

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

DONALD ANTHONY GRANT,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-10-171-F
)	
ANITA TRAMMELL, Warden,)	
Oklahoma State Penitentiary,)	
)	
Respondent.)	

ORDER

On January 25, 2011, Donald Anthony Grant through counsel filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. no. 22. In that petition and in a subsequently filed motion, counsel alleged that the petitioner was then mentally incompetent and could not assist them in the preparation of his habeas petition. See doc. nos. 22 and 32. Equitable tolling of the statute of limitations and a stay of the action until petitioner regained competence were sought. After the respondent responded to both the petition and the motion, *see* doc. nos. 37 and 39, and replies were filed, doc. nos. 44 and 45, the court ordered that petitioner undergo a competency evaluation at an appropriate federal facility and the filing with the court of a report concerning the results of that evaluation by the examiner. Doc. no. 47. Following the filing of the competency report, doc. no. 51, in which the examiner concluded that petitioner was competent to proceed with his habeas corpus petition, *id.* at p. 21, the court ultimately granted petitioner leave to file an amended petition for a writ of habeas corpus. *See* doc. nos. 64 and 76. On October 9, 2012, petitioner

filed his amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, doc. no. 77, which supplants his prior petition. *See* doc. no. 76. The amended petition is now fully at issue. *See* doc. nos. 79 and 86.

Petitioner was convicted of two counts of first degree murder and two counts of robbery with a firearm in the District Court of Oklahoma County, Oklahoma. Petitioner was sentenced to death on both of the murder convictions, the jury having found the existence of four aggravating circumstances with respect to one of the murders and five aggravators as to the other murder. Petitioner was sentenced to life imprisonment for the robbery convictions. Petitioner's judgment and sentences were affirmed on direct appeal by the Oklahoma Court of Criminal Appeals ("OCCA"). Grant v. State, 205 P.3d 1 (Okla. Crim. App. 2009). The United States Supreme Court denied certiorari review. Grant v. Oklahoma, ___ U.S. ___, 130 S.Ct. 404 (Oct. 13, 2009). The OCCA also denied petitioner's application for state post-conviction relief in an unpublished opinion. *See* Grant v. State, PCD-2006-615 (Okla. Crim. App. Jan. 27, 2010) (doc. no. 77, Ex. 1).

The facts of petitioner's crimes are described in the OCCA's factual determinations on direct appeal, which facts are presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *see* 28 U.S.C. § 2254(e)(1). Those factual determinations are as follows:

The essential facts of the crimes are not disputed. On July 18, 2001, Appellant entered a La Quinta Inn in Del City, ostensibly to fill out an employment application. In reality, Appellant had planned to rob the hotel in order to obtain money to post bond for a girlfriend, Shlonda Gatewood (who was in the Oklahoma County Jail at the time), and was prepared to kill any witnesses to the crime. Appellant may have been motivated to strike this particular business because another girlfriend of his, Cheryl Tubbs, had been fired from employment there a few months before; in any event, Appellant was familiar with the layout of the property and the location of video surveillance equipment.

When Appellant saw the hotel manager, Brenda McElyea, he approached her with a pistol in his hand and ordered her to walk to a storage room, where he fatally shot her once in the head, and slashed her neck and back with a box knife to make sure the knife was sharp enough to use on his next victim. Appellant then left the storage room and approached another employee, Suzette Smith, in the break room. Appellant ordered Smith at gunpoint to give him the money from the hotel register, which she did. Appellant then ordered Smith to walk back to the manager's office, where he shot her three times in the face. Smith continued to struggle to escape, so Appellant brutally beat her and cut her numerous times with his knife. He hit Smith in the head with his pistol, attempted to break her neck, and threw a computer monitor on her head in an effort to stop her struggling. Eventually, Smith succumbed to her wounds and died in the office. Before leaving the office, Appellant took personal property from Smith's purse.

Appellant then left the hotel and walked to a nearby discount store, where he abandoned his pistol and some traveler's checks he had taken in the robbery.^{FN3} He then called a cab to take him to the home of Cheryl Tubbs. Later that day, Appellant used money from the robbery to pay Shlonda Gatewood's bond, which was about \$200. Appellant and Gatewood then used a stolen car to drive from Oklahoma City to New York City, where Appellant had family. About a month after the murders,^{FN4} Appellant was arrested in New York and returned to Oklahoma.

^{FN3}. A few weeks after the crimes, the surveillance video that Appellant had removed from the hotel's recorder was found in a wooded area between the hotel and the discount store.

^{FN4}. Incriminating details of Appellant's motive, preparation, and execution of these crimes were presented in the guilt stage of the trial through the testimony of Gatewood, who related what Appellant had told her. A similar account was presented in the punishment stage of trial, through a letter that Appellant had written a few weeks before trial. Appellant also offered additional details when he elected to testify in the punishment stage.

Grant v. State, 205 P.3d 1, 7 (Okla. Crim. App. 2009).

In his amended petition, petitioner, as an initial matter, repeats his request that the court equitably toll the statute of limitations, and hold these proceedings in abeyance indefinitely due to his alleged incompetency to assist counsel. Petitioner raises the following claims for relief:

1. Petitioner was incompetent to stand trial, resulting in a violation of both his procedural due process and substantive due process rights.
2. Exclusion of expert psychological reports prevented the jury from considering all mitigating evidence in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
3. The jury instruction defining mitigating circumstances improperly limited the scope of relevant evidence, which error, exploited by the prosecutors, eviscerated the jury's consideration of valid mitigating evidence, in violation of the Sixth, Eighth and Fourteenth Amendments.
4. Trial counsel's failure to monitor petitioner's reversion into incompetency, their premature abandonment of the mitigation investigation and failure to challenge the prosecution's evidence and argument violated the Sixth, Eighth and Fourteenth Amendments.
5. Mr. Grant's *pro se* effort to represent himself was ignored, which, if he was truly competent to stand trial, should have been honored, resulting in a Sixth Amendment violation.
6. Minority jurors were stricken, in violation of Batson v. Kentucky.
7. Multiple errors occurred during jury selection, resulting in an unfair and partial jury.

8. Petitioner's constitutional right to due process was denied when the jury's unreliable sentencing decision was based on false evidence in violation of the Eighth Amendment.
9. One of petitioner's robbery convictions must be vacated because the convictions were obtained in violation of the constitutional prohibition against double jeopardy and prejudice from the stacking of the robbery charges contributed to the violation of petitioner's due process rights and a reliable sentencing proceeding guaranteed by the Eighth and Fourteenth Amendments.
10. Appellate counsel was ineffective in failing to raise trial counsel's objection to being excluded from the initial aspects of jury selection, in violation of the Sixth, Eighth and Fourteenth Amendments.
11. Appellate counsel failed to argue that petitioner's jury should have been instructed as to what constitutes a life sentence with the possibility of parole and a life sentence without the possibility of parole.
12. The cumulative trial errors violated petitioner's Sixth, Eighth and Fourteenth Amendments.

See Amended Petition, doc. no. 77

Standards of Review

In federal habeas review, pursuant to AEDPA, state court factual determinations are presumed correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Federal habeas review is limited to determining whether the state court adjudication resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1), or resulted in a decision based on an unreasonable determination of the facts in light of

the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2). An adjudication is “contrary to” clearly established Supreme Court precedent if the state court has decided a case differently than the Supreme Court has “on a set of materially indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 413 (2000). An unreasonable application of federal law is not the same as an incorrect application of federal law. An unreasonable application occurs when the state court identifies the correct governing legal principle but unreasonably applies it to the facts. *Id.* “When a federal claim has been presented to a state court and the state court has denied relief,” it may be “presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 784-85 (2011). Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden is still to show that there was no reasonable basis for the state court to deny relief. *Id.* “A state court’s determination that a claim lacks merit precludes habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” Harrington v. Richter, ___ U.S. at ___, 131 S.Ct. at 786, quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). In other words, “[a]s a condition for obtaining habeas corpus [relief] from a federal court, a state prisoner must show that the state court’s ruling on the claim presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.*, ___ U.S. at ___, 131 S.Ct. at 786-87. These AEDPA standards are “highly deferential,” requiring that “state court decisions be given the benefit of the doubt.” Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1398 (2011).

I.

Request for Equitable Tolling of the Statute of
Limitations and Abeyance of Habeas Corpus Proceedings

Petitioner's counsel seek equitable tolling and abeyance of these proceedings until petitioner "can be restored to competency, if at all." Doc. no. 77 at p. 5. They assert that this is necessary to give meaning to petitioner's right to court appointed counsel, *id.* at p. 6, citing Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003). Counsel state that they cannot be assured that all of petitioner's constitutional claims have been made and fully presented without the assistance of a competent client. *Id.*

It is unnecessary for the court to elaborate on petitioner's argument or to discuss respondent's response because the United States Supreme Court has now rejected the reasoning in Rohan as well as that of the Sixth Circuit in Carter v. Bradshaw, 644 F.3d 329 (6th Cir. 2011), concluding that there is no statutory right to competence during federal habeas proceedings under 18 U.S.C. § 3599(a)(2), Ryan v. Gonzales, ___ U.S. ___, 133 S.Ct. 696, 703-06 (2013), or under 18 U.S.C. § 4241, *id.*, ___ U.S. at ___, 133 S.Ct. at 706-07, and that

“[g]iven the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence.”

Id., ___ U.S. at ___, 133 S.Ct. at 704. Properly exhausted claims which are record-based or resolvable as a matter of law may be decided irrespective of a petitioner's competence and a stay is not generally warranted in those circumstances. *Id.*, ___ U.S. at ___, 133 S.Ct. at 708. Moreover, the Supreme Court stated that an “indefinite stay,” such as that requested in this case, “would be inappropriate” even if there was a claim that was unexhausted and not procedurally barred. *Id.*, ___ U.S.

at ____, 133 S.Ct. at 709. Nevertheless, with respect to a claim that is unexhausted but not procedurally barred, the Supreme Court stated as follows:

If a district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment.

In this case, in the reply brief, doc. no. 86, counsel assert that

[t]he array of information Mr. Grant possesses relating to his competency to stand trial and IAC claims remains undiscovered because it is locked within Mr. Grant's damaged brain and arose at a time when the symptoms of his severe mental illness were untreated.

Doc. no. 86 at p. 4. They suggest that an evidentiary hearing be held to determine whether this information can be unlocked "permanently." *Id.* The court, however, finds that petitioner's claims that he was incompetent to stand trial and his claims of ineffective assistance of trial and appellate counsel would not substantially benefit from petitioner's assistance. The claims for ineffective assistance of appellate counsel are based solely on the record and the court fails to understand how petitioner, if he was in fact incompetent at trial as his counsel now assert, could provide substantial assistance on the claim that he was incompetent at the time of trial and that his trial counsel's assistance was constitutionally ineffective. Furthermore, assuming petitioner is incompetent, his counsel have not shown that petitioner will regain his competence in the foreseeable future and remain competent sufficiently long to provide the assistance they contend they need. Moreover, petitioner has been found competent during these proceedings and has had the opportunity to have meaningful conversations with his counsel before filing his amended petition.

Petitioner in his reply asserts that a petitioner whose incompetency prevents matters from being raised may return to state court, citing Rhines v. Weber, 544 U.S. 269 (2005) and Fisher v. State, 845 P.2d 1272, 1277 (Okla. Crim. App. 1992). But under Rhimes, a stay and abeyance of a mixed petition of exhausted and unexhausted claims is only appropriate when the district court determines that there was good cause for the petitioner's failure to exhaust his claims first in state court. Rhimes, 544 U.S. at 277. Petitioner has not shown good cause for failure to raise and exhaust claims in state court. The OCCA's holding in Fisher that "[p]ost-conviction review is available for important issues, revealed after an appellant attains competence, which were not raised during an earlier appeal because of incompetence," Fisher v. State, 845 P.2d at 1277, is inapplicable here because petitioner's counsel do not assert that petitioner was incompetent during his direct appeal and this is a federal habeas proceeding, not a state court post-conviction proceeding.

Petitioner's counsel's request for equitable tolling of the statute of limitations and for a stay of these federal habeas proceedings is denied. Petitioner's request for a hearing to determine petitioner's "continued incompetency" is also denied.

II.

Incompetence to Stand Trial

A. Incompetence: Procedural Due Process

Petitioner asserts that the trial court violated petitioner's right to procedural due process by not conducting further inquiry when it had within its knowledge relevant information that created doubt as to petitioner's competency. Such information, according to petitioner, included the fact that petitioner's trial was stayed for four years because he was incompetent to stand trial, former judges' and attorneys' doubts as to his competency, a plethora of prior medical opinions, petitioner's irrational behaviors and the return of symptomatology and petitioner's non-receipt of required

medications. Respondent asserts that this claim is unexhausted and procedurally barred because not presented to the OCCA. Petitioner disagrees, citing appellant's brief at pp. 6, 7-9 & 10-11 and the Appellate Evidentiary Hearing at pp. 1 & 20. He claims that "[t]he substance of the procedural due process claim was fairly presented to the OCCA, citing Picard v. Connor, 404 U.S. 270, 278 (1971). Petitioner in reply also asserts that by arguing that this claim is unexhausted, respondent concedes that this claim was not adjudicated by the OCCA, making AEDPA deference inapplicable.

Although it is a close question, the court finds that the issue of procedural competency was not fairly presented to the OCCA on direct appeal and in petitioner's initial application for post-conviction relief. The OCCA would now find the claim procedurally barred. *See, e.g. Alverson v. Workman*, 595 F.3d 1142, 1162 (10th Cir. 2010). Petitioner argues that Oklahoma's procedural default rules are neither independent nor adequate following the OCCA's decision in Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002). Doc. no. 77 at pp. 127-130. However, the Tenth Circuit has put this issue to rest, finding the OCCA's procedural bar to claims raised for the first time in a second or subsequent post-conviction application both independent and adequate. Thacker v. Workman, 678 F.3d 820, 835-36 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 878 (2013). *See Banks v. Workman*, 692 F.3d 1133, 1145-46 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 2397 (2013). Accordingly, this claim is defaulted for purposes of federal habeas review. *See, e.g., Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000). Petitioner has failed to show either cause for this procedural default or that a fundamental miscarriage of justice would occur if this claim is not reviewed. Therefore, petitioner is barred from raising his procedural competency claim in this court. *See, e.g., Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006).

B. Incompetency: Substantive Arguments

Petitioner asserted on appeal to the OCCA that he was tried while he was incompetent to stand trial. The OCCA adjudicated this claim without an evidentiary hearing. *See* Amended Petition at p. 32; Grant v. State, 205 P.3d at 8-10. However, the OCCA only specifically addressed one prong of the competency test, that is, whether petitioner had an understanding of the nature of the charges against him. *See Grant v. State*, 205 P.3d at 8, citing Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) and Drope v. Missouri, 420 U.S. 162, 171-72 (1975). Nevertheless, the OCCA's decision constituted an adjudication that petitioner had the ability to consult with his attorney with a reasonable degree of rational understanding, Drope, 420 U.S. at 171-72, or to rationally assist counsel in his defense, Grant, 205 P.3d at 8, because the OCCA concluded that petitioner was competent at the time of his trial. *Id.* at 10. *See Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. at 784 & 786-87 (absence of explanation by state court of which element of a multipart claim on which petitioner failed to meet his burden does not preclude AEDPA deference).

In this court, petitioner does not challenge the OCCA's determination that at the time of trial petitioner understood the nature of the proceedings against him. But he argues that the court must review, on a *de novo* standard, the OCCA's determination that petitioner could rationally assist his counsel. Reply at p. 9. He further argues, based upon evidence offered on appeal, specifically the declaration and report of Dr. Richard Dudley and the declaration of Dr. Linda Anne Hayman, that the OCCA's adjudication was contrary to law under a *de novo* standard, an unreasonable application of clearly established law and an unreasonable determination of the facts.

The declaration and report of Dr. Dudley and the declaration and curriculum vitae of Dr. Hayman, *see* doc. no. 77, Ex. 15 & 27, are not properly before this court because they were never presented to the OCCA. *See Pinholster*, 131 S.Ct. at 1398.

Likewise, the affidavit of investigator Brandi Harris containing speculation that petitioner may possibly have been exposed to lead poisoning, *see* doc. no. 77, Ex. 3 at 2-3, is not properly before the court because not presented to the OCCA. *See id.* Petitioner contends that the OCCA's determination that petitioner's medication records were incomplete and didn't warrant a conclusion that petitioner could not rationally assist his attorneys was unreasonable. *See* Amended Petition at pp. 33-35.

Petitioner points to Dr. Antoinette McGarrahan's report of her retrospective assessment of competency to stand trial as evidence that petitioner regularly refused his medication in June and July of 2005, was "flushing" his medication for at least four to five months prior to his jury trial, and that the Oklahoma County Detention Center (OCDC) was not administering petitioner's prescribed psychotropic medication in September of 2005 and early November of 2005. But Dr. McGarrahan's statements concerning petitioner and the OCDC's actions relative to psychotropic medication are hearsay. The OCCA's factual determinations that records concerning whether petitioner took prescribed medications during the crucial time periods were missing or incomplete, and that the jail records of petitioner's medication history did not warrant a finding that petitioner was incompetent at the time of trial, were not unreasonable. This is particularly so since the OCCA refused to consider the extra-record materials submitted by petitioner. *See Grant v. State*, 205 P.3d at 10 n.9. In any event, the court notes that petitioner did not submit his own affidavit concerning medication compliance or any evidence regarding his compliance with medication during the critical time leading up to his trial lasting from November 14 to November 23, 2005. Indeed, petitioner himself acknowledges that jail medication records from September 6, 2005 through November 17, 2005 are missing. Doc. no. 77, Ex. 5 at 2. Finally, jail medication records submitted by respondent show

that petitioner continually took both Depakote (Valproic Acid) and Haldol continuously during the period petitioner met with Ms. Harris.

Petitioner has not shown that the OCCA's decision on direct appeal that petitioner was competent to stand trial is contrary to a decision by the Supreme Court on materially indistinguishable facts. Nor has he shown by clear and convincing evidence that the OCCA's factual determinations were incorrect or that they were unreasonable in light of the evidence presented to the OCCA. The OCCA found that petitioner's competency was placed in issue early in his prosecution; that experts "tended to agree" that petitioner had some form of mental illness, probably a form of schizophrenia; and that experts for both the prosecution and defense questioned petitioner's competency to stand trial – but that by early 2005 experts for both sides determined that he was competent to proceed. Grant v. State, 205 P.3d at 8. The OCCA further found that a jury trial on the issue of competency was held in February of 2005; that at that trial, the defense did not call its chief expert, Dr. Curtis Grundy, who believed petitioner to be competent at that time; and that the jury found that petitioner was competent to proceed.

Before the OCCA, in addition to the extra-record medication records, petitioner relied on his own statements at various pretrial and *in camera* hearings, his *pro se* writings and his testimony during the punishment stage of trial as well as an expert's retrospective opinion of his competency, in an effort to show the OCCA that he had not been competent to stand trial. The OCCA reviewed several exchanges the trial court had with petitioner close to and during the time of trial in which the trial court "not only observed appellant personally in pretrial settings, but conversed with him about matters bearing on his ability to understand choices in legal strategy." Grant v. State, 205 P.3d at 9. It also reviewed petitioner's writings, including that in which he admitted his commission of the crimes in question, and his testimony in the

punishment stage of trial. *See id.* The OCCA also considered the retrospective competency determination of Dr. McGarrahan, a determination made some two years after trial. *See id.* Based upon this review as well as the findings listed above, the OCCA concluded as follows:

In summary, we find no reason to second-guess the judgment of those parties most familiar with Appellant's history of mental problems before and during the trial – defense counsel, the trial court, and the defense experts retained at that time. The record supports a conclusion that Appellant was competent at the time of his trial.

Grant v. State, 205 P.3d at 10. Implicit in the OCCA's opinion was that trial counsel, the expert retained by petitioner who was present for much of trial, and the trial court, never expressed any doubt as to petitioner's competency to stand trial when petitioner actually did stand trial. Such implicit findings were consistent with the state court record, which the court has reviewed.

The OCCA observed that Dr. McGarrahan's conclusion that petitioner was unable to rationally assist his counsel in his defense "seem[ed] to be based on the fact that Appellant testified in the punishment stage against counsel's advice." Grant v. State, 205 P.3d at 9. But the OCCA also noted that lead trial counsel harbored "varying agreeability" with the idea of allowing petitioner to testify, that petitioner had little to lose by testifying and that petitioner's testimony might have been enough to sway a single juror to extend him sympathy and spare his life. *Id.* at note 8. In any event, the OCCA "refuse[d] to judge a defendant's competency solely by the wisdom of his own choices." Grant v. State, 205 P.3d at 9. In announcing such refusal, the OCCA noted that in the death penalty context, a strategy need only suffice to convince one juror that the defendant's life should be spared. *Id.* at note 8.

Petitioner has not shown that there was no reasonable basis for the OCCA to deny relief on his substantive competency claim. The OCCA did not unreasonably

apply the correct governing legal principle to the facts. The conclusion that petitioner had the ability to consult with his attorneys with a reasonable degree of rational understanding is one on which the correctness of which fairminded jurists could disagree. The OCCA's ruling has not been shown to be so lacking in justification that there was an error well understood in existing law beyond any possibility for fairminded disagreement.

III.

Ineffective Assistance of Trial Counsel

Petitioner asserts that his trial counsel were constitutionally ineffective by failing to monitor petitioner's reversion to incompetency, by abandoning the mitigation investigation prematurely and by failing to challenge the prosecution's evidence and argument that petitioner was not mentally ill. Amended Petition at p. 56. In particular, petitioner asserts not only that trial counsel failed to monitor petitioner's competency but that trial counsel failed to discover petitioner's frontal lobe brain damage; that petitioner's mental health difficulties predated the crimes at issue; that petitioner's delusions were not religious beliefs; and that petitioner had a predisposition for mental illness. Petitioner also asserts that trial counsel failed to investigate the "complete story" of petitioner's childhood. Doc. no. 77, at 76. Recognizing that the OCCA on appeal addressed some of these claims of trial counsel's ineffectiveness, petitioner initially asserts that the OCCA applied the wrong standard to these claims. However, while the OCCA did say that petitioner had to show that his trial counsel's performance was so deficient as to have rendered him in effect without counsel, Grant v. State, 205 P.3d at 22, the OCCA went on to properly paraphrase the Strickland v. Washington, 466 U.S. 668 (1984) test for ineffective assistance of counsel. *Id.*

The OCCA considered supplementary materials presented by petitioner on direct appeal in determining whether trial counsel was ineffective in allegedly failing to monitor petitioner's competency to stand trial. *See Grant v. State*, 205 P.3d at 10 & 23. The OCCA concluded that the supplementary materials were "insufficient to overcome the presumption that trial counsel had a sound basis for believing appellant was competent at the time of trial." *Grant v. State*, 205 P.3d at 10 (footnote omitted). In reaching that conclusion, the OCCA considered the totality of the evidence indicating that petitioner was competent to stand trial, including petitioner's competency history from the beginning of the case, the jury's determination of competency and the trial court's familiarity with petitioner's case, including the trial court's interactions with petitioner and his trial attorneys. *Grant v. State*, 205 P.3d at 8-10. The OCCA also considered the experience of petitioner's attorneys and their belief that petitioner had the ability to assist in his defense because they had previously sought competency determinations, demonstrating their willingness and ability to pursue that issue if necessary. Even Dr. McGarrahan in her retrospective competency determination submitted to the OCCA on appeal acknowledged that petitioner's trial counsel did not believe petitioner had decompensated psychiatrically after his competency determination in February of 2005. *See Ex. 3 to Amended Petition* at pp. 11 & 12. Based upon all of these circumstances, it is at least arguable that a reasonable attorney would not have questioned his client's competency and that there "was a reasonable justification for the state court's decision," *Richter*, 131 S.Ct. at 790. The OCCA did not expressly address on appeal the second prong of *Strickland*. However, given the OCCA's conclusion that petitioner was competent at the time of his trial, even assuming that his counsel's performance in allegedly failing to monitor petitioner's competence was deficient, petitioner cannot show that he was

prejudiced by his counsel's failure or that fairminded jurists could not disagree that petitioner was prejudiced.

The OCCA also addressed petitioner's claim on appeal that his counsel failed to discover and/or present evidence that petitioner suffered from an organic brain disorder. Grant v. State, 205 P.3d at 22-23. The OCCA said as follows:

Counsel's strategy was to present expert evidence on Appellant's mental illness, and testimony from family members about his disadvantaged and dysfunctional childhood. These mitigation strategies were by no means antagonistic. In fact, jurors might have found the circumstances surrounding Appellant's formative years to have created, or at least aggravated, his mental problems. But defense counsel spent considerable time presenting such evidence to the jury. And while the presence or absence of organic brain disorder might have shed light on one potential cause of Appellant's mental illness, the fact that Appellant had some sort of mental illness was never in serious dispute. In our view, the affidavits Appellant submits on appeal do not present anything qualitatively different from what was presented at trial on these issues. We find no reasonable probability that these additional witnesses would have affected the jury's sentencing decision. Wood v. State, 2007 OK CR 17, ¶ 44, 158 P.3d 467, 481. In summary, Appellant has not overcome the strong presumption that his trial counsel performed competently. This proposition is denied.

Petitioner has failed to demonstrate that there is no possibility that fairminded jurists could disagree that the OCCA's adjudication conflicts with Strickland. *See Richter*, 131 S.Ct. at 786. Evidence of petitioner's brain damage or dysfunction beyond that presented through Dr. Grundy's penalty phase testimony would have been "double-edged," as respondent asserts, Response to Amended Petition at p. 57, because it would have been both mitigating and aggravating. The prosecution sought to prove that petitioner was a continuing threat to society. While mental illness may well be managed with medications, as Dr. Grundy testified (*see* Tr. Vol. VI, 231 -- petitioner's symptoms would "go away partly to a great extent"), petitioner has

not submitted any evidence that his alleged organic brain damage can be managed. Moreover, in any event, evidence of petitioner's alleged organic brain damage would not have added to petitioner's mitigation case to any significant extent considering petitioner's own testimony revealing his abilities to organize and plan his attacks on his victims, avoid arrest and prosecution and destroy evidence linking him to the crimes. Even assuming that petitioner's counsel's failure to further investigate and present evidence of petitioner's organic brain damage amounted to deficient performance, fairminded jurists could disagree as to whether there is a reasonable probability that further evidence of organic brain damage would have affected the jury's sentencing decision.

Petitioner asserts that trial counsel failed to present evidence that petitioner's mental health issues were prevalent prior to the murders. The OCCA addressed this issue, finding that the affidavits petitioner presented on appeal "do not present anything qualitatively different than what was presented at trial on these issues." Grant v. State, 205 P.3d at 23 (footnote omitted). Petitioner contends that this evidence would have rebutted the prosecution's argument that petitioner became schizophrenic only after the crimes. The affidavits do establish that petitioner's behavior was somewhat odd prior to the crimes at issue, but they also easily attribute petitioner's odd behavior to the use of drugs and alcohol, which would not have supported petitioner's contention that he was mentally ill prior to the crimes. In any event, the fact that petitioner suffered from some kind of mental issue was never really disputed and the trial testimony of petitioner's relatives supported the notion that petitioner had mental health and behavioral issues and had been subject to head injuries since his youth. *See* Tr. Vol. VI, 133-35, 140-41, 143, 146 & Vol. VII, 109, 123-25, 142-43, 144, 179-184 & 193. The OCCA's decision that the additional testimony petitioner sought to present concerning the duration of petitioner's mental

health issues, which was merely cumulative to the testimony presented at trial, would not have affected the jury's sentencing decision, that is, that there was not a reasonable probability that the result would have been different, was not unreasonable or contrary to law. Petitioner has not shown and cannot show that fairminded jurists could not disagree that the OCCA's decision is contrary to or an unreasonable application of Strickland. See Richter, 131 S.Ct. at 786.

Petitioner also asserts that his trial counsel were ineffective in failing to discover petitioner's genetic predisposition to mental illness and in failing to discover and present more evidence regarding petitioner's deprived childhood. Petitioner raised these issues in his original application for post-conviction relief. The OCCA determined that these claims merely reformulated the argument made on direct appeal and concluded that the claims were barred by *res judicata*. See OCCA Opinion Denying Application for Post-Conviction Relief (Ex. 1 to Amended Petition) at 7. These claims are procedurally barred. See Welch v. Workman, 639 F.3d 980, 994 n.6 (10th Cir. 2011); Smallwood v. Gibson, 191 F.3d 1257, 1268, n.8 (10th Cir. 1999) (Oklahoma regularly and even-handedly applies the procedural bar of *res judicata* to claims previously raised on direct appeal).

Petitioner attempts to demonstrate cause by arguing that appellate counsel was ineffective in failing to raise issues of trial counsel's ineffective failure to discover and present predisposition evidence and additional evidence regarding petitioner's deprived childhood. However, the OCCA, in denying post-conviction relief, concluded that trial and appellate counsel were not ineffective. OCCA Opinion (Ex. 1 to Amended Petition) at p. 13. Considering the evidence that was actually presented at trial, and the nature of the evidence petitioner maintains trial counsel should have discovered and produced, petitioner cannot show prejudice, that is, that if appellate counsel had raised these issues on direct appeal he would have won relief. As has

been noted, the fact that petitioner suffered from some form of mental illness was never in serious dispute. Testimony concerning his alleged predisposition for mental illness, which was merely familial descriptions of petitioner's father as someone who drank heavily and acted "crazy," Ex. 20-22 & 24 to Amended Petition, was really just cumulative and would not have swayed the OCCA that had the jury heard this evidence, it would not have imposed the death penalty. Likewise, appellate counsel's failure to raise trial counsel's failure to discover and present additional details concerning petitioner's dysfunctional childhood would not have made a difference in the appeal outcome because the evidence petitioner points to is merely cumulative of petitioner's family members' testimony, *see* Tr. Vol. VI at 136-140, 143, 153-54, 155, 164-67 & Vol. VII at 105-09, 110, 111-122, and an expert, *see* Tr. Vol. VII at 180-92, presented at trial in mitigation. Petitioner makes no claim that he is actually innocent, so he has failed to establish that a fundamental miscarriage of justice will occur if these procedurally barred claims are not reviewed. Having failed to establish either cause for his procedural default or a fundamental miscarriage of justice, these claims of ineffective trial counsel are procedurally barred. Smallwood v. Gibson, 191 F.3d at 1269.

Petitioner also asserts that his trial counsel was ineffective in failing to discover that petitioner's delusions were not religious beliefs or connected to his religious beliefs. Amended Petition at pp.73-5. This claim is unexhausted. Petitioner did not present any evidence or argument relating to this claim to the OCCA on direct appeal or in post-conviction proceedings. This claim was available to petitioner when he filed his application for post-conviction relief. And there is no entitlement to effective assistance of post-conviction counsel. Coleman v. Thompson, 501 U.S. 722 (1991). Thus, petitioner cannot show cause for his failure to raise this claim in post-conviction proceedings. Petitioner cannot show a miscarriage of justice will result if the court

doesn't review this claim because he has not attempted to establish his factual innocence. *See Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997). If petitioner were required to exhaust this claim in a second application for post-conviction relief, the Oklahoma court would find the claims procedurally barred, *Alverson v. Workman*, 595 F.3d 1142, 1162 (10th Cir. 2010), a procedural bar the Tenth Circuit has recognized is independent and adequate. *See Thacker v. Workman*, 678 F.3d at 835-36; *Banks v. Workman*, 692 F.3d at 1145-46.

IV.

Exclusion of Psychological Reports

Petitioner asserts that application of evidentiary rules in a mechanistic manner to exclude psychological reports prevented the jury from considering mitigating evidence in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Petitioner's claim addresses two groups of reports, eight reports of Dr. Curtis Grundy, whom petitioner called as a witness during the penalty stage of trial, and ten psychological reports of other doctors' mental health evaluations that Dr. Grundy said he relied on in reaching his opinions. This issue was raised on direct appeal. The OCCA addressed the issue at some length, concluding that Dr. Grundy's own reports were cumulative to his own testimony and that their exclusion was not an abuse of discretion. *Grant v. State*, 205 P.3d at 19. The OCCA found that the second group of reports were never authenticated, *id.*, and that their exclusion was proper, stating as follows:

By excluding the second group of reports the trial court avoided placing undue emphasis on writings by authors who were never asked to come to court and testify about them. Many of these reports contain information and terminology which might be confusing to someone outside the world of psychology and psychiatry. Liberal admission of such documents could turn trials into paper wars, and undermine the fundamental preference for live testimony subject to cross-examination.

Further, admitting a stack of evaluations by non-testifying experts runs a serious risk of confusing the jury.

Grant v. State, 205 P.3d at 20 (footnote and citation omitted). Petitioner contends that the OCCA didn't address his constitutional claim so AEDPA deference should not apply. But the OCCA expressly recognized that petitioner's claim was that evidentiary rules arbitrarily deprived him of the constitutional right to present evidence. *Id.* at 19 n.30. Hence, AEDPA deference is applicable. *See, e.g., Richter*, 131 S.Ct. at 783-84 (deference applies even to one-word summary opinions denying relief); Welch v. Sirmons, 451 F.3d 675, 691-92 (10th Cir. 2006) (“[the Court’s] only concern is that the reasoning and result are consistent with controlling Supreme Court precedent.”), overruled on other grounds by Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009) (*en banc*).

Petitioner submits that the OCCA's ruling is contrary to Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982) and Skipper v. South Carolina, 476, U.S. 1 (1986), prohibiting states from limiting the sentencing jury's ability to consider any relevant mitigation evidence, and to Green v. Georgia, 442 U.S. 95 (1979) (per curiam), which states that in the sentencing phase of a death penalty case, evidentiary rules “may not be applied mechanistically.”

The jury was not prevented from considering the information contained in Dr. Grundy's own reports because, as even petitioner acknowledges, Dr. Grundy summarized the information in his reports, *see* Tr. Vol. VI, 222, 226-36, 238-49, 252, Vol. VII, 5-7, 10-11, 17, 19-20, 21-22, 30, 38, 40, 43, 47, 87-90, 94, and the reports were merely cumulative to his testimony. Dr. Grundy also testified extensively about tests performed by other experts and their opinions regarding petitioner's mental illness(es), Tr. Vol. VI, 223-25, 235, 236-37, 238-39, 240-41; Vol. VII, 7, and that he was not malingering. Hence, the sentencing jury was not precluded from considering

this evidence. Moreover, as noted by the OCCA, petitioner never suggested that petitioner was prevented from subpoenaing the experts whose reports he sought admission. Grant v. State, 205 P.3d at 19, n.30.

The OCCA's finding concerning the exclusion of Dr. Grundy's own reports does not run afoul of Skipper and petitioner cannot demonstrate that there was no reasonable justification for the OCCA's decision. Richter, 131 S.Ct. at 770. The OCCA's affirmance of the exclusion of the reports of non-testifying experts is not contrary to or an unreasonable application of clearly established Supreme Court law, *see Clark v. Arizona*, 548 U.S. 735, 770 (2006), because the OCCA affirmed their exclusion based on well-established rules of evidence designed to prevent jury confusion, not the mechanistic application of evidentiary rules serving no legitimate purpose.

V.

Petitioner's Argument that Oklahoma's Jury Instruction
Defining Mitigating Circumstances Improperly Limits The Scope of
Relevant Evidence and the Prosecutors Exploited Such Error,
Eviscerating the Jury's Consideration of Valid Mitigating Evidence,
in Violation of the Sixth, Eighth and Fourteenth Amendments

Petitioner complains that the jury was given former Oklahoma Uniform Jury Instruction OUII-CR (2d) 4-78 which in pertinent part provides that "[m]itigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame," O.R. 2349, and that the prosecution repeatedly argued, based on this instruction, that petitioner's second stage evidence, in particular his mental illness, did not qualify as "mitigating" because it didn't reduce his moral culpability or blame. Petitioner raised this claim on direct appeal and the OCCA rejected it. It found that the jurors were properly instructed that anything could be considered mitigating and that the prosecutor's argument did not misstate the

law but was merely an attempt to persuade the jury that evidence offered by the defense did not successfully serve the purpose of mitigation. *See Grant v. State*, 205 P.3d at 21. In light of other instructions given to the jury in petitioner's case, the OCCA's decision is not contrary to or an unreasonable application of Lockett and its progeny. The jury was instructed that "[t]he determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case." OUII-CR (2d) 4-78 (O.R. at 2349). They were also instructed that they did not have to unanimously agree on mitigating circumstances and that such circumstances did not have to be proved beyond a reasonable doubt. *Id.* More importantly, they were specifically instructed that evidence as to petitioner's diagnosis as schizophrenic and psychotic symptoms, his mental impairments, brain damage, and seven other circumstances, were mitigating circumstances and that they could consider that other mitigating circumstances existed as well. OUII-CR (2d) 4-79 (O.R. 2350-51). Moreover, the court agrees with the OCCA that the prosecutor's argument did not misstate the law and prosecutors never told the jury to disregard petitioner's proposed mitigation evidence. The prosecutors simply attempted to persuade the jury that petitioner's evidence was not mitigating.

The United States Supreme Court has established that in circumstances like those presented to the OCCA, the issue is whether there is a reasonable likelihood that the challenged instruction, coupled with the prosecutor's argument, misled the jury to believe it could not consider constitutionally relevant evidence. Brown v. Payton, 544 U.S. 133, 143-44 (2005). The OCCA's adjudication of this claim is not contrary to or an unreasonable application of Brown v. Payton. Moreover, even if the OCCA's decision were contrary to or involved an unreasonable application of clearly established federal law, its error did not have a "substantial or injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619,

623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). This court has no grave doubt about the effect of any such error on the jury's sentencing decision. Bland v. Sirmons, 459 F.3d 999, 1009 (10th Cir. 2006).

VI.

Petitioner's Assertion that He Should Have Been Allowed To Represent Himself *Pro Se* at Trial

Petitioner asserted before the OCCA and again asserts herein that his Sixth Amendment right was violated when the trial court ignored his request to represent himself. The alleged request to dispense with his attorneys and represent himself was contained in a letter dated September 22, 2005 which petitioner wrote and which was filed in the court file. The OCCA rejected this claim, finding that “[t]he record does not support a conclusion that Appellant made a clear, unequivocal expression of the desire to waive the assistance of counsel and proceed *pro se*.” Grant v. State, 205 P.3d at 11. The OCCA held as a matter of state law that if an initial request to proceed *pro se* is not heeded it must be renewed before trial. *See, id.* It then observed that the trial court held several pretrial colloquies with petitioner in which petitioner not only did not suggest any dissatisfaction with counsel but in which he never asked to represent himself. *See id.*

The right to self-representation is implicit in the Sixth Amendment to the United States Constitution. Faretta v. California, 422 U.S. 806, 819 (1975). Thrusting counsel upon a defendant against his considered wish violates the logic of the Amendment. *Id.*, 422 U.S. at 820. The parties do not dispute that a defendant who wishes to represent himself must clearly and unequivocally express his desire to waive the assistance of counsel and proceed *pro se*. *See Faretta*, 422 U.S. at 835. And of course, Faretta cautions that courts must ensure that the choice to proceed without counsel is made “knowingly and intelligently.” *Id.*

Assuming that the letter in question constitutes a clear, unequivocal expression of petitioner's desire to waive assistance of counsel ("eye write to you to dis card those attorneys out of my view. Eye don't want them in my presents As A 'so call' representative for me. . . . Eye want no further of no kind with these electrons, lawyers.") and to proceed *pro se* ("So therefore Grant represents his own defense of counsel"), itself a somewhat questionable assumption, there is no evidence that this letter, which was not addressed to the trial court, ever reached or was seen by the trial court. The trial record contains no clear and unequivocal request by petitioner to waive the assistance of his attorneys and represent himself. Indeed, during voir dire proceedings, petitioner agreed to his counsel's concession of his guilt, Tr. Vol. II at 4-5 & 267, thereby implicitly agreeing that his counsel acted for him. To the extent petitioner ever clearly and unequivocally made a request to the trial court to waive the assistance of his trial counsel and represent himself, petitioner, by his conduct at trial proceedings, acquiesced in his attorneys' assistance and waived his right to self-representation. Thus, even if fairminded jurists could disagree with the OCCA's finding that "the record" doesn't support a conclusion that petitioner made a clear, unequivocal request to waive counsel and represent himself, Grant v. State, 205 P.3d at 11, petitioner is not entitled to relief.

VII.

Petitioner's Argument that Minority Jurors Were Stricken in Violation of Batson v. Kentucky

Petitioner maintains that prospective jurors Epps and Jamerson were stricken by the prosecutor by the use of peremptory strikes in violation of Batson v. Kentucky, 476 U.S. 79 (1986). He contends that both of the reasons advanced by the prosecutor for striking prospective juror Epps bear strong indicia of pretext. He argues that the first reason advanced – nondisclosure of a misdemeanor charge – failed the second prong of Batson due to factual invalidity. He asserts that the prosecutor's second

reason for striking Epps – her need to pray and let God guide her – amounted to religious discrimination. Petitioner asserts that the prosecutor’s articulated reason for striking prospective juror Jamerson – that she couldn’t look at gruesome photographs – was factually wrong and was a reason that could be used to strike virtually anyone. Petitioner also faults the trial court for looking for a pattern and practice of discrimination. The OCCA’s deferential review of the trial court’s Batson rulings for an abuse of discretion was, according to petitioner, unreasonable and contrary to law because the trial court never conducted a proper Batson inquiry. Moreover, he asserts that the OCCA failed to reasonably assess the flaws in the “prayer reason” and to recognize that the prosecutor’s first reason for excusing Epps was factually unsupportable and pretextual. Petitioner also faults the OCCA for dismissing comparative juror analysis and employing some form of statistical analysis in affirming the dismissal of juror Jamerson which, he asserts, is contrary to law and unreasonable.

“The disposition of a Batson claim is a question of fact subjected to the standard enunciated in 28 U.S.C. § 2254(d)(2).” Saiz v. Ortiz, 392 F.3d 1166, 1175 (10th Cir. 2004). The state court’s factual findings are presumed correct unless rebutted by clear and convincing evidence. Sallahdin v. Gibson, 275 F.3d 1211, 1225 (10th cir. 2002), *citing, inter alia*, 28 U.S.C. § 2254(e)(1).

The OCCA found that one of the prosecutor’s reasons for striking juror Epps, her expressed need to pray and let God guide her, was facially race-neutral, indicative of the prosecutor’s concern panelist Epps might be unwilling to follow the law as instructed. Grant v. State, 205 P.3d at 14. It further found that it did not need to look at the other reason proffered by the prosecutor for striking juror Epps. *Id.* The OCCA also found that defense counsel offered no evidence that the prosecutor’s concern over juror Epps’ expressed need to pray and for God’s guidance was not race-neutral. *Id.*

Accordingly, it concluded that there was “no racial motivation” in the peremptory strike of panelist Epps, addressing in a footnote the legitimacy of the prosecutor’s first proffered reason for striking Epps. The OCCA also found that the prosecutor’s explanation for striking prospective juror Jamerson, also an African American woman, was “sufficiently race-neutral” and rejected petitioner’s Batson claim directed to that peremptory strike. *Id.* at 15. In doing so, the OCCA rejected petitioner’s argument that the percentage of minorities removed by the state from the panel was relevant to whether racial discrimination was at work and explained that in any event, statistical analysis did not advance petitioner’s argument. *Id.* The OCCA also noted that before the prosecutor struck juror Jamerson, she indicated that she wished to waive her remaining challenges, but the trial court insisted that the prosecutor use all nine peremptory challenges. 205 P.3d at 15 n.20.

Petitioner has failed to demonstrate that the OCCA’s factual findings are unreasonable in light of the evidence in the state court proceeding. 28 U.S.C. § 2254(d)(2). Petitioner has failed to show by clear and convincing evidence that the OCCA’s findings concerning petitioner’s Batson claims are incorrect. Nor did the OCCA unreasonably apply Batson and its progeny. In discussing the striking of panelist Jamerson, the OCCA said that “racially motivated discrimination is not established simply because panelists of different races provide similar responses, and one is excused while the other is not.” Grant, 205 P.3d at 15 (emphasis added). Instead, it correctly said all attendant circumstances are relevant to the determination of whether a strike is racially motivated. *Id.*, citing Miller-El v. Dretke, 545 U.S. 231, 240 (2005). To the extent those statements by the OCCA can be understood to be a rejection of comparative juror analysis, the OCCA’s statements were contrary to law. *See Miller-El v. Dretke*, 545 U.S. at 241-52. However, even when comparative juror analysis is employed, as petitioner urges, the OCCA’s finding rejecting petitioner’s

Batson claim with respect to potential juror Jamerson is not unreasonable in light of the evidence presented in the state court proceedings.

The prosecutor requested that juror Moore be dismissed for cause because she stated that she would not look at photographs. Tr. Vol. I, 231-41. When forced to exercise her remaining peremptory challenges by the trial court, the prosecutor struck juror Jamerson because “she was one of the jurors who said she could not look at photographs and did not want to look at photographs that might be graphic.” Tr, Vol. III, 113. Ms. Jamerson had raised her hand as someone concerned with her ability to look at very graphic photographs and stated that it was difficult for her to even look at things on TV, even when she knew they were not real. Tr. Vol. I, 225-26. Prospective jurors Abrams and Dinwiddie, whom petitioner points to as Caucasian comparative jurors who were not stricken, both indicated they could look at the photographs. *See* Tr. Vol. I, 248 (Prospective juror Abrams: “I think it would be upsetting, but I think I can handle it.”); Tr. Vol. III, 31 (Prospective Juror Dinwiddie: “Well, just like everyone else, its not something anyone wants to do, but if that is what I’m being asked to do I believe I have the courage and the strength to do it.”). Prospective jurors Abrams and Dinwiddie did not voice the degree of concern over viewing the photographs that prospective juror Jamerson did.

Petitioner had the ultimate burden of persuading the trial court that the peremptory strikes of prospective jurors Epps and Jamerson were racially motivated. Yet when the state offered what petitioner on appeal admitted were facially race-neutral reasons for striking Epps and Jamerson, *see* Appellant’s Brief at p. 38, petitioner’s counsel offered nothing other than the bare assertions that he didn’t think those were race-neutral reasons, Tr. Vol. III, 109 & 113. Thus, as indicated above, the OCCA’s finding that petitioner had failed to establish his Batson claims was not an unreasonable factual determination in light of the state court evidence.

VIII.

Petitioner's Argument that Multiple Errors Occurred During Jury Selection Which Resulted in an Unfair and Partial Jury

A. Alleged Erroneous Excusal for Cause of a Death-Qualified Juror

Petitioner asserts that the OCCA's decision on appeal affirming the dismissal of prospective Juror Irving for cause is contrary to law. He asserts that Juror Irving never said she could not consider all three sentencing options. He takes issue with the OCCA's statement that "there is another set of panelists who are excusable for cause: those who, for whatever reason, would be unable to fairly consider all punishment options as to the particular defendant in the case they have been summoned for." Grant v. State, 305 P.3d at 13 n.14. Petitioner maintains that the OCCA's statement is an extension of Wainwright v. Witt, 469 U.S. 412 (1985) that infringes on petitioner's right to an individualized sentencing determination. Such a "rule," petitioner asserts, would excuse for cause every juror who empathizes with any particular mitigating circumstance such that he or she might lean toward a life sentence or wouldn't know whether he or she could vote for a death sentence. Amended Petition at p. 104. Such a "rule," he further asserts, would deprive a defendant of the opportunity to have a jury give effect to his mitigating circumstances. *Id.* Petitioner further asserts that the OCCA's finding that Irving was not death-qualified is speculative and that the OCCA's adjudication of this claim is an unreasonable application of Witt.

The disposition of a Witt claim is a question of fact, making it subject to the standard set forth in 28 U.S.C. § 2254(d)(2). *Cf. Saiz v. Ortiz*, 392 F.3d at 1175 (disposition of a Batson claim). The state court's factual findings are presumed correct unless rebutted by clear and convincing evidence. Sallahdin, 275 F.3d at 1225, citing 28 U.S.C. § 2254(e)(1).

The OCCA's affirmance of the trial court's conclusion that Juror Irving could not fairly consider all punishment options is not unreasonable in light of the evidence in the state court proceeding, which the OCCA reviewed and described. Grant v. State, 205 P.3d at 13. Juror Irving said she did not think she could give both sides a fair trial if the issue of schizophrenia came up. Tr. Vol. III, 10. When defense counsel attempted to rehabilitate Juror Irving, she said she did not think she would be able to consider all three potential punishments if schizophrenia was a factor. *Id.* at 11. There was nothing speculative about Juror Irving's responses, even reading the cold record, but of course deference to the "impressions of the trial court, who can better assess whether a potential juror would be unable to fulfill his or her oath," Grant v. State, 205 P.3d at 13, citing Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) ("Deference [on jury selection issues] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court to make credibility determinations.") is appropriate. The OCCA did not unreasonably apply the Supreme Court's clearly established law in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985). Juror Irving's responses indicating she could not consider all three punishment options if schizophrenia was a factor, which was known to be the case, revealed that her "views would prevent or substantially impair the performance of . . . [her] duties as a juror in accordance with . . . [her] instructions and . . . [her] oath." Witt, 469 U.S. at 424.

B. Substitution of an Alternative Juror

Petitioner asserts that his due process right to a fair trial was denied by the trial court's substitution of Juror Abrams with an alternate juror prior to deliberations. The substitution took place after Juror Abrams reported several incidents that made her uncomfortable. According to the OCCA, Juror Abrams

stated that one of the witnesses had approached her outside the courtroom, that spectators to the trial had “stared her down” near the courthouse elevators, and that yet another spectator had ridden on the elevator with her, attempted to converse with her, and blocked her exit from the elevator and made an oblique comment. Juror A. stated that two of these incidents were witnessed by another juror in her company, Juror R. The trial court also spoke with Juror R., whose accounts differed somewhat from those of Juror A. In essence, Juror R. did not feel that the actions of the spectators were meant to be intimidating in any way. After both jurors had been interviewed, the prosecutor asked that Juror A. be excused and replaced with one of the alternates, because Juror A’s account of attempted jury tampering appeared to have been embellished. Defense counsel objected to A.’s removal, stating that she had done nothing wrong.

Grant v. State, 205 P.3d at 16.

Petitioner contends that there was no good cause for the excusal of Juror Abrams, who repeatedly insisted that these incidents would not affect her ability to be fair and impartial. He contends that the OCCA’s “handling of this claim was unreasonable,” Amended Petition at p. 111, and that structural error occurred as a result of the excusal of Juror Abrams and substitution with an alternate. Alternatively, he contends that the error was not harmless and prejudiced him because it effectively allowed the prosecutor to reconfigure the jury and gave her an extra peremptory strike.

The OCCA recognized that petitioner’s claim was based on his federal due process right to a fair and impartial jury. The OCCA concluded that petitioner had no right to have any particular juror on the panel selected to serve in his case and that his right was that of refusal rather than selection. Grant v. State, 205 P.3d at 16. It observed that the very purpose of selecting alternate jurors is to ensure that there are acceptable substitutes available in case a contingency arises. *Id.* It further noted that petitioner had passed the alternate for cause and voiced no objection to the alternate after he was seated. *Id.* The OCCA specifically concluded that in removing Juror

Abrams, “the trial court acted out of an abundance of caution to ensure a fair trial” and that it “fail[ed] to see how appellant was prejudiced.” *Id.* It further noted that there was no controlling authority to support the argument that removal of Juror Abrams was a “structural error” and rejected that argument.

Petitioner cites, and the court has located, no clearly established federal law, as determined by the United States Supreme Court, that was contravened or unreasonably applied by the OCCA. 28 U.S.C. § 2254(d)(1); *see House v. Hatch*, 527 F.3d 1010, 1021 (“Absent controlling Supreme Court precedent, it follows ineluctably that the New Mexico Supreme Court’s decision . . . cannot be ‘contrary to, or [] an unreasonable application of, clearly established Federal law.’”). Nor is the decision of the OCCA based on an unreasonable determination of the facts in light of the evidence presented in state court, *see Tr. Vol. V*, 4-39. 28 U.S.C. § 2254(d)(2). Petitioner has cited no authority for the proposition that striking Juror Abrams was structural error. Indeed, none of the identified structural errors includes the improper removal of a juror during trial and replacement with a previously qualified and selected alternate. *See Johnson v. United States*, 520 U.S. 461 (1997) (citing Supreme Court cases identifying structural error). If any error occurred in striking Juror Abrams, it has not been shown to be prejudicial.

C. Failure of Trial Counsel to Object to the Peremptory Strike of an African American Juror and Appellate’s Counsel’s Failure to Raise the Issue.

Petitioner asserts that his trial counsel was constitutionally ineffective in failing to make a Batson objection to the prosecutor’s peremptory strike of Juror Willis, an African American woman. This is so, he asserts, because the voir dire record reveals no race-neutral reason for the strike and no reason for failing to object. He further contends that his appellate counsel was ineffective in failing to raise this issue along with the other Batson claims. Moreover, he points out he requested but was denied

an evidentiary hearing in state court at which trial and appellate counsel's reasons why the objection was not made and the issue not raised on appeal could have been explored.

The OCCA addressed this claim on the merits on post-conviction review. Pointing out that jury selection is an art, the OCCA stated that “[t]he fact that a Batson challenge can be made, does not mean that it must be made.” Opinion Denying Application for Post-Conviction Relief (Ex. 1 to Amended Petition) at p. 8. Applying Strickland, the OCCA presumed that trial counsel had a sound strategic reason for not wanting this panelist on the jury any more than did the prosecutor and that appellate counsel recognized this issue as meritless. *Id.* at 8-9. The OCCA denied the claim.

The OCCA's decision is not contrary to or an unreasonable application of Strickland. Strickland requires that a reviewing court be “highly deferential” when reviewing trial counsel's performance and that the court “indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,” such that “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Sallahdin v. Mullin, 380 F.3d 1242, 1247-48 (10th Cir. 2004) (citing Strickland, 466 U.S. at 689). Petitioner has not overcome the presumption that his trial counsel's failure to make a Batson challenge was sound trial strategy in circumstances in which trial counsel made other Batson challenges to the prosecutor's peremptory strikes of African American jurors.¹ In addition, the court agrees with

¹ Of course, defense counsel needs no facts other than race as a predicate for a Batson challenge. But once counsel's evaluative process moves from simply noticing the prospective juror's race to considerations as to who he really does, and does not, want to sit in judgment of his client, the matter immediately becomes much more complex. There can be no doubt that considerations other than race, such as age, gender, socioeconomic class, religion and life experience can combine to give the defendant good reason to fear harsh judgment from a prospective juror of the same race as the defendant.

respondent that petitioner could not show prejudice resulting from his trial counsel's failure to make a Batson challenge. When prospective juror Willis was asked if there was anything about her that the prosecutors did not already know that would make them change their mind about leaving her as a juror, she responded that her son was around the age of the petitioner, and that as she looked at the petitioner, she felt empathy. Tr. Vol. II, 220-23. She also testified that empathy could possibly interfere with her ability to sit on the case if mental illness were an issue in the case. Tr. Vol. III, 47. Thus, had petitioner's trial counsel objected to the peremptory strike of this juror on Batson grounds, the prosecutor had a race-neutral reason for the strike. The absence of prejudice from trial counsel's performance would preclude a finding that appellate counsel was ineffective in omitting the issue on appeal. Fairminded jurists would not be of one view that the OCCA's decision conflicts with Supreme Court cases. *See Richter*, ___ U.S. at ___, 131 S.Ct. at 786-87.

IX.

Petitioner's Argument that His Due Process Rights Were Denied
When the Jury's Unreliable Sentencing Decision Was
Based on False Evidence, in Violation of the Eighth Amendment.

Petitioner contends that two documents admitted during second stage proceedings deprived him of a reliable sentencing decision. He further claims that the state court failed to address the constitutional due process claim and urges this court to review his claim *de novo*. This claim was raised on direct appeal and denied on the merits by the OCCA. Grant v. State 205 P.3d at 18.

During the penalty phase of trial, the state introduced numerous written requests purportedly made by petitioner while he was in jail for the purpose of countering petitioner's mitigation evidence of mental illness. The prosecutor used the writings not only to impeach Dr. Grundy but to argue that petitioner was not in "schizophrenic mode" when he committed the crimes. Tr. Vol. VIII, 32-4. Two of the writings,

requests to staff, were ultimately determined to be that of another inmate. The OCCA reviewed the admission of the two writings without proper authentication for plain error because defense counsel had not objected to the admission of those writings along with an entire packet of writings. Grant v. State, 205 P.3d at 18. Ultimately, the OCCA concluded that “[i]n light of the substantial documentary evidence on this issue, we have no difficulty concluding that the two writings Appellant complains of did not contribute to the jury’s punishment decision in any material way.” *Id.* (footnote omitted). In reaching that conclusion, the OCCA noted that the two writings which appellant didn’t write were brief inquiries of two sentences each, whereas the jury had much more convincing documentary evidence of appellant’s mental abilities including not only his own inmate inquiries but a half-dozen *pro se* pleadings appellant had filed during 2003 and 2004 and a nine-page letter he wrote in September of 2005 explaining his motivation for the murders and giving a detailed account of them.

Although the OCCA relied on its own precedent in denying this claim, in this habeas proceeding “[the Court’s] only concern is that its reasoning and result are consistent with controlling Supreme Court precedent.” Welch v. Sirmons, 451 F.3d at 691-92. The state court is not required to cite, or even be aware of, the governing Supreme Court precedent. *Id.* “When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits, in the absence of any indication of state-law procedural principles to the contrary.” *Id.* at 784-85. The OCCA did not rely on any procedural grounds in rejecting this claim so AEDPA deference applies. *See Richter*, ___ U.S. at ___, 131 S.Ct. at 784; Welch, 451 F.3d at 687.

Pursuant to clearly established federal law in Giglio v. United States, 405 U.S. 150 (1972), due process is violated if there is a reasonable likelihood that false

evidence which is material affected the judgment of the jury. Giglio, 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at _____. The OCCA's reasoning and result are not contrary to Giglio and do not involve an unreasonable application of Giglio. In effect, the OCCA found that the two writings not authored by petitioner were not material and, in light of other substantial documentary evidence introduced to show petitioner's mental abilities, there was no reasonable probability that the two writings affected the jury's sentencing decision. Fairminded jurists would not be of one view that the OCCA's decision was contrary to Giglio or an unreasonable application of it. Accordingly, petitioner is not entitled to relief on this claim.

X.

Petitioner's Argument that the Two Robbery Convictions
Violated the Prohibition Against Double Jeopardy

Petitioner asserts that the OCCA's determination that petitioner committed separate robberies was an unreasonable factual determination based upon a mistaken perception of facts. He asserts that according to the OCCA, petitioner first robbed Ms. Smith of her cash, ATM card and credit cards which were in her purse in the break room and then directed her to the front desk a few feet away where he instructed her to open the cash register and petitioner removed the bills. He states that this version of the facts is unsupported by the record which reveals that Ms. Smith's personal belongings were taken after the money was removed from the front desk. In any event, he claims that these events constituted a single robbery because the break room was right behind the front desk and the robbery took about forty or fifty seconds. Relying on Marsfield v. Champion, 992 F.2d 1098 (10th Cir. 1993), petitioner asserts that the acts in question were not sufficiently separated in time and space to constitute two robberies. Petitioner asserts that the acts amounted to but one robbery and that his convictions for two robberies constituted double jeopardy, in violation of his

constitutional rights. He further asserts that the “extraneous robbery charge, prosecution, and conviction so tainted the proceedings that . . . [his] death sentence must be reversed and remanded.” Amended Petition at p. 118. This is so, he argues, because the prosecution argued in favor of the “avoiding lawful arrest” aggravator, reminding the jury that it had found petitioner guilty of two different counts of robbery with a firearm. Amended Petition at p. 122, citing Tr. Vol. VIII at 20. At the least, petitioner argues, the stacking of an unconstitutional robbery count “contributed to the error committed at sentencing and added additional unreliability.” *Id.*

Petitioner’s assertion that the OCCA found that petitioner robbed Ms. Smith of her personal belongings and then robbed cash and checks from the hotel drawer is simply incorrect. *See Grant v. State*, 205 P.3d at 17:

The evidence showed that Appellant, at gunpoint, forced Suzette Smith to give him cash and checks from the hotel drawer. A short time later, Appellant took personal belongings, including an ATM card, from Smith’s purse.

Thus, the OCCA’s factual determination was not unreasonable, as petitioner asserts. The OCCA recognized that petitioner was asserting a federal constitutional double jeopardy claim and observing that “one person can be robbed twice by the same perpetrator within a short span of time,” *id.*, concluded that there was “sufficient separation in time and space between the two takings to warrant separate convictions.” Moreover, in a footnote, the OCCA distinguished Mansfield because, *inter alia*, in that case “there were not enough facts in the record to conclude that the takings occurred anything but simultaneously.” *Grant v. State*, 205 P.3d at 16 n.23. It also noted that the Mansfield court recognized that even moving the victim from one room to another can be sufficient to justify separate convictions even for the same type of crime. *Id.*

Regardless of the order in which petitioner took cash from the front desk and took Ms. Smith's personal belongings in the break room, the OCCA's conclusion that there was sufficient separation of time and space to support two separate convictions is not contrary to clearly established federal law articulated by the United States Supreme Court, *see Blockburger v. United States*, 284 U.S. 299, 304 (1932), nor did it involve an unreasonable application of that law. In *Blockburger*, the Supreme Court said that "[e]ach of several successive [drug] sales [to the same person] constitutes a distinct offense, however closely they may follow each other." *Id.* Likewise, petitioner's two separate takings at gunpoint in two separate rooms separated in time by merely forty to fifty seconds, constitute two separate robbery offenses, not a single, continuous offense. Petitioner is not entitled to relief on this claim.

XI.

Petitioner's Ineffective Assistance of Appellate Counsel in Failing to Raise Trial Counsel's Exclusion From Initial Aspects of Jury Selection

Petitioner asserts that his appellate counsel was ineffective for failing to raise the issue that trial counsel's exclusion from juror orientation violated petitioner's Sixth, Eighth and Fourteenth Amendment rights. Petitioner asserts that his trial counsel sought to be present at the orientation and excusal docket, cited authority to support same and sought to ensure that potential minority jurors were not excessively excused based on financial hardship. *See Amended Petition* at p. 123.

This claim was raised by petitioner in post-conviction proceedings. The OCCA denied the claim on its merits. The OCCA noted that juror orientation and excusal precede the calling of any particular group of prospective jurors to a particular courtroom for a particular trial. They are intended to give those called for jury service a basic idea of what to expect, and to recognize legitimate reasons why any particular citizen, summoned for service, might be unable to serve.

Doc. 77, Ex. 1 at 3, n2.

The OCCA addressed the claim as follows:

Before trial, Petitioner's counsel asked the court to permit him to be present, make a record, and interpose objections during the jury orientation and excusal docket. Finding no authority for defense counsel's request, the trial court denied it. The trial court's ruling was not challenged on direct appeal. Petitioner claims that his participation in these preliminary events was essential to securing his right to a jury drawn from a fair cross-section of the community, and his right to be present with counsel, at critical stages of his trial, and that appellate counsel was ineffective for failing to raise this issue on direct appeal. He also claims the alleged error was "structural" in nature, affecting the basic framework of the process such that no showing of actual prejudice is required. We disagree. Petitioner offers no authority holding either that the events in question are "critical stages" of a criminal trial, or that his absence from them amounted to a structural error in the proceedings. Furthermore, Petitioner has failed to show how the outcome of his trial might have been different if (1) he had observed or participated in the orientation of the prospective jurors, or (2) prior counsel had raised this claim on direct appeal. (Citing Strickland, 466 U.S. at 694). This claim is denied.

Doc. no. 77, Ex. 1 at 3-4 (footnotes omitted).

Petitioner has failed to present to this court any Supreme Court decision that holds that juror orientation is a critical stage of a criminal trial. The cases cited by petitioner in his Amended Petition do not at all support the proposition that a juror orientation and excusal docket is a critical stage. Nor has petitioner cited to this court any Supreme Court authority holding that a trial counsel's exclusion from an orientation and excusal docket is a structural error. Moreover, petitioner has not shown that the OCCA's application of Strickland was unreasonable. In summary, petitioner has failed to show that the rejection of this claim by the state court "was so lacking in justification that there was an error well understood and comprehended in

existing law beyond any possibility for fairminded disagreement.” Richter, 131 S.Ct. at 786-87.

XII.

Petitioner’s Assertion of Appellate Counsel’s Ineffectiveness in Failing to Argue That the Jury Should Have Been Instructed as to the Meaning of Life Without Parole and Life Sentences

Petitioner asserts that his appellate counsel was ineffective because he failed to argue that the jury should have been instructed as to exactly what life without the possibility of parole means, and as to a life sentence with parole, under Oklahoma’s 85% Rule as mandated by Anderson v. State, 130 P.3d 273 (Okla. Crim. App. 2006).

The OCCA on post-conviction addressed this claim on the merits. It observed that the jury chose the most severe of the three options, to which the notion of parole is irrelevant. Doc. no. 77, Ex. 1 at 11. It further stated that “[g]iven the nature of the crimes in this case, we can confidently conclude that, had the jury been instructed on the 85% Rule, that information would not have affected their sentencing recommendation.” *Id.* (footnote omitted). Finally, citing Strickland, it concluded that appellate counsel was not ineffective in failing to raise this issue on appeal.

The OCCA could reasonably conclude and implicitly did reasonably conclude that petitioner had failed to show prejudice under Strickland from omission of this claim, particularly in light of that court’s treatment of this issue in capital cases. *See* Doc. no. 77, Ex. 1 at 11-12, citing Cole v. State, 164 P.3d 1089, 1102 & n.15 (Okla. Crim. App. 2007). Given the jury’s selection of the death sentences and that life imprisonment without the possibility of parole is self-explanatory, the court cannot say that the OCCA’s adjudication of this claim involved an unreasonable application of the prejudice prong of Strickland, particularly in light of the “double deference” that applies to the OCCA’s rejection of an ineffectiveness claim. Richter, 131 S.Ct. at 788.

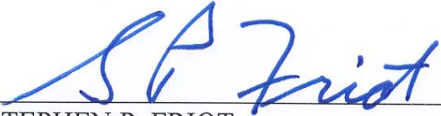
XIII.
Cumulative Error

Both on direct appeal and in post-conviction proceedings, petitioner raised a claim of cumulative error. The OCCA rejected this claim, *see Grant v. State*, 205 P.3d at 24-5; doc. no. 77, Ex. 1 at 13, finding on post-conviction that there were no errors resulting from petitioner's claims raised on direct appeal and on post-conviction to accumulate. Doc. no. 77, Ex. 1 at 13. Petitioner has not shown and cannot show that the OCCA's rejection of his cumulative error claim is contrary to clearly established Supreme Court precedent or that the OCCA's adjudication of this claim involved an unreasonable application of such precedent. There is no authority from the United States Supreme Court recognizing "cumulative error" as a separate violation of the federal constitution or as a separate ground for federal habeas relief. The absence of any clearly established federal law, as determined by the United States Supreme Court, is dispositive of any cumulative error claim raised in habeas corpus proceedings. 28 U.S.C. § 2254(d); *House v. Hatch*, 527 F.3d 1010, 1017-18 (10th Cir. 2008)

Conclusion

In accordance with the foregoing, petitioner's request for equitable tolling and abeyance of habeas corpus proceedings is **DENIED**; petitioner's Amended Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED**; and petitioner's request for an evidentiary hearing is **DENIED**.

Dated May 16, 2014.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE