sup>16</sup> April talked to the police about Carlton's attack and she was treated by a doctor (Vol. X, Tr. 1972, 1974, 1975, 1976). Upon returning to the United States, April attempted to get a protective order and court assistance (Vol. X, Tr. 1980,

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<sup>14</sup> April ended up leasing an Acura Integra (Vol. X, Tr. 1943).

<sup>15</sup> Carlton presented himself to April as the owner of the Acura dealership (Vol. X, Tr. 1944).

<sup>16</sup> Steve Hatchett testified that he and his wife heard angry yelling and sounds of physical violence of somebody being hit in the room next to theirs. Hatchett got out of bed and went to the room where he heard the violence and started pounding on the door. The door opened and it was Carlton, who Hatchett knew from the car business and who was on the Great Empire Broadcasting trip to Rome with other customers of Great Empire Broadcasting (Vol. XI, Tr. 1877-1881). Carlton was very, very angry and emotional (Vol. XI, Tr. 1885, 1889).

1993).<sup>17</sup> The attached affidavit of the Honorable Claire V Eagan fully set's out Ms. Wilkens condition shortly after her return from Europe.

In 1997, on a trip to Greece, Carlton brought cocaine with him. Carlton attacked April when he became agitated because he ran out of cocaine (Vol. XI, 1999). Carlton threatened to rape April (Vol. XI, Tr. 2000). April again filed for a protective order when they returned home (Vol. XI, Tr. 2001). April was very frightened of Carlton (Vol. XI, Tr. 2003). Carlton threatened to kill April (Vol. XI, Tr. 2004). April had numerous confrontations with Carlton (Vol. XI, Tr. 2006, 2008, 2009).

August of 1997 was the first time April used IV drugs with Carlton (Vol. XI, Tr. 2014). Around this time, Carlton raped April and threatened to beat or kill her (Vol. XI, Tr. 2016). In December, 1997, Carlton raped April again and shoved valium down her throat (Vol. XI, Tr. 2024, 2028). Carlton had also kicked the door in of her bedroom (Vol. XI, Tr. 2030-2032, 2046, 2047). As a result of the rape, April went to Hillcrest SANE center for a rape exam (Vol. XI, Tr. 2033, 2297). Photographs were taken and a report was completed of the rape exam (Vol. XI, Tr. 2034, 2035, 2038). Carlton was very concerned about rape charges being filed against him (Vol. XI, Tr. 2039, 2041).

In February 1998, Carlton attempted to rape April in her home (Vol. XI, Tr. 2060, 2062, 2063). In late February, 1998, Carlton had attempted to break into April's house. April called 911 and the police arrived and found a stun gun and a Glock (gun) in Carlton's car (Vol. XI, Tr. 2065, 2067). On another occasion, Carlton cut April's telephone lines (Vol. XI, Tr. 2074). In early April, Carlton entered April's home using keys and used a gun to force April to go to his house (Vol. XI, Tr. 2080).

On April 11, 1998, Carlton again attempted to rape April in his house and threatened to kill her. Carlton told her he would slice her throat and then kill himself (Vol. XI, Tr. 2081-2085, 2095). Police were again called and they investigated (Vol. XI, Tr. 2085).

In late April, 1998, April was released from Eastern State Hospital into the 12 and 12 drug rehabilitation program. April had been at Eastern State Hospital for four or five days. April ran away from the 12 and 12 drug rehabilitation program (Vol. XI, Tr. 2101,

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<sup>17</sup> April eventually filed three protective orders (Vol. XI, Tr. 2087).

2102).<sup>18</sup> Sometime around dark, April went rollerblading to get some exercise (Vol. XI, Tr. 2102, 2104, 2105). April tried to see Luke<sup>19</sup> at the hotel<sup>20</sup> but he wouldn't see her. April was upset and threw her backpack on Luke's car and hung the keys to his room on the visor (Vol. XI, Tr. 2121).

April left the hotel and was able to flag down Officer Masek to get a ride home (Vol. XI, Tr. 2121). April did not stay at her home long (Vol. I, Tr. 2122). About 2:00 or 3:00 a.m., April went to Carlton's house to make peace with him because she wanted a peaceful resolution to the months and months of conflict (Vol. XI, Tr. 2123).<sup>21</sup> This testimony is consistent of a tape-recorded conversation between the decedent and defendant where this dynamic is clearly seen. This tape recording was available to the defendant's trial attorney, but he failed to procure the tape from defendant's prior counsel. (Tape is possession of current counsel and a transcription for information purposes has been attached)

When April arrived at Carlton's home, she knocked on the front door. Carlton answered and invited her in. Carlton had a gun with him because it was so late (Vol. XI, Tr. 2129). Carlton had been sleeping but was glad April was there. Carlton wanted to go upstairs, but the two of them went directly downstairs instead (Vol. XI, Tr. 2130).

While in the basement, Carlton wanted to do drugs (Vol. XI, Tr. 2131, 2132). April told Carlton she had come over for a peaceful resolution of their problems so she could feel safe and he could get on with his life. But Carlton became short-tempered, so April also agreed to do drugs.<sup>22</sup> April made up her own mixture of methamphetamine, which she mixed weak (Vol. XI, Tr. 2132, 2133). After doing the drugs, April went upstairs and used the bedroom area restroom (Vol. XI, Tr. 2133, 2134). When April opened the door of the restroom to exit, Carlton stood in front of her and blocked the stairs. He had a gun in his hand. He pointed it at April and said she was never going to come around so he was going to take the "fuck" she owed him (Vol. XI, Tr. 2135, 2136). Carlton grabbed April and shoved her into the bedroom toward the bed (Vol. XI, Tr.

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<sup>18</sup> While April was at Eastern State Hospital, Carlton had visited her two or three times where Carlton pressured April into saying she was in love with someone else (Vol. XI, Tr. 2102, 2104, 2105).

<sup>19</sup> Luke Draffin was friends with and did drugs with April and Carlton (Vol. VII, Tr. 1501).

<sup>20</sup> The Executive Inn in east Tulsa (Vol. VII, Tr. 1501).

<sup>21</sup> When April had gone over to Carlton's that morning, her intent was to help him (Vol. XI, Tr. 2176).

<sup>22</sup> Carlton wanted April to take heroin, but she refused (Vol. XI, Tr. 2132).

2137-2139). Carlton became physically abusive when April told him she could not make a commitment to him<sup>23</sup> (Vol. XI, Tr. 2138, 2139). At some point, Carlton put the gun in the nightstand drawer so he could grab it quickly, and then told April he was going to rape and kill her. Carlton ripped off her shoes, threw them across the room, then yanked her pants down, ripping them in the process.<sup>24</sup> Carlton lifted up April's shirt (Vol. XI, Tr. 2140, 2141). April pleaded with Carlton not to have sex with her

Carlton

told her it didn't matter because she was "gonna be a dead bitch." Carlton was in control, and he raped her (Vol. XI, Tr. 2142; Vol. XII, Tr. 2342). Carlton already had his fingers in April and it was painful. April asked Carlton to please kill her before he raped her. Carlton told April "you're a dead bitch," hit her with his fists and reached around her neck to break it. April's neck cracked (Vol. XI, Tr. 2142, 2143). April eventually talked Carlton into stopping the forced sex (Vol. XI, Tr. 2144, 2145). April suggested Carlton get some rest, which would give her a chance to escape. But Carlton decided to go back downstairs with April (Vol. XI, Tr. 2145, 2145).

Once in the basement, Carlton mixed heroin and methamphetamine and insisted that April inject the drugs with him (Vol. XI, Tr. 2147). Carlton had difficulty finding a vein to inject the drugs.<sup>25</sup> April told Carlton she was going to use the telephone, and then went upstairs alone to use the phone (Vol. XI, Tr. 2150). While upstairs, April saw the gun in the nightstand when she was looking for the telephone. April quickly gathered together Carlton's credit cards and cash and<sup>26</sup> grabbed the gun so Carlton could not use it on her. She also wanted to protect herself (Vol. XI, Tr. 2151, 2152, 2153).

When April went back downstairs, she had the opportunity to run out the front door of the home, but Carlton could outrun her and she feared she could not get away

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<sup>23</sup> Carlton had wanted a commitment from April that she would commit to him after he got out of drug rehabilitation (Vol. XI, Tr. 2138).

<sup>24</sup> Exhibit No. 13 (Vol. VII, Tr. 1439). Officer Fadem testified April's pants had a tear on the seam (Vol. XI, Tr. 1488). April testified her pants were not ripped before she went to Carlton's house (Vol. XI, Tr. 2124).

<sup>25</sup> April said the difficulty was due to Carlton having injected a large quantity of drugs recently and there were no clean syringes (Vol. XI, Tr. 2149).

<sup>26</sup> April wanted to take away Carlton's means to find her if she was successful in escaping.

safely (Vol. XI, Tr. 2155)<sup>27</sup>. It was at this moment that Carlton handcuffed her (Vol. XI, Tr. 2156, 2157). Carlton asked April where the gun was, then he searched April's pocket. April was scared Carlton would find the gun.<sup>28</sup> Carlton quit searching for the gun, then told April he was going to kill her and rape her "up the ass." Carlton yanked April by her arm towards the couch. Carlton looked deranged, frightening, and fearless (Vol. XI, Tr. 2160). On the way to the couch, Carlton let go of April. Still handcuffed, April reached back and pulled the gun<sup>29</sup> from her back vest pocket. Carlton saw the gun. He became enraged and went toward April. April felt she had no other option with no more distance between her and Carlton. April shot the gun and just kept shooting.<sup>30</sup> April thought that if Carlton got the gun away from her, he would torture her and then kill her (Vol. XI, Tr. 2164-2168). April recalled Carlton told her he was paralyzed and to call an ambulance. After the shooting, April was in a daze (Vol. XI, Tr. 2169, 2171).

Dr. John Call ("Call") testified that in his opinion April was psychotic on April 27<sup>th</sup> and 28<sup>th</sup>, 1998, and that April was psychotic<sup>31</sup> at the time she shot Carlton. At the time of the shooting, April believed she was in danger and that her use of force was justified (Vol. XV, Tr. 2851-2852).

### Standard of Review

Generally, there are two broad types of constitutional violations that apply differing standards of review<sup>32</sup>. One type is the structural error affecting the basic nature

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<sup>27</sup> There was testimony of several instances where April did try to run from the decedent, he would always run her down sometimes grabbing her by the hair of the head and dragging her back into the house or catching up with her right as she got into her automobile and smashing out the windows.

<sup>28</sup> Earlier, April had checked to see if the gun was loaded and the gun was loaded with one bullet in the chamber, ready to fire (Vol. XI, Tr. 2158, 2159).

<sup>29</sup> April had placed the gun in the back pocket of her vest in the small of her back (Vol. XI, Tr. 2158, 2163).

<sup>30</sup> Carlton's head was "right there". April does not remember aiming the gun (Vol. XI, Tr. 2166).

<sup>31</sup> Dr. Call stated that when he used the word psychosis in reference to April, he meant that she had a mental disorder of psychotic proportions termed bipolar disorder I. The mental disorder that manifests itself in tangential thinking, flight of ideas and speech, rapidity of speech, and ideas that run through one's mind. Also, agitation, paranoia, inadequate social judgment, mood swings, irritability, depression, grandiosity, ..., and inadequate reasoning and use of logic (Vol. XV, Tr. 2914).

<sup>32</sup> The second type of constitutional violation is the trial error. In this situation a constitutional violation is fatal if it can be shown that the violation had a substantial and injurious effect or influence in determining the jury verdict. Under these circumstances the court engages in harmless error analysis. There are no trial type errors complained of in this Petition for Habeas corpus.

of the trial itself. This type of violation cannot be considered harmless and if found the Petitioner's Writ of Habeas Corpus should be granted. In the matter currently before the court, the Petitioner complains of ineffective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States and therefore, the court should not engage in the harmless error analysis.

The courts review of state court action in this matter is de novo. In issues such as those presented herein where there are mixed questions of fact and law the court need not defer to state court findings. State court opinions can be used as persuasive argument in a habeas proceeding just as any well reasoned legal position may assist the court. Indeed, where as in this case, an appellate court issues a conclusory order with no analysis, the habeas court has nothing in which to guide it in resolving the alleged violations. Under such circumstances, the court must then engage in its own analysis to determine any factual disputes *See Wright v. West 505US 277 (1992) discussing deference to state decisions..*

#### I

**The Defendant was denied her Sixth Amendment Right to Counsel because  
Trial Counsel's failure to Investigate the Defendant's defenses  
Constituted ineffective assistance of counsel**

The right of a defendant to effective counsel is necessary to conduct a fair trial in the adversarial system. This right is driven by the rationale that the effective assistance of counsel is necessary to safeguard the right to a fair trial. Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have. *Fisher v. Gibson WL*

382892 (10<sup>th</sup> cir 2002) quoting Federalism & State Criminal Procedure, 70 HARV.

L.REV. 1, 8 (1956)

It is well established that trial counsel has an obligation to properly investigate and present reasonable defenses on behalf of his client when they are charge with criminal conduct. The seminal case outlining the importance of a defendant's Sixth amendment right to counsel observed:

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Strickland v. Washington* 466 US 688 104 S.Ct 2052 citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942); see *Powell v. Alabama, supra*, 287 U.S. at 68-69, 53 S.Ct. 63-64.

It is not enough for the defendant to merely have counsel but, that counsel play an effect role to ensure that the adversarial system provides just results. In that regard, the Court in *Strickland* held that defense counsel had a duty to make reasonable investigations into all reasonable defenses. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. With the luxury of hindsight, the court must be mindful not to merely second guess trial counsel if his decision and investigation were reasonable at the time they were made. The court must determine if counsel's actions were deficient looking at the totality of the circumstances using professional norms in the community as a guide.

The defendant asserts that trial counsel was ineffective for failing to investigate the petitioner's defense in three ways. The defense's theory of this case focused on self



defense and whether the defendant on the night of the shooting had a reasonable belief that the decedent was threatening her with death or serious bodily harm thereby justifying the killing. Counsel was aware of a long history of beatings visited upon the defendant by the decedent. Further, counsel was aware that the defendant had on at least two occasions sought protective orders against Carlton. In the protective order proceedings dated 1996 the defendant was represented by the Honorable Claire Eagan prior to her assuming the responsibilities on the federal bench. In her affidavit, Judge Eagan notes that although she expected to hear from Mr. Lyons defendant's trial counsel never contacted her. Also, had counsel ever spoken to Judge Eagan he would have discovered that her former law partner Michael Cook also had first hand information concerning the defendant's relationship with Carlton. Also, had Mr. Lyons contacted Mr. Cook he would have discovered a audio tape<sup>33</sup> recording of a discussion between the defendant and the decedent discussing the abuse she experience with at his hands on a trip to Europe. Finally, trial counsel was deficient for failing to procure from the state tapes of the numerous 911 calls made to police by the petitioner wherein she is complaining of violence by the decedent.

The petitioner can satisfy the prejudice prong of the *Strickland* test by showing that the evidence trial counsel overlooked had an effect on the fairness of the trial. For example, the defendant testified to a history of the decedent physically attacking her leading her to have a reasonable fear of Carlton. One of the instances for which there was testimony concerned a trip to Europe with a group of people including Carlton and the defendant. The testimony was that during this trip the defendant was subject to

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<sup>33</sup> The Petitioner has attached a copy of the transcript of the tape in order to assist the court in determining whether a evidentiary hearing would be appropriate in this case.

beatings by the decedent. This evidence was of such importance that the state called Shirley Carlton to testify that she was present on the European trip and what she saw as it related to abuse. Ms. Carlton, the decedent's mother testified that shortly after one incident of abuse by Terry Carlton she saw the defendant. She testified she saw Wilkens in the bathroom of her hotel room; that the defendant was completely naked and there were no marks on her body (Vol XV Tr 2975). Judge Eagan would testify that Wilkens called her upon her return to seek a protective order and Judge Eagan could testify as to how Wilkens had bruises and lacerations immediately following her return from overseas. This evidence contradicts the testimony of Ms. Carlton; and given the black eyes suffered by Wilkens it goes a long way to negate The prosecutions theory that any violence between the two was mutual combat.

The audiotape in possession of Mike Cook is a conversation between the decedent and the Wilkens where they are discussing the abuse in Europe. This tape would be the only evidence that is in the decedent's own voice admitting to abuse. Additionally, there were experts at trial that testified as whether Wilkens was suffering from battered women's syndrome and why she would continue to stay in an abusive relationship. The tape is the only piece of direct evidence of interaction of the parties, it would have been critical for the experts to have the tape in order to do a proper analysis of an abusive relationship.

The failure of Trial counsel to request 911 tapes could also have been prejudicial. The petitioner informed trial counsel that she had contacted the police concerning Carlton on numerous occasions; that these contacts were in the form of calls to emergency 911 operators. That the subject of these calls was beatings visited on the Petitioner by the

decident. That they evidence the fear that the Petitioner felt and they go directly to the Petitioners theory of self defense. The failure to procure these tapes has subjected the Petitioner to harm that probably cannot now be overcome<sup>34</sup> .

**II**  
**The Defendant was denied her Sixth Amendment Right to Counsel because**  
**Trial Counsel's failure to request a jury instruction for**  
**Manslaughter rose to the level of ineffective**  
**Assistance of counsel**

Trial counsel's performance can be deficiency under the *Strickland* standard if he failed to ask the court for a lesser included offense jury instruction. Generally, in non-capital cases a defendant is not entitled to habeas relief for failure to give a lesser-included offense instruction even if the habeas court believes that there is sufficient evidence to necessitate the giving of such instruction, *Lujan v. Tanasy* 2 F3d 1031 (10<sup>th</sup> cir 1993). However, that rule was never extended to cases involving ineffective assistance of counsel claims based on the failure to request a lesser-included offense instruction.<sup>35</sup> Indeed, the Tenth Circuit in *Florez v. Williams* 281 F3d 1136 (10<sup>th</sup> cir 2002) granted the petitioner habeas relief when it determined that trial counsel was ineffective because he had failed to request a lesser included offense instruction.<sup>36</sup> In

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<sup>34</sup> These 911 tapes are almost certainly not in existence. Since they were not sought as evidence it is likely that they were not preserved. Further, their exact content cannot be determined unless the tapes are produced.

<sup>35</sup> In *Hooks v. Ward*, 184 F3d 1206 (10<sup>th</sup> cir 1993) the court declined to analogize the *Lujan* rule in the context of failure to request lesser included offense instructions.

<sup>36</sup> In its Summary Opinion of the present case the Oklahoma Court of Criminal Appeals made a conclusory finding that there was insufficient evidence to support the giving of an instruction of first degree manslaughter, however, because the court's opinion engages in no analysis the habeas court should not be bound by direct appeal courts cursory treatment of the issue *See Newsted v. Gibson* 158 F3d 1085.

the current case,<sup>37</sup> the Petitioner asserts that the jury instructions for manslaughter should have been pursued by trial counsel. Counsel's failure to make a written request for said instruction is clearly constitutionally deficient.

If counsel's failure to request a lesser-included offense instruction falls below reasonable professional judgment then the deficient conduct prong of the Strickland test can be satisfied. The court in *Florez* noted that an attorney's choice not to request a lesser included offense instruction may be part of "sound trial strategy" and therefore not indicative of a Sixth Amendment violation. As a result, it is incumbent on the court to engage in an analysis of the reasonableness of trial counsel's conduct in his failure to request the manslaughter jury instruction.

An examination of Oklahoma law establishes that the failure to give a manslaughter instruction when the evidences warrants one, falls well below the professional standard for defense attorneys in that state. In cases such as the one before the court, the professional standard as it relates to counsel's conduct in requesting a lesser included offense instruction has been discussed in a great deal of litigation in Oklahoma. The duty of counsel surrounding lesser included offense instructions was clearly delineated in *Ballard v. State 31 P3d 390 (Okl Cr 2001)*. In *Ballard*, the defendant was convicted of murder in the first degree. In that case, the trial judge offered a lesser included offense instruction and trial counsel refused the instruction. The Court of criminal appeals reversed the conviction, finding trial counsel to be ineffective and that in order not to include an instruction of manslaughter the record needed to show a waiver

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<sup>37</sup> Any reference to manslaughter in this brief is in reference to first degree manslaughter, a copy of the OUII instructions in question have been attached.

of the instruction by the defendant *Ballard at 391 citing Shrum v. State 991 P2d 1032 (Okla. Cr 1994)*.

Even though Defendant's counsel has a duty to request and instruction of manslaughter in a murder case, that duty is only triggered if there is sufficient evidence so support its issuance. Therefore, an examination of Oklahoma's laws on manslaughter is appropriate. Manslaughter in the first degree is defined in *Okla. Stat. tit 21 . §711*

Manslaughter in the first degree defined

Homicide is manslaughter in the first degree in the following cases:

1. When perpetrated without design to effect death by a person while engaged in the commission of a misdemeanor
2. When perpetrated without a design to effect death by a person, and in the heat of passion, but in a cruel and unusual manner, or by means of dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.
3. When perpetrated either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

Any doubt as to the sufficiency of the evidence to support an instruction of manslaughter should be resolved to the benefit of the Defendant *Tarter v. State, 359 P2d 596 (Ok Cr. 1961)* Sufficient evidence was presented in this case to require an instruction of manslaughter under subparts 2 & 3.

The evidence in this case that demonstrates the Defendant's fear of the decedent justifies the necessity of giving a manslaughter instruction. The Petitioner testified of instances of beatings visited upon the Defendant by the decedent over a period of years. Indeed, the Defendant testified that on the night of the shooting she was raped by the

decedent.<sup>38</sup> There was physical evidence of rape of the . Additionally, the Defendant testified that on the evening in question the decedent forced her to use illegal drugs. That prior to the shooting the was able to secrete one of the plethora of the decedent's hand guns on her person and that when the decent noticed the gun was missing handcuffed the Defendant. Not finding the weapon, he then indicated he was going to kill her after he "raped her up the ass" (Vol XI Tr 2160). At this time the Petitioner drew the weapon and fired in the direction the decedent striking him and emptying the semi automatic handgun into his body<sup>39</sup>.

It appears that the Court of Criminal Appeals when they reviewed the evidence in this case they may have simply chose to believe the evidence was sufficient to support a conviction under the state's theory of the case and that ended their analysis at that point.<sup>40</sup> This is precisely what the respondent wanted the court to do in *Florez*. The

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<sup>38</sup> The defendant testified that she had been raped and beaten that same night before the shooting (Vol XI, Tr 2137-2145). This was supported by State's witness Kelly Bell testifying that the defendant had two vaginal tears (Vol VI Tr 1691,1692) Police Officer Fadem testified that when she arrived at the scene of the shooting there was what could have been a red mark on the side of her face. She also, testified that the decedent threatened to kill her (Vol XI 2142) When the defendant asked the decedant not to rape her he said what's it gonna matter anyway your going to be dead bitch.

Given her close proximity to the decedent, the defendant testified that she felt she had no other option than to shoot Carlton, given the fact that she believed that Carlton would take the gun away from her and torture her and then kill her (Vol XI Tr 2164-2168

<sup>39</sup> The fact that the defendant administered multiple wounds to the decedant does not automatically evidence formulation of intent and a manslaughter instruction could still issue. *See Hogan v. Gibson 197 F3d 1297 (10<sup>th</sup> cir 1999)* Hogan is a capital offense case analyzed under *Beck v. Alabama 100 S.Ct. 2382 (1980)* and therefore, is based on a different legal theory than the violation of a defendant's Sixth Amendment rights, but its analysis of sufficient evidence to support a manslaughter instruction in Oklahoma is informative and by analogy pertinent to this case.

<sup>40</sup> Two cases cited by the OCCR in its Summary Opinion to support its contention that there was not sufficient evidence to support a manslaughter instruction are not instructive in this case

a). *Le v. State 947 P2d 535 (Ok. Cr. 1997)* a defendant is not entitled to a manslaughter instruction when after mutual combat he leaves arms himself, returns and kills the victim. In the instant matter the defendant testified that right before the shooting the defendant testified while she was handcuffed the decedent said he was going to rape her up the ass and kill her

b). *Workman v. State 824 P2d 378 (Ok. Cr. 1991)* a man is convicted of killing a toddler this case is so unlike the instant matter it does not deserve comment.

court in that case noted, that if that were the test there would never be as case of ineffective assistance of counsel for failing to request a lesser-included offense instruction. The court declined to follow such flawed logic.

The defendant has to satisfy the prejudice prong of the Strickland test in order to prevail in its request for Habeas relief. However, once it has been proven that there was sufficient evidence to offer a manslaughter instruction it is not to far to go to believe that it would have effected the trial. For instance, prejudice would not be found if the omitted instruction would have the effect of negating other instructions relied on by the defendant. In this case the defendant was allowed an instruction on self-defense. Self-defense requires an reasonable believe that one is in immediate danger of death or serious bodily harm. An instruction on manslaughter would not have negated the self defense instruction , but would allow the jury to find that she was in fear, but that her fear **unreasonable**. Armed with that instruction the jury could have convicted the defendant, but to a much less than the life sentence she now serves.<sup>41</sup>

**WHEREFORE**, for all the forgoing the Petitioners request for Habeas Corpus relief should be granted, the petitioner's conviction overturned and she be discharged from custody.

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the third case *Shrum v. State 991 P2d 1032 (Okl Cr 1999)* actually finds that there is a necessity for a lesser included instruction of manslaughter in a factual situation that is similar to the case that is currently before the court.

<sup>41</sup> To illustrate this point the Oklahoma Uniform Jury Instructions CR-4-102 reads as follows:

An "unnecessary killing constituting first-degree manslaughter would thus be found under circumstances where the defendant did not initiate the difficulty, yet honestly but unreasonably believes that either the he is in danger of injury, or that the slaying is the only way to prevent injury. The defendant's unreasonablness 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 *citing Husband v. State 503 P2d 563 & Fry v. State 218 P2d 643*.

*Respectfully submitted*

*Attorney for the Petitioner*

A handwritten signature in black ink, appearing to read "David R. Blade", written over a horizontal line.

*DAVID R. BLADE OBA 15187  
1861 EAST 15<sup>TH</sup> STREET  
TULSA OKLAHOMA 74104  
(918) 747-4600*



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Appendix

Affidavit of the Honorable Claire Eagan

Affidavit of Michael Cook

Affidavit of Lynda Driskell

Transcript of Audio tape conversation between Terry Carlton and April Wilkens


Oklahoma Uniform Jury Instruction 4-102

Oklahoma Uniform Jury Instruction 4-95

**Certificate of Mailing**

I the undersigned certify that on the 3 day of April I mailed a copy of the forgoing certified mail return receipt requested to:

Vicki Shoecraft  
29501 Kickapoo  
McLound Ok 74851



David R. Blades

COUNTY OF TULSA                    )  
  ) ss.  
STATE OF OKLAHOMA                )

**AFFIDAVIT OF CLAIRE V. EAGAN**

I, Claire V. Eagan, of sound mind, and of lawful age, do state upon personal oath the following:

1. In November 1996, I was an attorney licensed to practice in Oklahoma and a shareholder with the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. ("Hall Estill").

2. On or about November 13, 1996, Michael D. Cooke, another shareholder at Hall Estill, requested that I represent a business client of his, April Rose Wilkens, in an attempt to procure a protective order against her then-fiancé, Terry Carlton. Mr. Cooke represented that Ms. Wilkens had been severely beaten by Mr. Carlton while they were in Rome, Italy, and that she was returning from Rome immediately per his advice.

3. On November 15, 1996, I met with April Rose Wilkens in my office. I observed her obvious physical injuries to be: two blackened eyes, numerous bruises on her arms, face, and throat, as well as a red and swollen jaw. She also indicated that she had contusions of her shoulder, back, hip and pelvic area resulting from Mr. Carlton slamming her on the floor, up against the wall and in a door jamb. I accompanied her that afternoon to the Tulsa County Courthouse where we obtained an Emergency Protective Order (Case Number PO 96-3373) from Judge Allen Klein. A hearing date was set for November 26, 1996 for a permanent protective order.

4. On November 18, 1996, I spoke by telephone and met with April Rose Wilkens in my office regarding the upcoming hearing date. We discussed witnesses and documents necessary for the hearing. She gave me a detailed account of the history of her relationship with Mr. Carlton. She indicated that he had been physically violent towards her in the past, that this was aggravated by his use of alcohol and/or drugs, and that the violence would escalate whenever she would attempt to distance herself from him or terminate the relationship.

5. On November 18, 1996, Ms. Wilkens and I reviewed an audio tape recording of several phone conversations which occurred after the beating in Rome, but prior to Mr. Carlton's being served with the emergency protective order. The tape recording contains the following statements and/or admissions by Mr. Carlton regarding the Rome incident:

- (a) telling her prior to the beating that "this is Europe and I can do what I want to here";
- (b) "strangling the living shit" out of her;
- (c) that the beating was "drastic";
- (d) choking her, but only after she resisted his attempts to pick her up and throw her, naked, out of the hotel room; and
- (e) the possibility that alcohol and/or drugs "aggravated" his violence towards her.

He additionally admitted the following regarding incidents of violence which occurred prior to the Rome incident:

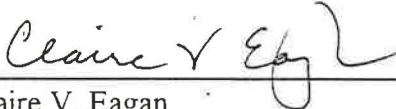
- (f) slamming her against the ground;
- (g) raping her; and
- (h) that obtaining counseling and learning to control his anger "may help the situation", but that his "anger builds and builds" and there is "no other way to address an issue" with her other than through violence.

6. On November 26, 1996, I appeared for the permanent protective order hearing, but Ms. Wilkens did not. I telephoned her to inquire why she was not present and she stated that she did not appear because Mr. Carlton had informed her the evening before, in violation of the existing emergency protective order, that he would be present the next morning with an attorney. Ms. Wilkens stated that she was fearful and too intimidated to appear.

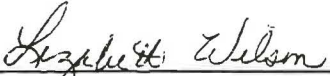
7. The preceding information which I acquired as a result of my representation of Ms. Wilkens was not available from any other source. The tape recording remained in my possession until I left the firm of Hall Estill in January 1998, at which time I left it in Ms. Wilkens' file at the firm.

8. At no time after the April 28, 1998 death of Mr. Carlton was I, Michael Cooke, or to my knowledge, my former employer, Hall Estill, ever contacted by anyone associated with April Rose Wilkens' trial defense team.

9. Had I been contacted by anyone regarding April Rose Wilkens in connection with the criminal charge for first degree murder in CF-98-2173, and trial in April 1999, I would have made myself available and willingly shared all information of which I was aware, including the information contained herein, upon authorization by Ms. Wilkens.

  
\_\_\_\_\_  
Claire V. Egan

Subscribed and sworn to before me this 20<sup>th</sup> day of March, 2002.

  
\_\_\_\_\_  
Notary Public

1-15-05  
\_\_\_\_\_  
My Commission Expires

**AFFIDAVIT OF LYNDA DRISKELL**

STATE OF OKLAHOMA    )  
  )        SS  
COUNTY OF TULSA     )

I, Lynda Driskell, of lawful age and of sound mind, being first duly sworn upon oath states as follows:

1. I am a Licensed Professional Counselor and was involved with the defense of **April Rose Wilkens** against charges of murder in the first degree for the shooting of Terry Carlton.
2. That numerous discussions it was had that Ms. Wilkens was adamant as to her desire to inspect the 911 emergency call she made to police regarding Mr. Carlton's abuse.
3. That she was adamant that **Claire Eagan** be contacted as a witness in this case since **Judge Eagan** had previously represented Ms. Wilken's in a Protective Order issue that arose as a result of Mr. Carlton's abuse.
4. That I had conversations with Chris Lyons and asked him if he was going to call **Judge Eagan** as a witness. When Mr. Lyons was asked this question in the initial stages of trial he informed me that he did not know how to get a hold of Judge Eagan and therefore was unable to contact her.

Affiant say further not.

*Lynda Driskell NCC, LPC*  
Lynda Driskell, NCC, LPC

Subscribed and sworn to before me this 2nd day of April, 2002

*Jerrie A. Andrews*  
Notary Public

My Commission Expires:  
12-16-2005



COUNTY OF TULSA        )  
  ) ss.  
STATE OF OKLAHOMA    )

**AFFIDAVIT OF MICHAEL D. COOKE**

I, Michael D. Cooke, of sound mind, and of lawful age, do state upon personal oath the following:

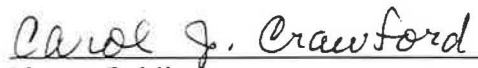
1. I am a shareholder with the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson P.C. In 1995, the firm and I were retained by April Rose Wilkens for the purpose of assisting her in the acquisition of a business.
2. I continued in my role as Ms. Wilkens's business attorney over the course of the next two years. During that time we discussed on several occasions her tumultuous relationship with her boyfriend/fiancé, Terry Carlton.
3. On several occasions during 1996, Ms. Wilkens and I specifically discussed problems she was having with Carlton and/or what she described as his attempts to control her. During several of these conversations, Ms. Wilkens became very agitated and appeared to be frightened.
4. On or about November 13, 1996, I was contacted by Ms. Wilkens while she was in Rome, Italy. She said she was there with Carlton and several other people. She was very upset and told me that she had been severely beaten by Carlton, that her injuries had necessitated medical assistance and that the Rome police had been called in. I instructed her to return to the United States immediately and that I would arrange for an attorney in our firm knowledgeable in domestic matters to assist her in obtaining a protective order against Carlton. Upon her return she met with Claire V. Eagan, another Hall, Estill shareholder, regarding obtaining a protective order against Carlton. I did not attend that meeting.
5. I did not hear again from Ms. Wilkens until about the middle of 1997. At that time, she called about several bankruptcy issues. We also spoke about her child. She called a few more times after that mostly to talk about personal matters.
6. In December, 1997, Ms. Wilkens contacted me at home one evening. She was panicked and frantic. She begged me to come to her house. I went to her residence. After I arrived she said that someone or some drug making equipment possibly was locked in her garage. She said it was Terry Carlton or some of his friends from Sapulpa. She appeared to be very upset. We walked together through her house, but we could not get into the garage. I told her I was going to call the police. She said they would do nothing. I then called the police and shortly after met the responding officer in the street outside her residence. I explained to the officer who I was, what I knew about the violent nature and history of the relationship between Ms. Wilkens and Mr. Carlton and of her concern that he or someone else had taken over her garage. The officer indicated that they had been called to her residence "several times before." He asked me several times why she had called a lawyer. I observed the police officer to be fairly dismissive of Ms.

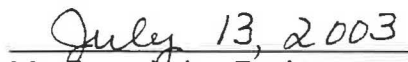
Wilkins's concerns, and to my knowledge, no further action was taken by the police regarding this matter.

7. I have had no further contact with Ms. Wilkins after this December 1997 incident.
8. At no time after the April 28, 1998, death of Terry Carlton was Claire Eagan, I, or to my knowledge, anyone else employed at Hall, Estill, Hardwick, Gable, Golden & Nelson P.C. ever contacted by anyone associated with April Rose Wilkins's defense team.
9. Had I been contacted by anyone regarding April Rose Wilkins in association with the criminal charge for first degree murder brought against her and the subsequent trial in April of 1999 for the same, I would have been available and, with Ms. Wilkins's consent, would have willingly revealed all information of which I was aware.

  
\_\_\_\_\_  
Michael D. Cooke

Subscribed and sworn to before me this 1st day of April, 2002.

  
\_\_\_\_\_  
Notary Public

  
\_\_\_\_\_  
My Commission Expires



TAPE OF APRIL WILKENS

Message 10:04 a.m. today. (Beeps in background)

Phone ringing...

TERRY: *Hello?*

APRIL: Hi.

TERRY: *Hello. Sounds like someone's at the door.*

APRIL: Somebody's selling candy, so, that's kind of strange, but, sorry, I didn't mean to interrupt it kind of surprised me to have a knock on the door.

TERRY: *Yeah.*

APRIL: All right, I'm listening.

TERRY: *I just need to know, you know, I just don't understand why, it just doesn't seem like you're convinced that you might have any issues at all there that would be important to our relationship. Your going to have to work on those April and I don't know, so, maybe I'm wrong, maybe it's all me but somehow I just don't think so. I just don't think, I think it takes 2 people.*

APRIL: I guess it just concerns me, I don't know, you know, (sigh).

TERRY: *What concerns you?*

APRIL: Well, I've told you before that I (Terry interrupts).

TERRY: *Hold on a second. All right. You said what?*

APRIL: I have told you before that I realize that in any relationship that certainly both people have to be looking out for each other (sigh) but I don't understand what drives you to the point where like you said, that you want to strangle the living shit out of me. I mean.

TERRY: *Well, if you're interested I'll tell you. It's to where you know, I can't talk to you, that you just know everything, have everything figured out and it's all my fault. You know? And you do things that you know will piss me off and you do them on purpose. You know, to me that's provoking somebody, I mean it really is and why would you want to do that? You know, I took you to Europe, you know, I was in bed, we had had an argument and I did the right thing, I got up and I left and I removed myself.*

APRIL: Yeah, but you hit me as you went.

TERRY: *Oh that was an accident I did not mean to.*

APRIL: You didn't mean to flip me with your napkin and shove and push me inside.

TERRY: *I was just was trying to leave. Leave. So, you know, then I'm in bed so what do you do? Instead of trying to make the situation better by just going to bed, you know, you deliberately aggravate the situation cause you do something that you **know** is going to **really piss me off** and that is **wake me up** call calling Hunter and talking to Hunter knowing that you're going to keep me up when all I want to do is go to bed. Then I believe that you made the suggestion that if I didn't like it I should leave.*

APRIL: I don't recall that.

TERRY: *Yes you did , and you know, that's further inflaming the situation. (Clears throat).*

APRIL: So do you see how (Terry interrupts her)?

TERRY: *You know, here I am, here I am taking you to Europe on what I thought was a nice trip and you're telling me if you didn't like the way if I didn't like the way you acted that I should just get me another room pay for you a room and me a room so you could continue to act like a spoiled brat.*

APRIL: Sigh.

TERRY: *You know April, you got mad at the gas station cause it was to dirty, then we go into another place you complained about all the time for the rest of the trip you complained about having to go to the bathroom, okay, then when we get there you won't even go you don't even go look at the bathroom that they drop us off at we gotta go spend, we have an hour to look at Serento(sp?) okay, we've got instead of going and seeing Serento we've got to go look for a fucking bathroom for you so I take you to the very next place looked okay to me you wouldn't even go in and look. Remember that?*

APRIL: I was waiting on you to get done so that we could go together.

TERRY: *What, you were going to shop, watch me shop and walk around Serento for another hour?*

APRIL: No you were in a shop doing something.

TERRY: *No April I took you to a restaurant the very next the restaurant that was next door right where they dropped us off and you said wasn't good enough either.*

APRIL: I did not.

TERRY: *That you weren't going in the tour bus place cause the last time you went it was nasty and* (April interrupt him).

APRIL: Okay, I can see, okay lets say this, even if these things happened and even if (Terry interrupts her).

TERRY: *What do you mean if they happened? They happened.*

APRIL: Okay, let's say, all right let's say (Terry interrupts her).

TERRY: *They happened. I didn't make them up April.*

APRIL: Okay, do you not see how maybe it's a little drastic to pounce on someone and choke them and throw them out on their ass naked, threaten to throw them out on their ass naked and, you know, I mean does that not seem a little drastic and?

TERRY: *Yes. You're right. It is drastic and I admitted it.*

APRIL: But what, I mean I don't understand.

TERRY: *But did you do anything to help the situation? No.*

APRIL: How, you know I mean (Terry interrupts her).

TERRY: *You want to know how you could've helped the situation? I thought I told you. You could have dropped it, you could've gone to bed just like I was trying to do. But no, you wanted to keep me up awake by making calls that you didn't need to make just to fucking punish me keep me awake to keep me up that night you wanted, you wanted to call Hunter and then you started telling me if I didn't like it I could just fucking leave.*

APRIL: I don't (Terry interrupts her).

TERRY: *I could get me my own room.*

APRIL: I didn't say that.

TERRY: *And you know I already paid and shelled out enough money you know and I just don't need people telling me that shit, you know, so you can., so you can be, you*

*know, bust my balls, you know, that's what, that's what you were doing. That's all you were trying to do April.*

APRIL: I was - trying to call Hunter.

TERRY: *But trying to keep me awake. Okay. We had already had this discussion before earlier in the week when you called Hunter and started laughing and getting real loud and everything, you know, woke me up, already suffering from jet lag, you know, I'm trying to get some sleep, trying to get into the you know time change and you know we talked about it, you said you were sorry, which of course you weren't, and then you were doing it again because you were mad April. You're not above being petty April I mean you act like an idiot but you would never do anything like that on purpose but April I have seen you do some pretty petty things before. Now you're acting like, you know, Pollyanna here that you know. You know.*

APRIL: I suppose that everybody does things that are aggravating to the other person I just don't understand the need for physical violence.

TERRY: *I see, so it's okay for you to do to pull out the stops and do everything that you can do to piss me off but you know as soon as I you know react in the same way and pull out the stops and do the things I can do to hurt you what's the difference April? You know, what's the difference? You're fucking with me I'm fucking with you. You understand? You know that's the big fucking lie that's it's you know it's okay to do whatever the fuck you want to, but it's not okay for me to do whatever I feel like doing. I loose my temper, you loose my temper, you're mad at me, so you fuck with me you bust my balls and you try to egg, egg, egg on the fight and aggravate me and play some kind of little head games.*

APRIL: Like (Terry interrupts her)

TERRY: *But then, whenever I just, you know, I loose my temper and I'm going to throw you outside the room naked.*

APRIL: And choke me.

TERRY: *That's when you started resisting, but, you know, is one any better than the other? I mean, do you dummy? To me it seems like you think it's okay to do those things. I mean that's what you're telling me. Oh well I suppose we all fuck with each other every once in a while but you, you broke the rule you went over you stepped over the line you got physical. I'm saying neither one of them are right. Okay? Two rights don't make a, you know, two wrongs don't make a right and you know I'm saying neither one of them are right but you seem to think that it's okay. I mean, that's what I'm getting out of this conversation is that it's okay to play little head games with Terry to do things*

*to piss him off on purpose to aggravate him. Why would you want to aggravate somebody whose trying to take you to do something nice for you? Huh?*

APRIL: I guess my (Terry interrupts her).

TERRY: *Do you think I fucking desperately needed your company to drag you half way around the world so you could bust my balls all week? I don't think so.*

APRIL: Why would you, I guess I don't understand is why you would naturally assume that anything that I do is to upset you, I mean that you have a choice to decide how you look at things and you choose to look at them in the most negative way possible and that only creates a lot more aggravation for you.

TERRY: *Wait a minute, that's horse shit. It's just psycho babble right there it's just bull shit psycho babble. We've talked about you calling while I was asleep but you did it in Amsterdam, you talked to your mother.*

APRIL: Well where else do you suggest I call from I have a son?

TERRY: *It was 4:00 o'clock in the morning and fucking wake my ass up.*

APRIL: I have a son.

TERRY: *WHAT?*

APRIL: I have a son, where else do you suggest I call from?

TERRY: *Hey, go down to the lobby. That would be the considerate thing to do.*

APRIL: Perhaps you are right.

TERRY: *No, but you think it's your God given right to fucking step on every body else and I'm tired of being stepped on okay? I'm tired of being stepped on by you April and until you until you wake up to that fact me going to all these counselors in the world will not help that okay? Yeah, you know, I might learn to control my anger, okay? That might help, but that, it won't make me any less angry will it? Because you will still be doing the things that make me angry and yeah, I'll do something if you'll do something but you're going to have to do something, I'm not, I'm not satisfied with this because what you're going to do is to go to a victims group okay and you're all going to sit there and tell each other it's not your fault that this happened to you and pat each other on the back and feel sorry for each other and, you know, it's going to be what a bastard I am, okay, and you're not going to be working on your own problems, okay? You're not going to work on why you feel it is necessary to do those petty little things that make me angry and you would still do them, you know, if I didn't do the violence, if the violence thing*

*was not even a factor you would still do those things because that's your way of controlling the situation and April control to you is everything. You have got to be in control. Just like tonight when, you know, you had to control when we talked about this. I wanted to talk about it tomorrow but no we're talking about it tonight so you're in control once. Again you're proven that you April are in control of the situation. You know, I don't know why you are like that but I think that you need to explore that because you have to control.*

APRIL: Well, (sighs) I guess what I was trying to say was all I can do is give you the name of the counselor, (sigh) you know?

TERRY: *I guess I can look up a psychiatrists name and give you the name of a good psychiatrist, you know to find out.*

APRIL: You asked for resources, um.

TERRY: *Okay, but you're not asking because you're not interested. You know, April I just don't ever. (tape cuts off).*

APRIL: The problem is when you do it you don't apologize, you know, (laughs). I mean I don't remember hearing April I raped you I know that must of really upset you and I'm sorry or April I know that I, you know, that I slammed you against the ground and I know that must of been really traumatic for you and I'm sorry.

TERRY: *I have said those things. I have said those things you just want to hear them over and over again, you know, and I'm, you know, I'll apologize once but I'm not going to sit there and just have to apologize every fucking day of my life you either except the apology or you don't. It sounds like to me that you don't. April I'm not interested in fighting with you.*

APRIL: Yeah, I don't want to fight with you either.

TERRY: *I mean this is the reason that's we're in trouble right now.*

APRIL: Yeah, I understand, I don't want to fight with you either. I guess that's why I was trying to explain that it's best for us to stay apart and you know if you want to do, you know, if you want to call fine and if you don't that's your decision and I've got to do what I've got to do, so.

TERRY: *Well, You know, that's fine. You can put it all on me again.*

APRIL: No, I (Terry interrupts her)

TERRY: *I'm a bastard because I didn't call but you know you don't even admit that you have a problem and so, you know, there's no need for me to call. There's no need for me to call. It's not, it just doesn't fucking matter. The best thing I can do is separate myself from you.*

APRIL: Well, that's what I've been telling you. (laughs) You know.

TERRY: *You know you want me to call then later down the world we're going to talk and find out, you know?*

APRIL: I thought that's what you wanted.

TERRY: *April until you change there's no need for me to change. I mean, you know, I don't think that I'm somehow, you know, I just get the feeling that somehow all this is on me and I'm just this horrible fucking mutant that you know (April interrupts him).*

APRIL: I told you that I feel like (Terry interrupts her)

TERRY: *And the fact is you're a ball buster, you always have been and you always will and that's the reason you're not married to Eric and that's the reason you're not with Scott and that's the reason you're not with me you're not ever going to be with anybody unless you can just totally dominate them and suck the fucking life out of them and I don't I don't want the life sucked out of me I want somebody who cares about me and thinks about me.*

APRIL: I understand that.

TERRY: *Thinks about my feelings, you don't think about my feelings, you're, just like today and tonight you haven't thought about my feelings. What about my feelings what about if I wasn't ready to talk about this, huh? What about my feelings? My feelings count for nothing with you and until they do all this is just bullshit. So, Goodbye!*

Pause in tape.....

APRIL: I don't know, do you think that alcohol and the drugs or anything like that have anything to do with it?

TERRY: *Sighs, uh, well I'm sure, I mean yeah, it has something to do with it, I have never taken any drugs so I don't know, but the alcohol, the alcohol is an dis-inhibitor so it makes you do things that you normally wouldn't do or allows you to do things that you don't normally do but mainly the thing is I don't allow myself, it's a complicated thing but I think mainly it's I like build up, these things builds up inside me, you know my anger just builds and builds and I don't have any way since we're so bad at communicating I don't feel like I can communicate those things and I'm really I'm not trying to put any*

*blame on you, but, when I do tell you things, you don't listen, you know, you don't believe in yourself*

APRIL: Yeah.

TERRY: *And so, and if I tell you that something hurts my feelings or if it makes me angry, or you know, I think you're being selfish about something you just go no it's not true, what's true is bebebububabab. You know and if I don't feel like I can really, there's no healthy outlet, you know what I'm saying?*

APRIL: Yeah.

TERRY: *Then it just builds and builds till it explodes because I cant, there's no way to address an issue with you, I mean, I'm sorry, I'm not trying to, I mean, you don't know what's that's like.*

APRIL: I don't know, I guess I guess what I kind of thought was that you were doing the drugs again cause it kind of scared me and well, it more than kind of scared me it frightened the hell out of me with the you know just listening you know, but I mean I just I don't know maybe you said it in a fit of anger and I don't know why but when you said hey this is Europe and I can do what I want to you here I just thought that was kind of scary like it was premeditated or something.

TERRY: *No, it wasn't premeditated, it was just meant to scare you. Try to go to sleep and have a good dinner, you know, have a good evening.*

APRIL: Well, I hope you have sweet dreams, I just (tape is turned off).

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End of tape.



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OUJI-CR 4-102 MANSLAUGHTER IN THE FIRST DEGREE BY RESISTING CRIMINAL  
ATTEMPT - ELEMENTS

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

First, the death of a human;

Second, perpetrated unnecessarily (**while resisting an attempt by the deceased to commit a crime**)/(after an attempt by the deceased to commit a crime had failed);

Third, perpetrated by the **defendant(s)**.

Statutory Authority: 21 O.S. 1991 § 711 [21-711](3).

Committee Comments

The Commission has found no cases which rely specifically on subsection 3 of section 711 [21-711] in discussing the validity of a first-degree manslaughter conviction. Thus, since the parameters of the statute remain unclear, the Commission has relied on common law principles in resolving questions raised by its provisions.

The first question is raised by incorporation of the term "unnecessarily" in the statute. The term could be narrowly construed as synonymous with "unlawfully," so as to negate the applicability of any legal justification for the slaying, such as self-defense or justifiable or excusable homicide. Or the term could be construed as meaning that the slaying was "unnecessary" in order to accomplish successful resistance to the attempted crime. This latter construction should be rejected for two reasons. First, it requires a strained reading of the statute, since "unnecessarily" appears to govern both the resistance to the attempt and the subsequent killing after the attempt has aborted. Second, the latter construction implies that the defendant is justified in slaying another where such killing is "necessary" in order to resist an attempted criminal act by the person slain, a contention that is untenable outside the parameters of the doctrines relating to self-defense and excusable or justifiable homicide. **Thus, the**

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 equivalent to "unlawfully" or "without legal justification." An "unnecessary" killing constituting first-degree manslaughter would 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

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that his honest, albeit erroneous, beliefs negate malice aforethought indicates that his crime is first degree manslaughter. Cf. *Husband v. State*, 503 P.2d 563 (Okl. Cr. 1972) (defendant shot wife who wielded knife and attempted to stab him); *Fry v. State*, 91 Okl. Cr. 326, 218 P.2d 643 (1950) (defendant stabbed deceased after physical assault); *Wingfield v. State*, 81 Okl. Cr. 146, 160 P.2d 945 (1945) (defendant killed deceased with shotgun blast after deceased moved his hand to a pocket as though to draw a gun). In many cases, where adequate provocation is found, the defendant may demonstrate that the erroneous beliefs he entertained impelled fear in him, so as to produce a "heat of passion" in satisfaction of section 711 [21-711](2).

*Mammano v. State*, 333 P.2d 602 (Okl. Cr. 1958), illustrates lack of necessity in killing after an attempt by the deceased to perpetrate a crime has failed. In that case, the deceased grabbed the defendant's hand and placed it on the deceased's private parts while both were sitting in the front seat of an automobile. The defendant freed his hand and stabbed the deceased with a switch-blade knife. In affirming the defendant's first-degree manslaughter conviction, the court declared:

[T]his homicide was entirely unnecessary. . . . [T]he assault had already been repelled by the defendant jerking his hand away from the decedent's grasp. . . . If [decedent] had persisted in his assault, there was nothing to prevent the defendant from leaving the automobile. . . . He did not have to kill [decedent] in order to protect his person.

*Id.* at 604.

The second question raised by the statute is whether the attempted crime must be directed against the person or property of the defendant. The use of the language "resisting" indicates an

affirmative answer. However, since section 733 [21-733] of Title 21 permits use of deadly force where the defendant lawfully attempts to defend enumerated persons from imminent peril (see Committee Comments accompanying OUJI-CR 8-2), it seems reasonable to infer that, in a case where the defendant kills while harboring a belief that his spouse, child, parent, master, or mistress is in imminent peril, although his belief is erroneous, an instruction relating to section 711 [21-711](3) should be given. The term "resisting" seems to militate against broadening the applicability of section 711 [21-711](3) to killings committed in an attempt to forestall **any** crime being attempted by the deceased.

Finally, utilization of the word "crime" necessitates an inquiry as to whether the conduct of the deceased must constitute a felony, and, if not, whether it must be the type of misdemeanor offense which poses a threat to the safety and security of the defendant's person or property. Incorporation of the term "crime," as opposed to "felony," is indicative of a negative response to the former question. Thus, if a murder charge is reducible to manslaughter in the first degree where the defendant kills either to prevent a misdemeanor by deceased or subsequent to the failure of an attempt by deceased to perpetrate a misdemeanor, the term "crime" should be restricted to those offenses which, inherently or potentially, endanger the safety or security of the person or property of the defendant.

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OUJI-CR 4-95 MANSLAUGHTER> IN THE FIRST DEGREE BY HEAT OF PASSION -  
ELEMENTS

No person may be convicted of <manslaughter> in the first degree heat of passion unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, caused by the **defendant(s)**;

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Third, the death was not excusable or justifiable;

Fourth, the death was inflicted in a cruel and unusual manner;

Fifth, when performing the conduct which caused the death, **defendant(s) was/were** in a heat of passion.

OR

Fourth, the death was inflicted by means of a dangerous weapon;

Fifth, when performing the conduct which caused the death, **defendant(s) was/were** in a heat of passion.

Statutory Authority: 21 O.S. 1991 § 711[21-711](2).

Committee Comments

See *Brown v. State*, 1989 OK CR 33, ¶¶ 5-8, 777 P.2d 1355, 1357-58 (heat of passion is required for <manslaughter in the first degree dangerous weapon>); *Camron v. State*, 1992 OK CR 17, ¶ 6, 829 P.2d 47, 51 (Okla. Cr. 1992).

Former OUJI-CR 4-96 has been incorporated into this instruction.

(2000 Supp.)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 4 2002

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

APRIL ROSE WILKENS,

Petitioner,

vs.

VICKI SHOECRAFT, Warden,

Respondent.

Case No. 02-CV-244-B (J)

**ORDER**

On April 2, 2002, Petitioner, a state inmate represented by counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket #1) and supporting brief (#2). Petitioner also paid the full \$5.00 filing fee required to commence this action.

Respondent is directed to prepare a response to the petition pursuant to Rule 5 of the *Rules Governing § 2254 Habeas Corpus Cases*. That rule states:

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court may on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

As an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to 28 U.S.C. § 2244, failure to comply with

the 1-year limitations period, or lack of jurisdiction. If Respondent files a motion to dismiss based upon alleged nonexhaustion, and if Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Petitioner's brief on appeal and of the opinion of the appellate court, if any, should be filed by Respondent with the motion to dismiss. If Respondent files a motion to dismiss based upon alleged untimeliness, Respondent should file with the motion copies of all documents demonstrating relevant dates of any state court proceedings pursued by Petitioner.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The Clerk shall mail, via certified mail, a copy of the petition (#1) and a copy of the supporting brief (#2) to both Respondent Shoecraft and to the Oklahoma Attorney General. See Rule 4, Rules Governing § 2254 Cases.
- (2) Respondent shall show cause why the writ should not issue and file a response to the petition within thirty (30) days of the entry of this order. Extensions of time will be granted for good cause only. See Rule 4, Rules Governing § 2254 Cases.
- (3) Petitioner may file a reply brief within thirty (30) days after the filing of Respondent's response. If Respondent files a motion to dismiss, Petitioner has fifteen (15) days from the filing date of the motion to respond. Failure to respond may result in the automatic dismissal of this action. See Local Rule 7.1 for the Northern District of Oklahoma.

SO ORDERED THIS 4<sup>th</sup> day of April, 2002.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT