IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JEROME JAY ERSLAND,	)	
	)	
Appellant,	)	
v.	)	**No. F-2011-638**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

NOTICE OF EXTRA-RECORD EVIDENCE SUPPORTING APPELLANT'S SUPPLEMENTAL BRIEF AND RULE 3.11 MOTION TO SUPPLEMENT APPELLATE RECORD AND/OR TO ORDER EVIDENTIARY HEARING REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL

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ATTORNEY FOR APPELLANT

October 1, 2012

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JEROME JAY ERSLAND,	)	
	)	
Appellant,	)	
v.	)	**No. F-2011-638**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

NOTICE OF EXTRA-RECORD EVIDENCE SUPPORTING APPELLANT'S SUPPLEMENTAL BRIEF AND RULE 3.11 MOTION TO SUPPLEMENT APPELLATE RECORD AND/OR TO ORDER EVIDENTIARY HEARING REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL

The Appellant, Jerome Ersland, appears by his attorney of record, Doug Friesen, pursuant to Rule 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals,* Okla. Stat. Ch. 18, App., and Walker v. State, 933 P.2d 327, 331 (Okl.Cr.1997), and states the following:

This Notice and Motion is related to the Proposition of Error in Appellant's Supplemental Brief filed contemporaneously herewith (with permission of the Court), wherein Appellant argues that trial counsel was ineffective in: a) failing to engage in plea negotiations without consultation with Appellant; b) failing to meaningfully communicate with Appellant during the course of counsel's representation; c) advising Appellant to discuss with media substantive issues related to his case; d) placing counsel's interests over and above Appellant's; e) failing to properly and sufficiently investigate Apellant's case; f) failing to conduct adequate *voir dire;* g) refusing to permit Appellant to testify at trial; h) failing to interview necessary witnesses; i) failing to utilize expert witnesses at trial; j) failing to call medical experts at trial; k) failing to utilize available impeachment evidence at trial; l) failing to object to inadmissible evidence at

trial; and, m) failing to protect Appellant's interests. In support of this motion and the argument and authorities contained in his Supplemental Brief, Appellant submits the following attached Affidavits or Sworn Statements as designated and referred to in the Supplemental Brief:

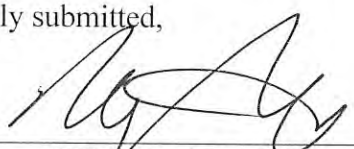
Exhibit A	Laurel Boyd
Exhibit B	Lana Cohlmia
Exhibit C	Jerome Ersland
Exhibit D	Doug Friesen
Exhibit E	Elmer Humphreys III
Exhibit F	Cindy Jones
Exhibit G	Karen Monahan
Exhibit H	Marvin Peyton MD
Exhibit I	Jeanne Read
Exhibit J	Doug Sisemore
Exhibit K	Cheryl Sisemore
Exhibit L	Rev. David Thompson
Exhibit M	Megan West
Exhibit N	Ronald Boone
Exhibit O	David McKenzie
Exhibit P	Jim Drummond
Exhibit Q	(omitted)
Exhibit R	Joe Evans
Exhibit S	Glen McIntyre
Exhibit T	Dr. Andrew Sibley (sworn statement)
Exhibit U	Inos Yacomb (sworn statement)
Exhibit V	Jacquelyn Ford
Exhibit W	Dr. Richard Kishur
Exhibit X	Stephen Parker

Appellant incorporates by reference herein the arguments and authorities contained in the Proposition of Error in the Supplemental Brief of Appellant addressing ineffective assistance of counsel. These items are essential in enabling the Court to fully consider and decide the claims raised in Appellant's Supplemental Brief. An evidentiary hearing is needed only if the State disputes the issues and/or the Court deems it necessary to develop more precisely and exhaustively the available evidence on the question of trial counsel's ineffectiveness. See Rule 3.11(B)(3)(b)(i), Rules of the Court of Criminal Appeals, Okla. Stat. Ch. 18, App. (Supp.2001).

Appellate counsel brings the foregoing information to the attention of the Court for a proper determination of the issues and to provide the procedural and substantive due process to which Mr. Ersland is entitled. See U.S. Const. amend. VI, XIV; Okla. Const. art. II, §§ 7, 20; Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Williamson v. Ward, 110 F.3d 1508, 1522 (10th Cir.1997); Wilhoit v. State, 816 P.2d 545, 546-547 (Okl.Cr.1991); Okla. Stat. tit. 22, § 1051 (1991).

WHEREFORE, Mr. Ersland requests that the Court grant such relief as deemed appropriate to accurately and fairly determine the merits of his claim or, alternatively, grant an evidentiary hearing.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

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

DOUG FRIESEN

AFFIDAVIT OF LAUREL BOYD

I, Laurel Boyd, being of legal age and duly sworn, do hereby state:

1) That I am the sister of Jerome Ersland;

2) That Jerome Ersland and I spoke often about his court case and the status of same;

3) That throughout the time after Jerome Ersland's arrest and before the trial, Jerome Ersland often told me about his concerns regarding extreme communication problems with his attorney, including:

   a) Irven Box did not return Jerome Ersland's phone calls on a number of occasions;
   b) Irven Box cancelled numerous appointments his secretary set and then would not set up replacement appointments;
   c) Jerome Ersland was very frustrated because he could never talk with Irven Box in person.

4) After the hearing in which Jerome Ersland was told his witnesses would not be allowed, Jerome Ersland became convinced he would be convicted of 1st Degree Murder.

5) Irven Box has never contacted me.

6) Regarding Jerome Ersland, I have noticed his:

   a) Specialized fields of interest;
   b) High intelligence;
   c) Extreme focus on a particular interest or hobby;
   d) Problems maintaining friendships; and
   e) Problems controlling feelings such as depression and anxiety;

Laurel Boyd

Laurel Boyd

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF Deady)

Subscribed and sworn to before me this 25th day of September, 2012.

My Commission Expires:
10/18/15

Cynthia S. Nichols
Notary Public

CYNTHIA S. NICHOLS NOTARY # 99017071 EXP. 10/18/15 PUBLIC STATE OF OKLAHOMA

EXHIBIT A

AFFIDAVIT OF LANA COHLMIA.

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

Lana Cohlmia, of lawful age, and being first duly sworn, state as follows:

1. I am a practicing attorney and a licensed member of the Oklahoma Bar Association. I am in good standing.

2. I volunteered my time to help Doug Friesen in the investigation and drafting of the Appellate Brief for Jerome Ersland.

3. Shortly after Doug Friesen was hired in this matter, Doug Friesen and I were approached in the Cleveland County Courthouse by attorney Ron Boone. Ron Boone advised us that he had represented Jerome Ersland's second ex-wife in her post-decree Motion to Relocate, filed in Cleveland County. Ron Boone further advised us that Jerome Ersland's ex-wife advised him that their son (Jerome Ersland and his ex-wife's) had been diagnosed with Asperger's Syndrome and that she, his ex-wife, saw many of the same symptoms in Jerome that she saw in her son. Ron advised that Mr. Ersland's ex-wife had long suspected Jerome Ersland had Asperger's as well. Ron Boone further advised us that within approximately two (2) weeks of Irven being hired in the Jerome Ersland case, Ron Boone met with Irven Box and conveyed all of the above information to Irven Box.

4. I personally spoke with Bob Lyon, Doug Sisemore, Elmer Humphreys III., Chad Jones, and Brenda Hatfield, all persons who were listed on the defense witness list. None of these persons were aware that Mr. Ersland's legal defense team had listed them as a witness. None of them had ever spoken with any of Mr. Ersland's attorneys about the incident or regarding their testimony.

5. I also interviewed Dr. Laura Black-Wicks, who was Jerome Ersland's personal physician for approximately eight (8) years. She was listed as a witness for the prosecution. She advised me that the only time she spoke with any of the defense team lawyers was just moments before she was going to the stand to present her testimony. She stated Irven Box did not at that time discuss her anticipated testimony. He stated only one thing to her, and that statement was a derogatory remark about Mr. Ersland. She had no other communication with Mr. Box or any

EXHIBIT B

other members of Mr. Ersland's defense team. She stated that to the best of her recollections, none of Mr. Ersland's defense lawyers had ever attempted to contact her.

6. I further interviewed Everett Baxter, an expert in crime scene investigation and blood spattering. Mr. Baxter was listed as an expert witness by the State. He stated he was never contacted prior to the trial to go over his investigation or his testimony. The only time any of Mr. Ersland's defense lawyers spoke to him prior to trial was when Irven Box saw him and made a comment, something to the effect of "I saw you at the pharmacy. So, you are in this case now." Mr. Baxter advised me that it was most unusual to not have a defense expert to contradict his analysis.

7. I spoke with Tom Bevel's office. Tom Bevel was another expert witness called on behalf of the state. Mr. Bevel's office stated that at no time did anyone from Mr. Ersland's defense team ever request to speak to Tom Bevel.

8. I interviewed Marvin Lane Peyton, a proposed defense expert witness. His affidavit regarding his communications with Mr. Ersland's legal team is being presented.

9. While I have not been able to personally contact all of the witnesses listed by the State, all those I have been able to contact, with the exception of Dr. Peyton spoken of above, have advised me that they had no contact with Mr. Ersland's defense team prior to trial.

FURTHER AFFIANT SAYETH NOT.

Lana Cohlmia

Subscribed and Sworn to before me this 26 day of September, 2012.

Kathy Walker
Notary Public

My Commission Expires:
1-24-16

KATHY WALKER NOTARY PUBLIC # 08000855 EXP. 01/24/16 STATE OF OKLAHOMA

AFFIDAVIT OF JEROME ERSLAND

I, Jerome Ersland, being of legal age and duly sworn, do hereby state:

1) That I hired Irven Box to represent me in criminal case number CF-2009-3199.

2) That throughout the entire time Irven Box represented me, there were extreme communication problems including but not limited to:

   A) Irven Box never went over the shooting with me in detail;

   B) The total time Irven Box spent with me, outside of court proceedings, was approximately two (2) hours - not counting the time he spent talking with me about money owed to him;

   C) Irven Box did not return my phone calls on approximately forty (40) occasions;

   D) Irven Box cancelled numerous appointments his secretary set and then would not set up replacement appointments;

   E) On at least six (6) occasions I was so frustrated with the lack of communication between Irven Box and myself, that I and Karen Monahan went into his office and waited for hours and he still wouldn't see me;

   F) Irven Box never asked me if I was ok with hiring the other attorneys who represented me, he just told me they were coming on board and to get more money.

3) I have been informed by my attorney Doug Friesen that David Prater approached Irven Box a number of times before trial and asked Irven Box if something could be worked out along the lines of a plea to manslaughter. Irven Box <u>never</u> conveyed to me there was a possibility of anything other than trial. Irven Box's specific words to me were "We are not taking an kind of a deal from the State."

4) Irven Box would call me periodically before the trial and tell me to call the press and tell them various things.

5) It was Irven Box's idea to get on the O'Reilly show - not mine

EXHIBIT C.

6) Irven Box never discussed with me or gave me the option to testify at trial. He simply told me I would not be testifying. When I would inquire of Irven Box about trial strategy, Irven Box would simply say "You're not testifying so you don't need to worry about it".

7) During the Motion to Recuse Judge Elliott, I told Karen Monahan "I thought this was about me, not Irven Box."

8) Whenever I asked Irven Box about preparation for trial he would just say "No twelve (12) jurors in the whole State would convict you".

9) After the hearing at which I was told my witnesses would not be allowed to testify, I knew I would be convicted of 1st Degree Murder.

10) I specifically gave Irven Box $40,000 for the purpose of retaining experts.

11) I have been informed that I suffer from Meniere's disorder, which affects my balance and hearing.

12) Irven Box did not consult with me prior to filing the Motion To Recuse Judge Elliott. At some point during the hearing I asked him why he (Irven Box) was doing this and he told me he thought it best to get Judge Elliott off my case.

Jerome J Ersland

Jerome Ersland

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF)

Subscribed and sworn to before me this 26 day of Sept, 2012.

Tepri Dennis

Notary Public

My Commission Expires:
8/18/13

AFFIDAVIT OF DOUG FRIESEN

I, Doug Friesen, being of lawful age and duly sworn do hereby state:

1) I am a licensed member of the Bar Association of the State of Oklahoma.

2) I am in good standing with the Oklahoma Bar Association.

3) Shortly after being retained by Jerome Ersland I met with David Prater the Oklahoma County District Attorney.

4) Mr. Prater advised me he did not enter into any formal plea negotiations with Irven Box, but did approach Irven Box at various times with the concept of Jerome Ersland pleading guilty to a Manslaughter charge and some undermined sentence.

5) Irven Box would return a call to David Prater and tell David Prater that Jerome Ersland was not interested in pleading to anything.

Doug Friesen, OBA #12634

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 25 day of Sept, 2012.

My Commission Expires: 8/18/13

Notary Public

EXHIBIT D

AFFIDAVIT OF ELMER HUMPHREYS III

COMES NOW, Elmer Humphreys III, being of legal age and duly sworn and does hereby state:

1) I worked with Jerome Ersland at Reliable Pharmacy;
2) I was present at Reliable Pharmacy when it was robbed in 2007;
3) I had no idea I was put on the witness list. I never spoke to any of Jerome Ersland's attorneys. I saw Irven Box at the pharmacy one time. I do not believe I even said "Hi" to Irven Box and I know Irven Box did not say "Hi" to me.
4) I have observed the following characteristics in Jerome Ersland:
   a) Having specialized fields of interest;
   b) Having the inability to see another persons point of view:
   c) Having problems engaging n "small talk";
   d) That repetitive routines provide a feeling of security to Jerome Ersland;
   e) Having inflexible thinking abilities;
   f) Having stress when his routine suddenly changes;
   g) Having a lack of managing appropriate social conduct;
   h) Having high intelligence; and
   I) Having problems controlling feelings such as depression, fear or anxiety.

Elmer Humphreys III

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF)

Subscribed and sworn to before me this 25 day of Sept, 2012.

Terri Lewis
Notary Public

My Commission Expires:
8/18/13

TERRI LEWIS NOTARY PUBLIC STATE OF OKLAHOMA

EXHIBIT E

AFFIDAVIT OF CINDY JONES

COMES NOW Cindy Jones, being of legal age and duly sworn, does hereby state:

(1) I worked with Jerome Ersland for approximately eight (8) months at the Reliable Pharmacy;

(2) Jerome Ersland and I talked a few times about his concerns about his case;

(3) Jerome Ersland told me was concerned about the very limited contact he had been able to get with Irven Box;

(4) Jerome Ersland told me he was worried about his case and being not properly represented;

(5) Jerome Ersland was extremely worried about the outcome of his case the last few weeks before trial;

(6) Jerome Ersland never talked with me about any possibility of a plea agreement with the District Attorney;

(7) Jerome Ersland never talked with me about the possibility of Jerome Ersland testifying;

(8) Irven Box never spoke with me about Jerome Ersland prior to the trial;

(9) I have observed Jerome Ersland:

a) having specialized fields of interest;

b) having high intelligence;

c) having repetitive routines which provided a feeling of security for him;

d) having the inability to see another persons point of view;

e) having problems engaging in "small talk";

f) with extreme focus on a particular interest or hobby;

EXHIBIT F

g) having controlling feelings such as depression, fear or anxiety;

h) having inflexible thinking;

I) having stress when his routine suddenly changes.

Cindy Jones

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF OKLA)

Subscribed and sworn to before me on the 24 day of Sept, 2012.

Notary Public

My Commission Expires:
8/15/13

AFFIDAVIT OF KAREN MONAHAN

COMES NOW, Karen Monahan, being of legal age and duly sworn, and states:

(1) That I have visited with Jerome Ersland at least on a weekly basis from the time of his arrest until his conviction approximately two (2) years later;

(2) Jerome Ersland was constantly telling me about problems with communications with Irven Box which included:

A) Irven Box never went over the shooting with him in detail;

B) The total time Irven Box spent with Jerome outside court proceedings was approximately two (2) hours - not counting the time Irven Box spent talking with Jerome Ersland about money owed to Irven Box;

C) Irven Box did not return Jerome Ersland's phone calls on approximately forty (40) occasions;

D) Irven Box cancelled numerous appointments his secretary set and then would not set up replacement appointments;

E) On at least six (6) occasions, Jerome Ersland was so frustrated with the lack of communication between Irven Box and himself, that he went into Irven Box's office and waited for hours and still Irven Box would not see him. I was present for those attempted meetings;

F) Irven Box never asked Jerome Ersland if it was ok to hire the other attorneys who represented Jerome Ersland, Irven Box just told Jerome Ersland the other attorneys were coming on board.

(3) Jerome Ersland never told me about any plea agreement offered to him and I was in such close contact, that if Jerome Ersland had been told of any plea negotiations, Jerome Ersland would have told me about them.

EXHIBIT G

(4) Jerome Ersland told me that it was Irven Box's idea to get on the O'Reilly show - not Jerome Ersland's.

(5) Jerome Ersland told me before th trial that Irven Box never discussed with Jerome the option to testify at trial. Jerome Ersland told me that Irven Box simply told Jerome he would not be testifying. Jerome also complained to me about not knowing anything about the trail strategy. When I asked him what Irven Box said, Jerome stated Irven Box simply told him "You're not testifying so you don't need to worry about it."

(6) I specifically heard Irven Box say to Jerome "No twelve jurors in the whole state would convict you."

(7) During the Motion to Recuse Judge Elliott, Jerome Ersland told me "I thought this was about me, not Irven Box."

(8) After the hearing in which Jerome Ersland was told his witnesses would be unable to testify, Jerome Ersland was convinced he would be convicted of First Degree Murder.

(9) Jerome Ersland told me he gave Irven Box $40,000 for expert witnesses.

(10) During the time I have known Jerome Ersland, I have seen Jerome Ersland exhibit the following:

A) Having problems maintaining friendships;

B) Talking whatever is said literally and being unable to read between the lines;

C) The lack of managing appropriate social conduct;

D) Having high intelligence;

E) Having problems controlling feelings such as depression, fear or anxiety;

F) Having a lack of empathy;

G) Having an inability to listen to others;

H) Having inflexible thinking;

I) Having stress when his routine suddenly changes;

J) Having an inability to think in abstract ways;

K) Having specialized fields of interest;

L) Having an inability to see another persons point of view;

M) Having problems engaging in "small talk";

N) Having extreme focus on a particular interest or hobby;

O) Having people see Jerome Ersland as selfish, egoistic, cold, ridged or uncaring;

P) Having obsessive focus on his subject of interest; and

Q) That repetitive routines provide feelings of security for Jerome Ersland.

Karen Monahan

Karen Monahan

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF)

Subscribed and sworn to before me this 25 day of Sept, 2012.

Terri Dennis

Notary Public

My Commission Expires:
5/18/13

TERRI DENNIS NOTARY PUBLIC STATE OF OKLAHOMA

AFFIDAVIT OF MARVIN L. PEYTON, M.D.

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

Marvin Lane Peyton, of lawful age, and being first duly sworn, state as follows:

1. I am a Board Certified Psychiatrist, Diplomat of the American Board of Psychiatry and Neurology, and Psychotherapist practicing in Oklahoma City, Oklahoma.

2. I was contacted by Jerome Ersland's criminal trial defense team for the purpose of potentially being an expert witness on Mr. Ersland's behalf. The team asked me to do an initial psychiatric evaluation of Mr. Ersland.

3. On the 3rd day of February, 2010, I performed the requested evaluation. From the evaluation I determined that Jerome Ersland exhibited non-diagnostic findings which I felt required additional psychometric or neuropsychiatric testing, particularly cognitive testing.

4. Mr. Ersland exhibited signs that suggested cognitive impairment or cognitive processing deficiencies. Mr. Ersland spoke in a high-pitched monotone manner without any change in inflection, tone or pace throughout the evaluation. Mr. Ersland, aside from the back brace he wore, also had relatively rigid posturing without appreciable fluidity of movement consistent with his speech.

5. These are findings which can be associated with people with cognitive impairment.

6. Mr. Ersland's speech and posturing (i.e. the way he spoke and how he held himself physically) lead me to suspect that he may not be able to process information in a normal manner, especially when reacting under stress.

7. These clinical findings lead me to believe there was more to investigate in terms of the way he processes information and sensory stimuli. I felt further psychometric testing was warranted to determine if Mr. Ersland had deficiencies, specifically to determine whether Mr. Ersland was cognitively impaired or had cognitive processing deficits.

EXHIBIT H

8. At the time of my evaluation and recommendation, I was not aware that Mr. Ersland's biological son had been diagnosed with Asperger's Syndrome. This was not captured in the history given by Mr. Ersland during the evaluation, nor was it shared by his legal counsel.

9. I recently learned through Mr. Ersland's appellate counsel that Irven Box had been told shortly after Mr. Ersland was charged with murder that Mr. Ersland's son had Asperger's Syndrome.

10. Asperger's Syndrome is by definition a cognitive processing disorder. Asperger's changes the way one thinks and processes information, particularly when one is under stress or in social situations that are stressful.

11. Mr. Ersland's son's Asperger's Syndrome is a significant finding and an important piece of Mr. Ersland's medical history. It would have been very helpful to have had this information. The non-diagnostic findings are symptoms typically found in people with Asperger's Syndrome. And, Asperger's is thought to be a very heritable disease. A medical history of Asperger's in the biologic family typically requires me to refer for further cognitive testing.

12. I personally spoke with Irven Box, Jeff Box and Joe Brett Reynolds regarding my findings and the need for further cognitive diagnostic testing. I was never told by any members of Mr. Ersland's trial defense team that Mr. Ersland's biological son had Asperger's.

13. Many experts view Asperger's as a mild form of Autism, with both on the spectrum of cognitive processing disorder. Those with Asperger's are often slightly more functional and often hold jobs. But, they are often socially deficient and perhaps prone to processing challenges, as we may see in Jerome Ersland.

14. Although it is difficult and sometimes impossible to diagnose many of the cognitive processing disorders like Asperger's without psychometric testing, the non-diagnostic findings I appreciated during my evaluation of Jerome Ersland are consistent with the diagnosis of Asperger's.

15. My recommendation to further test Mr. Ersland was discussed with Mr. Ersland's defense team: Irven Box, Jeff Box and Joe Brett Reynolds. I informed them of my findings and the need for further psychometric or neuropsychologic testing to potentially confirm cognitive impairment or cognitive processing deficits.

16. The trial defense team was also informed that, if tested appropriately, Mr. Ersland could have cognitive impairment or cognitive processing deficits, which could help the jury better understand Mr. Ersland's reaction to the traumatic event he experienced.

17. When I shared with the trial defense team my findings and the need for further testing, I also suggested a PhD psychologist with said testing experience to conduct the testing, and I would be willing to testify as to Mr. Ersland's potential condition, pending the results.

18. To my knowledge, Mr. Box and the trial defense team did not follow these recommendations.

19. I cannot state definitively that Jerome Ersland has Asperger's or any other cognitive deficits or cognitive processing deficits. However, my findings and his medical history would suggest that to be a possibility warranting further testing.

20. Had Mr. Box followed through on the testing that I requested and had Mr. Ersland been definitively diagnosed with Asperger's or other diagnostic cognitive impairment or cognitive processing deficit, I may have had the medical information necessary to testify to the jury on Mr. Ersland's behalf

21. Had the testing been performed and had those tests resulted in a definitive diagnosis of Asperger's, then I could have testified as follows: Mr. Ersland has cognitive impairment or cognitive processing deficit commonly known as Asperger's Syndrome. Mr. Ersland cannot process information imparted to him in the way others do who do not have these deficits. As a result of Mr. Ersland's deficits, he cannot react to socially stressful situations the way others do or the way he might without these diagnostic deficits.

FURTHER AFFIANT SAYETH NOT.

MD

Marvin Lane Peyton, M.D.

Subscribed and Sworn to before me this 26 day of September, 2012.

Notary Public

My Commission Expires:
8/18/13

AFFIDAVIT OF JEANNE READ

COMES NOW, Jeanne Read, being of legal age and duly sworn and does hereby state:

1) I was employed at Reliable Pharmacy with Jerome Ersland;

2) I was at Reliable Pharmacy during the attempted robbery in question;

3) I have observed Jerome Ersland:

   A) Having problems maintaining friendships;
   B) Taking whatever is said literally and being unable to read between the lines;
   C) Having a problem with lack of managing appropriate social conduct;
   D) Having high intelligence;
   E) Having problems controlling feelings such as depression, fear, or anxiety;
   F) Having an inability to listen to others - he seems to listen, then forgets what is told to him;
   ~~G) Having inflexible thinking;~~
   H) Having stress when his routine suddenly changes;
   I) Having problems engaging in "small talk";
   J) His extreme focus on a particular interest or hobby; and
   K) Needing repetitive routines to provide a feeling of security.

4) None of Jerome Ersland's attorneys spoke with me in detail about the shooting.

Jeanne Read
Jeanne Read

STATE OF OKLAHOMA)
) SS:
COUNTY OF)

Subscribed and sworn to before me this 25 day of Sept, 2012.

Terri Dennis
Notary Public

My Commission Expires:
8/18/13

TERRI DENNIS NOTARY PUBLIC STATE OF OKLAHOMA

EXHIBIT I

AFFIDAVIT OF DOUG SISEMORE

I, Doug Sisemore, being of lawful age and duly sworn do hereby state:

1) I am the owner of Reliable Pharmacy.

2) That Jerome Ersland was my employee from before his arrest until trial.

3) Jerome Ersland and I would talk frequently about Jerome Ersland's legal situation.

4) Specifically regarding Jerome Ersland, I have observed his:

   A) High intelligence;

   B) Having specialized fields of interest;

   C) Being stressed when his routine suddenly changes;

   D) His inability to see another persons point of view;

   E) His extreme focus on a particular interest of hobby; and

   F) That repetitive routines provide a feeling of security for him.

5) During the talks I had with Jerome Ersland after his arrest and before Jerome Ersland's trial, Jerome Ersland told me:

   A) That he felt there was no communication between he and his attorneys. Jerome Ersland stated that he had no clue about what was going on in his case because no one would tell him anything;

   B) Jerome Ersland stated the only time Irven Box would talk with him was when he wanted more money from him;

   C) Jerome Ersland never told me about the possibility of a manslaughter plea and if it had been offered to him, I am sure he would have discussed it with me;

   D) After the hearing in which Jerome Ersland's witnesses were excluded, Jerome Ersland became convinced he would be convicted of 1st Degree Murder.

6) I was never informed that I was on the defense list of witnesses.

EXHIBIT J

7) I never spoke with any of Jerome Ersland's attorneys about my testimony.

8) I never observed any of Jerome Ersland's attorneys investigating the scene of the shooting.

Doug Sisemore

Doug Sisemore

STATE OF OKLAHOMA)
) SS:
COUNTY OF)

Subscribed and sworn to before me this 21 day of Sept, 2012.

Terri Dennis

Notary Public

My Commission Expires:
8/18/13

TERRI DENNIS NOTARY PUBLIC STATE OF OKLAHOMA

AFFIDAVIT OF CHERYL SISEMORE

COMES NOW, Cheryl Sisemore, being of legal age and duly sworn and does hereby state:

1) I am the wife of Doug Sisemore, owner of Reliable Pharmacy;

2) Jerome Ersland was my husband's employee from before his arrest until after the trial;

3) I have had frequent contact with Jerome Ersland and I observed the following in reference to Jerome Ersland:

   a) Having high intelligence;
   b) Having extreme focus on a particular hobby or interest;
   c) Having excessive focus on his subject of interest; and
   d) That repetitive routines provide feelings of security to Jerome Ersland.

4) I was never contacted by any of the defense attorneys for Jerome Ersland..

Cheryl Sisemore

STATE OF OKLAHOMA)
COUNTY OF) SS:
)

Subscribed and sworn to before me this 25 day of Sept, 2012.

My Commission Expires:
8/18/13

Notary Public

EXHIBIT K

AFFIDAVIT OF REVEREND DAVID THOMPSON

COMES NOW David Thompson, being of legal age and duly sworn, and does hereby state:

1) I have known Jerome Ersland since approximately 1999;

2) I am the Pastor of the Church which Jerome Ersland attended;

3) Jerome Ersland and I talked at length during the time after his arrest and before his trial;

4) Jerome Ersland often spoke about his frustrations regarding the lack of communication between himself and Irven Box;

5) Jerome Ersland often spoke about the fact that all of the small amount of time Irven Box did spend with Jerome Ersland, the time was spent talking about money and not the facts of the case;

6) Jerome Ersland was also very frustrated about the lack of investigation on the part of Irven Box;

7) It is my belief that had Irven Box talked with Jerome Ersland about a plea offer, Jerome Ersland would have talked with me about the plea offer, which he never did;

8) Jerome Ersland told me he wanted to testify at his trial, but Irven Box would not let him;

9) After the hearing wherein Jerome Ersland was informed that his witnesses would not be allowed to testify, Jerome Ersland became convinced he would be convicted of First Degree Murder;

EXHIBIT L

10) Irven Box has never spoken with me about Jerome Ersland;

11) I have observed Jerome Ersland:

a) Having high intelligence;

b) Having persistent feelings of depression, fear or anxiety; and

c) Having extreme focus on his interests and hobbies.

David Thompson

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF)

Subscribed and sworn to before me this 25 day of Sept., 2012.

Pamela S Cooper
Notary Public

My Commission Expires:
2-14-16 2595

NOTARY PUBLIC State of Okla.
PAMELA S. COOPER
Comm. # 00002595
Expires 02-14-2016

AFFIDAVIT OF MEGAN WEST

COMES NOW, Megan West, being of legal age and duly sworn and does hereby state:

1) I was employed at Reliable Pharmacy with Jerome Ersland;

2) I was at Reliable Pharmacy during the attempted robbery in question;

3) I have observed Jerome Ersland:

   A) Having problems maintaining friendships;
   B) Taking whatever is said literally and being unable to read between the lines;
   C) Having a problem with lack of managing appropriate social conduct;
   D) Having high intelligence;
   E) Having problems controlling feelings such as depression, fear, or anxiety;
   F) Having an inability to listen to others;
   G) Having inflexible thinking;
   H) Having problems with stress when his routine suddenly changes;
   I) Having an inability to see another persons point of view;
   J) Having problems engaging in "small talk";
   K) His extreme focus on a particular interest or hobby;
   L) Having an obsessive focus on his subject of interest; and
   M) Needing repetitive routines because it provided a feeling of security.

4) None of Jerome Ersland's attorneys spoke with me in what kind of person Jerome Ersland is.

Megan West

Megan West

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF)

Subscribed and sworn to before me this 25 day of September, 2012.

Terri Dennis

Notary Public

My Commission Expires:
8/18/13

TERRI DENNIS NOTARY PUBLIC STATE OF OKLAHOMA

EXHIBIT M

AFFIDAVIT OF RONALD R. BOONE

STATE OF OKLAHOMA)
)SS.
COUNTY OF OKLAHOMA)

Ronald R. Boone, of lawful age, and being first duly sworn, state as follows:

1. I am a lawyer, licensed to practice in the State of Oklahoma. My law office is located in Norman, Oklahoma.

2. I represented Jerome Ersland's ex-spouse, Wanda Ersland, in a post divorce matter against Jerome Ersland.

3. About a week or so after Mr. Ersland had been charged with murder, I contacted and spoke in person to Irvin Box for the purpose of informing him that Jerome Ersland's ex-spouse for many years had suspected that Mr. Ersland suffered from Asperger's Syndrome. I stated to Mr. Box that Mr. Ersland's ex-spouse believed this to be true because the Ersland's biological son had been diagnosed with Asperger's Syndrome and she saw many similarities in Mr. Ersland's mannerisms, behaviors and characteristics that she saw in their son. I also told him that I suspected Mr. Ersland suffered some type of mental defect, or problem in processing information, after I had read some of his writings and cross-examined him on the witness stand.

4. Sometime thereafter, I again spoke, in person, to Irvin Box. I then asked him if he had checked into the possibility that Jerome Ersland had Asperger's. I do not remember Mr. Box's specific response, but I do recall Mr. Box giving me the impression that he had dismissed the issue or had not as of yet investigated the possibility that Mr. Ersland had Asperger's or any other mental health issues.

FURTHER AFFIANT SAYETH NOT.

Ronald R. Boone

Ronald R. Boone

Subscribed and Sworn to before me this 19th day of September, 2012.

Notary Public

RACHEL A. MERFELD NOTARY PUBLIC IN AND FOR STATE OF OKLAHOMA #09004110 • May 8, 2013

My Commission Expires:

5/8/13

EXHIBIT N

AFFIDAVIT OF DAVID T. MCKENZIE

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

David T. McKenzie, of lawful age, and being first duly sworn, state as follows:

1. I am a practicing attorney, licensed to do so in the State of Oklahoma, and am currently employed as an Assistant Public Defender, working for the Oklahoma County Public Defender's office as a Felony trial lawyer.

2. A true and correct copy of my curriculum vitae is attached hereto relating my experience in criminal felony defense, and is accurate to the best of my information and belief.

3. I, along with Robin McPhail, also an Assistant Oklahoma County Public Defender, represented Anthony Devale Morrison in *State of Oklahoma v. Morrison, et. al.*, District Court of Oklahoma County, Case No. CF-2009-3297, a companion criminal felony case to the *State of Oklahoma v. Jerome Ersland* matter. Both the *Morrison* and *Ersland* trials involved primarily the same set of facts and many of the same witnesses.

4. The *Morrison* trial began April 19, 2011 and concluded on May 2, 2011. The record indicates that the *Ersland* trial began May 16, 2011.

5. To prepare to defend Mr. Morrison in his felony murder trial, Ms. McPhail prepared an extensive questionnaire for members of the jury pool to answer prior to trial.

6. Upon reviewing the 129 responses to our questionnaire, I learned that a majority of the potential jury venire were against the actions Mr. Ersland took during the incident in question. Many members believed Mr. Ersland's actions constituted "over kill" or were criminal in nature.

7. As a result of my findings from the jury pool questionnaire, I approached one of Mr. Ersland's attorneys to inform him of what I learned from the responses to my questionnaire. I informed him that a substantial number of potential jurors had the impression that Mr. Ersland's actions were wrong. The member of Mr. Ersland's to whom I was speaking immediately dismissed the notion that a jury could find Mr. Ersland's actions to be criminal.

8. I then articulated to that attorney that the jury pool questionnaire responses showed that most responsible gun owners questioned Mr. Ersland's actions and might convict Mr. Ersland. Again, the attorney dismissed what I was saying and appeared to give no credence to the information I had learned from the questionnaires.

EXHIBIT O

9. To urge the attorney to reconsider his position, I offered him copies of all the questionnaire responses for him and other members of Mr. Ersland's trial defense team to review for themselves. The attorney refused to accept my offer.

10. Previous to reviewing the responses to the questionnaire, I had believed that public sentiment was fully in support of Mr. Ersland's actions. I gleaned this due to the many news and media reports about Mr. Ersland. However, upon reviewing the responses to my questionnaire, and after questioning potential jury members during *voir dire* at the *Morrison* trial, it became clear to me that the opposite was more likely true. Many of the potential members of *Morrison* jury believed Mr. Ersland acted wrongfully.

11. Although the Morrison trial and the Ersland trial had significant similarities of facts and witnesses, I expected Mr. Irven Box and/or other members of Mr. Ersland's legal defense team to be present for the *Morrison* trial, especially for *voir dire* and to hear the testimony of the common witnesses. To my knowledge, none of Mr. Ersland's attorneys were present for *voir dire*. Neither were any of them present for the testimony of the common witnesses or the remainder of the two week long trial, with two exceptions: Jeff Box was present for approximately one hour of testimony; and, Irven Box appeared for the sole purpose of appearing with Mr. Ersland as he took his fifth amendment right to remain silent when he was called as a witness.

12. Mr. Ersland's defense team had a significant advantage in that they could not only hear the testimony of the common witnesses, but they could also obtain transcriptions of the witnesses testimony. Mr. Ersland's defense team had the right to request a continuance for the sole purpose of obtaining those transcripts. To my knowledge, and the court docket reveals, that Mr. Ersland's defense team did not request a continuance, nor did they request the common witnesses testimony be transcribed.

13. In reviewing the jury instructions and having a complete understanding of the facts of the *Ersland* prosecution, Mr. Ersland's trial counsel should have specifically demurred to Murder in the First Degree and requested that the jury only be instructed as to Manslaughter in the First degree as set forth in OUJI-CR 4-102 (a copy of which I attached hereto as Exhibit A).

14. In my opinion, Mr. Ersland's trial counsels' refusal to even review the *Morrison* jury questionnaires, ask for a continuance to obtain the sworn testimony of the common witnesses for impeachment purposes during the *Ersland* trial, failing to specifically demurrer to murder in the first degree and request that the jury only be instructed on manslaughter in the first degree; and, to refuse to observe the same basic facts being tried as were going to be presented during Mr. Ersland's case was, by pertinent legal standards, deficient and resulted in ineffective assistance of counsel.

FURTHER AFFIANT SAYETH NOT.

DAVID T. MCKENZIE

Subscribed to and sworn before me this 26 day of September, 2012.

Kathy Walker
Notary Public

My Commission Expires:
1-24-16

KATHY WALKER
NOTARY
08000855
EXP. 01/24/16
PUBLIC
STATE OF OKLAHOMA

DAVID T. MCKENZIE
601 Robert S. Kerr, Apt. 120
Oklahoma City, OK 73102
(405) 406-2771 cell phone
dmckenzie47@aol.com

EDUCATION:

- ***JURIS DOCTORATE***, University of Oklahoma College of Law, May, 1988.
- ***MASTER OF ARTS,*** American Studies with an emphasis in American literature and English. Northeastern Oklahoma State University, Tahlequah, Oklahoma, May, 1985.
- ***MASTER OF SCIENCE,*** Criminal Justice with an emphasis in Constitutional history, search and seizure law, crime scene investigation, evidence collection and evidence analysis. Northeastern Oklahoma State University, Tahlequah, Oklahoma, May, 1984.
- ***BACHELOR OF ARTS***, Political Science with a minor in English, Southwestern Oklahoma State University, Weatherford, Oklahoma, May, 1982.

PROFESSIONAL:

- Admitted to practice law as a licensed legal intern in the State of Oklahoma on May 28, 1987.
- Admitted to the Oklahoma Bar Association on October 5, 1988.
- Licensed to practice law in:
    - United States District Court for the Western District of Oklahoma
    - United States District Court for the Northern District of Texas
    - Tenth Circuit Court of Appeals
    - Supreme Court of the United States

EXPERIENCE:

- *2006- Present*, Assistant Oklahoma County Public Defender. Felony trial lawyer.
- *2005 to present*, CEO, McKenzie Litigation Consultants. Advising lawyers on issues of motion practice, constitutional law, evidentiary issues, evidence collection, trial strategy, trial preparation, techniques in the interview of witnesses, investigative errors, police misconduct, prosecutorial misconduct, cross-examination, direct examination and jury selection.
- *2005-2006*, solo practice, Oklahoma City, Oklahoma. Criminal trial practice.

- *2004-2005*, Albert and McKenzie, Oklahoma City, Oklahoma. Criminal trial practice.

- *2000-2004*, Assistant Oklahoma County Public Defender. Felony trial lawyer.

- *1993-2000*, solo practice, Oklahoma City, Oklahoma.
    - Practice included both civil and criminal trial work, first amendment litigation and workers' compensation defense.
- *1989-1993*, J. W. Coyle, III, Inc.
    - Duties included criminal defense, civil defense, first amendment litigation on behalf of adult bookstores, adult magazines, erotic gentlemen's clubs and their employees and workers' compensation defense.

- *1988-1989*, Assistant City Attorney, Moore, Oklahoma.
    - Duties included municipal prosecutions, forming and drafting legal opinions and the defense of civil lawsuits against the city, its officials and employees.

- *1986-1988*, Legal Intern, Sherman, Pool, Coldiron and Blankenship.
    - Duties included drafting of motions, municipal prosecutions and legal research and writing in the area of municipal government law.

CAREER HIGHLIGHTS:

Over 125 criminal jury trials and seven civil jury trials.

Recipient, 2011, "**Barry Albert Award"** for excellence of criminal trial advocacy presented by the Oklahoma County Criminal Defense Lawyers Association.

Recipient, 2010, "**Professional Advocate Award, Defender of the Year,**" presented by the Oklahoma Bar Association, Criminal Law Division.

Recipient, 1997, "**Clarence Darrow Award"** presented by the Oklahoma Criminal Defense Lawyers' Association.

Member, **Civil Procedure and Evidence Code Committee**, Oklahoma Bar Association. Term expires December 31, 2013.

Member, **Bench and Bar Committee**, Oklahoma Bar Association. Term expires December 31, 2014.

AV Preeminent rating by Martindale-Hubbell on October 29, 1993 in first year of being eligible for rating and have been continuously rated AV Preeminent by Martindale-Hubbell since 1993.

Fellow, Oklahoma Bar Foundation, 1997 to present.

Live On-Camera Legal Analyst, KFOR-TV, Oklahoma City, Oklahoma. May 2011 to present.

Named a "**Super Lawyer**" in Oklahoma in the area of criminal defense law for 2008. (Selection based on top five percent of attorneys).

June 1989 graduate of the National Institute for Trial Advocacy held at Southern Methodist University, Dallas, Texas.

Jury trial acquittals on charges of: Murder in the First Degree, Arson in the First Degree, Discharging a Firearm with the Intent to Kill, Assault with a Deadly Weapon, Rape in the First Degree, Burglary in the First Degree, Manufacturing a Controlled Dangerous Substance, Driving Under the Influence of Alcohol (felony and misdemeanor), Drug Possession, Drug Possession with Intent to Distribute, Acquiring and Concealing Drug Proceeds, Sex Crimes, Assault and Battery with a Dangerous Weapon, Felony Assault and Battery on a Police Officer, Assault and Battery on an EMSA employee, Unauthorized Use of a Motor Vehicle, Kidnapping for the Purpose of Extortion, Maiming, Aggravated Assault and Battery, Pointing a Firearm, Armed Robbery, Possession of a Drug Precursor Without a Permit, Drug Trafficking, Conspiracy, Possession of Drug Paraphernalia, Possession of a Controlled Dangerous Substance Within 2000 feet of a School, Shoplifting, Unlawful Inference with a 911 Call, Misdemeanor Assault and Battery, Alcohol Sales Violations, Resisting a Peace Officer, Maintaining a Dwelling House Where Drugs are Kept, Possession of a Firearm after former conviction of a felony, Public Drunkenness and Domestic Assault and Battery cases.

Better than a 70% acquittal rate in criminal jury trials.

Represented the accused in more than 1000 preliminary hearings.

Handled more than 100 Murder in the First Degree cases.

Lead attorney in five death penalty cases.

Petitioned the Oklahoma Court of Criminal Appeals and the Supreme Court of Oklahoma for extraordinary relief from district court rulings more than ten times.

Petitioned the United States Supreme Court for a Writ of Certiorari in *Tremaine Williams v. Oklahoma,* February 2010.

Represented more than 3000 persons accused of felony offenses.

Former member of the First Amendment Lawyers' Association.

Represented defendants in more than 300 civil lawsuits.

Represented plaintiffs in more than 75 civil lawsuits.

Taken and/or defended more than 500 civil depositions.

Represented more than thirty criminal defendants in Federal District Court.

Represented more than twenty civil defendants in Federal District Court.

Tried one case before the trial panel of the Oklahoma Bar Association, resulting in an acquittal for the lawyer accused.

Succeeded in quashing a grand jury empanelment in Greer County, Oklahoma.

Successful representation of Police Officers, a District Court Judge, a District Attorney, City Council members, a Town Trustee and a United States Secret Service Agent in civil proceedings.

2002 graduate of the Gerry Spence death penalty seminar in DeBois, Wyoming.

Given Oral Argument before the Oklahoma Court of Criminal Appeals and the Tenth Circuit Court of Appeals.

Lead appellate counsel in *In the Matter of Beverage License No. ABL-93-26*, 899 P.2d 660 (Okla. Civ. App. 1995), *Trim v. State*, 909 P.2d 841 (Okla. Crim. 1996), *Cruz-Camacho v. United States,* 137 F.3d 1220 (10th Cir. 1998) and *McCormack v. Town of Granite,* 913 P.2d 282 (Okla. 1993).

TEACHING EXPERIENCE:

Program Planner, Speaker and Member of the Prosecution Team, "The Second Annual Learning From the Oklahoma Criminal Jury Trial Masters—Advanced Criminal Jury Trial Techniques—LIVE—Mock Jury Trial by OCDLA Clarence Darrow Award Recipients--The Jury Trial of James Leroy Green, II." Oklahoma Bar Association, CLE, Tulsa, Oklahoma, December 2011.

Materials Author, "Defending the Falsely Accused: The Power of Accusation in Domestic Violence Cases." Oklahoma Bar Association Webcast, November 2011.

Speaker, "2404 B Evidence and Jury Sentencing: A Constitution Crisis", 2011 Oklahoma Bar Convention, Tulsa, November 2011.

Program Planner and Speaker, "United States Supreme Court Update: The Confrontation Clause of the Sixth Amendment and its Application in Oklahoma State Court Proceedings." An Oklahoma Bar Association Webcast, August 30, 2011.

Speaker, Patrick Williams Oklahoma Criminal Defense Institute, "Cross-Examination of the SANE Nurse," June 2011.

Program Planner and Speaker, "Maximizing Your Courtroom Firepower: What They Did Not Teach You in Law School Evidence Class", Tulsa and Oklahoma City, CLE, Oklahoma Bar

Association, May 2011.

Program Planner, Speaker and Defense Team Member, "Learning From the Oklahoma Criminal Jury Trial Masters—Advanced Criminal Jury Trial Techniques—LIVE—Mock Jury Trial of Brandon McFarthing by OCDLA Clarence Darrow Award Recipients." Oklahoma Bar Association, CLE, Oklahoma City, December 2010.

Program Planner and Speaker, "Learning From the Oklahoma Criminal Jury Trial Masters—Advanced Criminal Jury Trial Techniques--Presented by OCDLA Clarence Darrow Award Recipients", Oklahoma Bar Association, CLE, Tulsa and Oklahoma City, April 2009.

Speaker, "Witness Preparation," Oklahoma Bar Association, CLE, January 2008.

Speaker, "Effective Voir Dire When Your Defense is Going to be Presented Through Cross-Examination," Oklahoma Bar Association, CLE, March 2007, and to the Oklahoma Department of Labor, Legal Division, Spring 2007.

Speaker, "Opening Statements: The Art of Telling Your Client's Story," In-House CLE, Office of the Public Defender of Oklahoma County, Spring 2007.

Speaker, Criminal Law Track, Oklahoma Bar Convention, November 2006.

Speaker, "The Art of Jury Selection", Oklahoma Bar Association Annual Convention, November 2002.

Guest speaker, Criminal Law and Procedure, University of Central Oklahoma.

Future Seminars

Program Planner and Ethics Speaker, "To Testify or Not to Testify That is the Question. 'Tis it More Noble to Suffer the Slings and Arrows of Outrageous Cross-Examination?" Tulsa and Oklahoma City, CLE, Oklahoma Bar Association, May 2012.

Program Planner, Speaker and Trial Judge, "The Third Annual Learning From the Oklahoma Criminal Jury Trial Masters—Advanced Criminal Jury Trial Techniques—LIVE-- Mock Jury Trial by OCDLA Clarence Darrow Award Recipients." Oklahoma Bar Association, CLE, December 2012.

Oklahoma Uniform Jury Instructions

Oklahoma Jury Instructions- Criminal

Chapter 4

C. HOMICIDE

Article 4. MANSLAUGHTER

Section OUJI-CR 4-102 - First Degree by Resisting Criminal Attempt - Elements

Cite as: O.S. §, __ __

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)**;

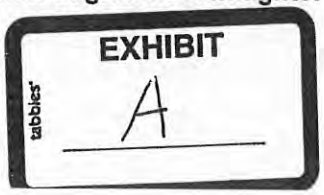
Third, perpetrated by the **defendant(s)**.

Statutory Authority: 21 O.S. 1991, § 711(3).

Committee Comments

The Commission has found no cases which rely specifically on subsection 3 of section 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 Commission has concluded that "unnecessarily" is equivalent to "unlawfully" or "without legal justification." An "unnecessary" killing constituting first-degree manslaughter would thus be found under**



AFFIDAVIT OF JAMES DRUMMOND

I, James Drummond, being of lawful age and duly sworn do hereby state:

1) I am a licensed practicing attorney in the State of Oklahoma.

2) A true and accurate copy of my resume is attached hereto.

3) I have reviewed the brief proposed to be filed in the Jerome Ersland matter.

5) I have not had the opportunity to review and read the case file nor the transcript of the trial.

6) I am familiar with previous trial work performed by Irven Box during my tenure as a capital appellate attorney for the Oklahoma Indigent Defense System and more recently as Chief of the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma.

7) Assuming that the case file, trial transcript and supporting affidavits are true and accurate, it is my belief that:

   (1) The performance and preparation of the defense team in the Jerome Ersland case was inadequate;

   (2) The inadequate performance and preparation of the defense team in the Jerome Ersland case was highly prejudicial and worked against Jerome Ersland's interest;

EXHIBIT P

(3) The performance and preparation of the defense team in the Jerome Ersland case resulted in ineffective assistance of counsel for Jerome Ersland.

(4) The failure to give Mr. Ersland the option of testifying was a reprehensible usurpation of his client's right to make that decision.

(8) If an evidentiary hearing is granted in this matter, by reviewing the record, I would be able to elaborate to requisite specificity the failures in representation which prejudiced Mr. Ersland's case.

Further Affiant sayeth not.

James Drummond

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 25th day of September, 2012.

JOY TATE NOTARY PUBLIC IN AND FOR STATE OF OKLAHOMA JUNE 23, 2013 #05221

Notary Public

My Commission Expires: 6-23-2013.

RESUME OF JAMES ALEXANDER DRUMMOND
OKLAHOMA BAR ASSOCIATION #2504
STATE BAR OF ARIZONA # 9671
TEXAS BAR # 24081380
220 ½ East Main Street, Suite 2
Norman, Oklahoma 73069-1353
405-310-4040; Cell 405-818-3881
jim@jimdrummondlaw.com

EDUCATION:

B.A. (English Literature), Wesleyan University, Middletown, CT, 1969.
J.D., University of Oklahoma College of Law, Norman, OK, 1976.
M.A. (Creative Writing), City College of New York, New York City, 1976.
Trial Lawyers College, Dubois, WY (Gerry Spence), 2011 graduate

American Jurisprudence Awards in Torts and Labor Law

MILITARY EXPERIENCE:

Specialist Five, U.S. Army, active duty 1969-1971, East German border; honorably discharged, 1975.

CURRENT BAR MEMBERSHIPS:

- States: Oklahoma (1976); Arizona (1984); Texas (2012)
- Federal: Admitted to U.S. Supreme Court (1997); Tenth Circuit Court of Appeals (2007); Fifth Circuit Court of Appeals, 2009; 6th Circuit Court of Appeals (2011); Western District – Oklahoma (1976); Northern District – Oklahoma (2007); Eastern District – Oklahoma (2007); Eastern District – Texas (2011); District of Arizona (1984).

WORK EXPERIENCE:

October 1, 2008 - present: sole practitioner, Jim Drummond Law Firm PLC, Norman, Oklahoma

January 2007-September 2008: Supervisor, Capital Habeas Unit, Office of Federal Defender, Federal Judiciary (U.S. Government): Supervised attorneys and investigators in defense of petitioners in capital cases in the U.S. Courts (including U.S. Supreme Court)

January 1998-January 2007: Chief, Non-Capital Trial Division, Oklahoma Indigent Defense System. Supervised 22 staff attorneys and 13 support staff and administered legal representation contracts covering 75 Oklahoma counties; managed budget of $5 million per annum.

1996-1998: Appellate Defense Counsel III, Oklahoma Indigent Defense System, Norman, Oklahoma: Capital Direct Appeals Division. Briefed and argued 5 death penalty cases in 19 months.

1995-1996: Private practice of law, Edmond, Oklahoma

1984-1986: Admission to Arizona Bar; Private Practice in Tucson with Immigration Law focus; served as chief counsel for Tucson Ecumenical Council Legal Aid

1978-1984: Managed agricultural operation, Marshall County, Oklahoma

1977-1978: Partner, Harding, Eldridge & Drummond, Oklahoma City, Oklahoma; general practice with criminal law emphasis

PUBLIC SERVICE: [Partial Listing]

- Chair, Legal Ethics Advisory Panel, Oklahoma Bar Association (2009-present); panelist 2006- 2009
- Inaugural Chair, Criminal Law Section, Oklahoma Bar Association, 2004-2005
- Commissioner, Oklahoma Sentencing Commission, July 2001-October 2006
- Board member, Oklahoma Criminal Defense Lawyers Association, 2006-present
- Board member, Oklahoma County Criminal Defense Lawyers Association, 2008-present
- Chair, Oklahoma Bar Association Committee on Public Defenders, 2002-2003
- Oklahoma Bar Association Lawyers for Heroes participant, 2010-present
- Board member, Oklahoma Lawyers Association, 2011-present
- Master, Ruth Bader Ginsburg Inn of Court, 2007-present
- Past-President, Cleveland County Bar Association

PUBLICATIONS:

Legal: "A Natural History of the *Leon* Good Faith Exception in Oklahoma," Oklahoma Bar Journal, May 14, 2011 issue (winner of Maurice Merrill Golden Quill Award); "*Gant* TKO's *Belton* in the Fourth Round; *Belton* Demands Rematch," Oklahoma Bar Journal, October 2009 issue; "A Little Known Branch of Law Enforcement: The Oklahoma Indigent Defense System," Oklahoma Bar Journal, Vol. 74, Issue 9, 3/15/2003; "OBA-Net: Boring Name, Great Site," Oklahoma Bar Journal (Back Page), Vol. 76, Issue 32, 11/19/2005; "The Devil Is In The Generalities," Oklahoma Bar Journal (Back Page), Vol. 74, Issue 10, 4/13/2003; article on Transferred Intent doctrine, in *The Gauntlet*, Fall 1996 issue (Publication of Oklahoma Criminal Defense Lawyers Association).

HONORS:

- Perfect 10.0 rating, **www.avvo.com**

- Named one of top 100 trial lawyers in Oklahoma, 2012 by National Trial Lawyers

Continuing Legal Education PRESENTATIONS:

- 2010 Lectures at University of Brescia, Italy, on death penalty and American Criminal Justice
- 2010 Criminal Law Track, Annual OBA Meeting
- 2012 and 2010 Annual Institute of Pickens County, I.T., presentations on the CSI Effect in the Courtroom and voir dire
- 2010 Forensic Institute, Criminal Law Section, Oklahoma Bar Association, panelist on Sex Offender Registration laws
- 2008 Forensic Institute, Criminal Law Section, Oklahoma Bar Association, *Daubert* hearings
- 2007 Criminal Defense Institute: *Daubert* practice
- Search and Seizure Update, Sequoyah County Bar Association, 5/15/2003
- Legislative Update, Oklahoma Bar Association Convention, Criminal Law Track, November 2001
- Gang Expert Testimony segment, Forensic Science Seminar, Oklahoma City University, February 2002
- Legislative and Criminal Law Update, Washington County Bar Association, Bartlesville, Oklahoma, March 2002.
- Oklahoma Sentencing Policy, Cleveland County Bar Association, 2001
- Drug and Vice Law Update, September 2005, Cleveland County Bar Association
- Planner, moderator and organizer of numerous other presentations

AFFIDAVIT OF JOE EVANS

I, Joe Evans, being of lawful age and duly sworn do hereby state:

1) I have been retained as a Use-of-Force expert in the Jerome Ersland appellate case.

2) My C.V. is attached hereto and is true and accurate.

3) Jerome Ersland was held to a higher standard of responsibility than we, as a society, hold our law enforcement officers.

4) Jerome Ersland was presented with a set of facts over which he had no control.

5) Jerome Ersland's acts in this matter were reasonable acts when confronted with an armed robbery.

6) Law enforcement officers are not interviewed immediately after the critical incident, because we recognize that because of the stress they are under right after the critical incident, they are not able to accurately state what happened immediately following the critical incident.

7) Further, most often there are gaps in the memory right after the critical incident and the mind, if forced to talk about the critical incident while the person involved is still under stress, will fill in the blanks in the person's mind.

8) The facts filling in the blanks may or may not be accurate if forced to recite the facts immediately after the critical incident, however, these facts become real to the person involved in the critical incident.

9) In my opinion, Jerome Ersland was not intentionally lying about the events surrounding the shooting. The inaccuracies he recited were what he thought happened.

EXHIBIT R

10) Some of the statements about his past are easily explained as a result of him looking for any positive reinforcement he could find to help deal with the anguish which always comes from the taking of a human life.

11) It would have been highly unlikely for Jerome Ersland to accurately reflect what happened immediately after the shooting.

12) It is a natural reaction for any person, not comfortable with his own shooting capability, but committed to stopping a threat, to get as close to the target as possible, however, persons engaging in this type of behavior generally don't realize they are doing so at the time of the shooting.

13) Jerome Ersland, to the best of my knowledge, has no type of training in handling this type of critical incident.

14) It is my opinion that Jerome Ersland, at the time of the second string of shots, (shots #2 - #6) was acting in a reasonable manner in responding to the threat he perceived.

15) Jerome Ersland also had to be concerned that the other robber might come back to the aid of the first robber - so without action, Jerome Ersland could have been confronted with two armed robbers to deal with.

Joe Evans

STATE OF OKLAHOMA)
) **SS:**
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 25 day of Sept, 2012.

Terri Dennis
Notary Public

My Commission Expires:
8/18/13

TERRI DENNIS
NOTARY
00002345
EXP. 08/18/13
PUBLIC
STATE OF OKLAHOMA

5921 Morgan Drive, Guthrie, OK (405) 282-3625

M. Joe Evans

Experience

1998 to Present State of Oklahoma Oklahoma City, OK
Council on Law Enforcement Education and Training

Law Enforcement Instructor

- Firearms instructor for state law enforcement basic academy to prepare new recruits for street duty
- Conducts continuing education and advanced education programs for veteran law enforcement officers to maintain and advance their skill levels
- Develops and updates training curriculum
- Awards: 1999 Governor's Top 20, firearms award for the top twenty law enforcement officers in the State based upon competition shooting matches

1998 Meridian Technology Center Stillwater, OK

Law Enforcement Training Coordinator

- Managed law enforcement training program
- Implemented training courses
- Coordinated training programs with regional agencies

1977 – 1998 Edmond Police Department Edmond, OK

Beginning Rank: Patrol Officer

Ending Rank: Police Lieutenant, Patrol Shift Commander

- Completed twenty years of service as a municipal police officer
- Worked five years as a selective traffic enforcement officer and accident investigator with emphasis on the detection and arrest of drunk drivers
- Managed the Alcohol Safety Action Project, a federally funded program to identify and arrest drunk or impaired drivers.
- Certified in Standardized Field Sobriety Testing (SFST) to identify persons who drive while impaired by alcohol or other drugs through a battery of three tests: (1) Horizontal Gaze Nystagmus (HGN); (2) walk and turn; and (3) one leg stand.
- Served as the first Range Master of the Edmond Police Department and was responsible for the marksmanship and police tactics training for the 86 member agency, as well as the administration of the firearms training range.
- Served four years as the patrol shift commander on the evening shift. Duties included management of the patrol district assignments, crime analysis to direct patrol emphasis in high crime areas, general

assignments to maintain peace and order, review of arrest and accident reports, tactical response and backup assistance for patrol officers as needed.

1976–1977 University of Central Oklahoma Edmond, OK

Police Officer

- Served as campus police officer

Education

1972 Graduated Yukon High School Yukon, OK

1972–1975 Southwestern Oklahoma State University Weatherford, OK

- 59 hours towards Industrial Education Major
- 1976 Certified by the State of Oklahoma as a Police Officer
- CLEET certified Firearms Instructor
- CLEET certified Law Enforcement Driver Training Instructor
- CLEET certified Radar Operator Instructor
- 1,300 + hours of basic, continuing and advanced law enforcement training

Related Experience

Worked as a contract instructor providing training seminars to the U.S. Government. Internationally, has marketed and conducted firearms training programs to the U.S. State Department Anti-Terrorism Assistance Program and on several occasions trained peace officers in San Salvador, El Salvador.

State of Oklahoma

COUNCIL ON LAW ENFORCEMENT EDUCATION AND TRAINING

INDIVIDUAL FULL PROFILE

EVANS, MELVIN J

Report Date: 7/5/2000

Peace Officer

Officer Information:

Officer Type:	Flag:	Type:	Basic Academy Weapon:
Peace Officer	N/A	Mandate Training	REVOLVER

Employment:

Start Date:	End Date:	Empl Status:	Department:	City:	Rank:
12/1/1997	7/22/1998	Inactive	INDIAN MERIDIAN VO TECH	STILLWATER,	PTLMN
7/1/1977		Active	EDMOND PD	EDMOND	PTLMN
4/18/1976	7/1/1977	Inactive	CSU	EDMOND	

Training:

Date:	Code:	Course:	Hrs:	Grade:	MT Yr:	MT:	MH:	City:	Agency:
12/22/1999	4052	ALZHEIMERS	1	0	1999	1	1	EDMOND	CLEET
5/3/1999	3012	F.A. INST. TACTICAL SHOOT	24	0	1999	24	0	EDMOND	CLEET
11/9/1998	3022	OK.ASSOC.LEFAI	16	0	1998	16	0	MCALESTER	OALEFAI
11/2/1998	3041	RIFLE INSTRUSTO	40	0	1998	40	0	EDMOND	CLEET
8/10/1998	3028	FLD ARMORER SC.	20	0	1998	20	0	OKLA. CITY	REMINGTON
3/2/1998	3014	FATS INSTRUCTOR	40	0	1998	40	0	OKC	OK CSO
11/10/1997	4052	ALZHEIMER'S MH	1	0	1997	1	1	EDMOND	EDMOND PD
10/21/1997	334	FTO ADMINISTRAT	24	0	1997	24	0	OKLA. CITY	CLEET
3/25/1997	7741	CRISIS NEGOTIAT	24	0	1997	24	0	OKC	US DOJ
2/26/1997	5020	JUVENILE LAW	8	0	1997	8	0	SHAWNEE	CLEET
2/6/1997	6527	SURIVAL SPANISH	40	96	1997	40	0	OKC	OCPD
12/5/1996	4052	HAND.MENTAL ILL	1	0	1996	1	1	EDMOND	EPD
4/25/1996	3510	F.AID-CPR-BBPAT	8	0	1996	8	0	EDMOND	EDMOND PD
4/18/1996	3010	F/ARMS IN-SERV.	6	0	1996	6	0	EDMOND	EDMOND PD
3/14/1996	3010	F/ARMS IN-SERV.	6	0	1996	6	0	EDMOND	EDMOND PD
1/24/1996	6553	ETHICS LAW/ENFO	8	0	1996	8	0	OKC	OACP
10/20/1995	4052	REC.HAND.MEN.IL	1	0	1995	1	1	EDMOND	EPD
4/12/1995	3000	TERMINAL BALLIS	8	0	1995	8	0	OKC	OK CSO
11/22/1994	7011	EXPANDABLE BATO	16	0	1994	16	0	EDMOND	E PD
11/16/1994	7001	O.C.SPRAY	4	0	1994	4	0	EDMOND	E PD
10/27/1994	7526	BOMB THREATS	8	0	1994	8	0	OKC	OHP
10/21/1994	4052	REC/HAND MEN/IL	1	0	1994	1	1	EDMOND	E PD
10/22/1993	4052	HAND/MENTAL ILL	4	0	0	4	4	EDMOND	E PD
4/30/1993	3010	FIREARMS IN-SER	8	0	0	8	0	EDMOND	E PD
4/29/1993	7614	HAZARDOUS MATER	8	0	0	8	0	EDMOND	US DOT
4/28/1993	6011	DRUG INTERDICTI	8	0	0	8	0	EDMOND	OHP
4/27/1993	3500	BLOODBORNE PATH	4	0	0	4	0	EDMOND	E PD
9/11/1992	4867	GANG PROB.SOCIE	4	0	0	4	0	EDMOND	E PD
5/26/1992	7557	WATER SAFETY	40	0	0	40	0	OKC	OCPD
4/9/1992	7120	ROPES/CHALLENGE	8	0	0	8	0	EDMOND	E PD
12/11/1991	7556	WILDLIFE LAW/EN	8	0	0	8	0	CLAREMO	OSDW
12/9/1991	2611	GUNSHOT/WOUN II	1	0	0	1	0	EDMOND	LETN
12/9/1991	2611	GUNSHOT WOUNDS	1	0	0	1	0	EDMOND	LETN

State of Oklahoma

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EVANS, MELVIN J

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12/9/1991	2614	1ST/RESP-AIDS	1	0	0	1	0	EDMOND	LETN
12/9/1991	2614	BUILDING SEARCH	1	0	0	1	0	EDMOND	LETN
12/2/1991	2613	HAZ/MAT & DOT	1	0	0	1	0	EDMOND	LETN
12/2/1991	2613	USE EMER/RES HB	1	0	0	1	0	EDMOND	LETN
12/2/1991	2613	ACTION 1ST RESP	1	0	0	1	0	EDMOND	LETN
12/2/1991	2615	AIDS/POLICE OFF	1	0	0	1	0	EDMOND	LETN
12/2/1991	3050	RUGER ARMORER'S	40	0	0	40	0	OKC	OKCO TC
8/6/1991	3051	GLOCK ARMORER S	8	0	0	8	0	EDMOND	GLOCK
2/11/1991	4012	STREET SURVIVL	24	0	0	0	0	TULSA	CP
1/7/1991	4012	S&W ARMORER	40	0	0	40	0	DRUMRIG	VO-TECH
9/4/1990	7516	SFST	24	0	0	0	0	STILLWA	VOTECH
3/24/1989	3015	FATS TRAINING	2	0	0	0	0	OKC	CLEET
2/1/1989	3057	S-AUTO-P ARMORE	16	0	0	0	0	OKC	DPS
1/31/1989	3056	S-AUTO PIST INS	8	0	0	0	0	OKC	DPS
2/23/1988	3022	F.A.INST.WORKSH	8	0	0	0	0	TULSA	CLEET
11/17/1986	4012	IN-SERVICE TRAI	0	0	0	0	0	DRUMRIG	EDMOND
10/30/1986	4012	IN-SERVICE TRAI	0	0	0	0	0	EDMOND	EDMOND
10/28/1986	4012	IN-SERVICE TRAI	0	0	0	0	0	EDMOND	EDMOND
10/27/1986	4012	IN-SERVICE TRAI	0	0	0	0	0	EDMOND	EDMOND
10/1/1986	4012	IN-SERVICE TRAI	0	0	0	0	0	EDMOND	EDMOND
5/7/1986	3056	AUTO PISTOL INS	24	0	0	0	0	EDMOND	LETC
4/7/1986	8063	EVO INSTRUCTOR	80	0	0	0	0	BURNS F	LETC
3/3/1986	4012	IN-SERVICE TRAI	40	0	0	0	0	EDMOND	EPD-ACC
1/20/1986	4012	IN-SERVICE TRAI	40	0	0	0	0	EDMOND	EPD-ADV
1/13/1986	4012	IN-SERVICE TRAI	40	0	0	0	0	EDMOND	EPD-ADV
1/11/1986	9999	SURVIVAL VS SUR	8	0	0	0	0	EDMOND	NUTSHEL
1/7/1986	4012	IN-SERVICE TRAI	12	0	0	0	0	EDMOND	EPD-SWA
12/18/1985	3065	DEFENSIVE SHOTG	24	0	0	0	0	OKLA. C	LETC
11/21/1985	7511	RE-QUAL. FOR BR	4	0	0	0	0	OKLA. C	DPS
9/16/1985	4012	IN-SERVICE TRAI	16	0	0	0	0	EDMOND	EPD-TER
11/15/1984	7511	RE-QUAL. FOR BR	4	0	0	0	0	OKLA. C	DPS
8/27/1984	7610	CERTIFIED INSTR	40	0	0	0	0	OKLA. C	LETC
10/26/1983	7511	RE-QUAL. FOR BR	4	0	0	0	0	OKLA. C	DPS
10/5/1983	4012	IN-SERVICE TRAI	16	0	0	0	0	OKLA. C	LETC-F.
8/24/1981	8095	RADAR INSTRUCTO	0	0	0	0	0	OKLA. C	DPS
10/20/1980	3020	FIREARMS - INST	0	0	0	0	0	OKLA. C	LETC
2/13/1980	7020	DEFENSE TACTICS	0	0	0	0	0	OKLA CI	LETC
11/27/1979	4810	ACCIDENT - INVE	0	0	0	0	0	ENID	LETC
8/20/1979	8510	N. W. TRAFFIC I	0	0	0	0	0	OKLA CI	NORTHWE
8/7/1979	8085	MOTORCYCLE OPER	0	0	0	0	0	EDMOND	CSU
9/21/1977	8020	DRIVING - DEFEN	0	0	0	0	0	EDMOND	CSU
7/25/1977	1590	OCPD TRAINING A	200	0	0	0	0	OKLA CI	PD
7/18/1977	9999	UNIDENTIFIED CO	40	0	0	0	0	EDMOND	OK TRAU
8/5/1976	1520	AUTO THEFT (PAT	0	0	0	0	0	OKLA CI	CLEET
8/3/1976	1565	COMMUNITY SERVI	0	0	0	0	0	OKLA CI	CLEET
7/30/1976	1560	TRAFFIC-PROBLEM	0	0	0	0	0	OKLA CI	CLEET
7/28/1976	1510	ARREST PROBLEM	0	0	0	0	0	OKLA CI	CLEET
7/26/1976	1530	CRIME SCENE PRO	0	0	0	0	0	OKLA CI	CLEET
7/21/1976	1540	FIREARMS	0	0	0	0	0	OKLA CI	CLEET

State of Oklahoma

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7/16/1976	1555	CRIMINAL LAW	0	0	0	0	0	OKLA CI	CLEET
7/12/1976	1550	GENERAL INFORMA	0	0	0	0	0	OKLA CI	CLEET
		Totals	1167			493	9		

Course Count: 84

Mandatory Training Summary:

MT Year:	MT hours:	MH hours:
1999	25	1
1998	116	0
1997	97	1
1996	29	1
1995	9	1
1994	29	1

Polygraph Licenses:

Canine Team License: