Capital Case

Case No. ______________________

In the Supreme Court of the United States

KEVIN RAY UNDERWOOD,
Petitioner,
v.
MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,
Respondent.

APPENDIX OF ATTACHMENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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January 14, 2019

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Kevin Ray UNDERWOOD, Petitioner–Appellant,

v.

Terry ROYAL, Warden, Oklahoma State Penitentiary, Respondent–Appellee.

No. 16-6262

United States Court of Appeals, Tenth Circuit.

FILED July 2, 2018

Background: Following affirmance of his first degree murder conviction and death sentence, 252 P.3d 221, state inmate filed petition for writ of habeas corpus. The United States District Court for the Western District of Oklahoma, No. 5:12-CV-00111-D, Timothy D. DeGiusti, J., 2016 WL 4059162, denied petition, and petitioner appealed.

Holdings: The Court of Appeals, Matheson, Circuit Judge, held that:

(1) determination that petitioner was not denied effective assistance due to trial counsel's failure to present expert rebuttal testimony relating to timing of victim's death was reasonable;

(2) state's closing argument that evidence established that petitioner had shaved child victim's pubic area did not violate due process;

(3) determination that jury instruction defining "mitigating circumstances" and prosecutor's related argument did not unconstitutionally limit jury's consideration of mitigating evidence was reasonable;

(4) admission of victim's parents' sentence recommendations did not amount to structural error;

(5) erroneous admission of victim's parents' sentence recommendations was harmless; and

(6) determination that failure to instruct jury that it had to find that aggravating circumstances outweighed mitigating circumstances beyond reasonable doubt in order to impose death penalty was reasonable.

Affirmed.

1. Habeas Corpus ⚷842

Court of Appeals' review of federal district court's application of Antiterrorism and Effective Death Penalty Act (AEDPA) is de novo. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⚷452

State court's decision is "contrary to" clearly established law, thus warranting federal habeas relief, if it applies rule different from governing law set forth in Supreme Court cases, or if it decides case differently than Supreme Court has done on set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

See publication Words and Phrases for other judicial constructions and definitions.

3. Habeas Corpus ⚷450.1

State court's decision is "unreasonable application" of clearly established federal law, thus warranting federal habeas relief, if it identifies correct governing legal principle but unreasonably applies that principle to facts of petitioner's case. 28 U.S.C.A. § 2254(d).

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus ⚷842, 846

If claim was not resolved by state courts on merits and is not otherwise procedurally barred, Antiterrorism and Effective Death Penalty Act (AEDPA) does not apply, and Court of Appeals reviews federal district court's legal conclusions de novo

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and its factual findings, if any, for clear error. 28 U.S.C.A. § 2254(d).

5. Habeas Corpus ⚷753

Federal habeas review is limited to record that was before state court that adjudicated claim on merits. 28 U.S.C.A. § 2254(d).

6. Criminal Law ⚷1870

Counsel can deprive defendant of right to effective assistance by failing to render adequate legal assistance. U.S. Const. Amend. 6.

7. Habeas Corpus ⚷486(1)

To establish violation of his right to effective assistance of counsel, habeas petitioner must show that (1) counsel's performance was deficient, and (2) deficient performance prejudiced defense. U.S. Const. Amend. 6.

8. Criminal Law ⚷1882

To establish constitutionally deficient performance, defendant must show that counsel's representation fell below objective standard of reasonableness. U.S. Const. Amend. 6.

9. Criminal Law ⚷1871

Defendant asserting claim of ineffective assistance of counsel must overcome presumption that, under circumstances, challenged action might be considered sound trial strategy. U.S. Const. Amend. 6.

10. Criminal Law ⚷1882

To establish ineffective assistance of counsel, counsel's performance must have been completely unreasonable, not merely wrong. U.S. Const. Amend. 6.

11. Criminal Law ⚷1870

In assessing claim of ineffective assistance of counsel, every effort must be made to evaluate conduct from counsel's perspective at time. U.S. Const. Amend. 6.

12. Habeas Corpus ⚷486(5)

While federal habeas court must entertain strong presumption that counsel's conduct falls within wide range of reasonable professional assistance, it nevertheless must apply closer scrutiny when reviewing attorney performance during sentencing phase of capital case. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

13. Sentencing and Punishment ⚷1684

Under Oklahoma law, to find heinous, atrocious, or cruel (HAC) aggravator in death penalty case, there must be evidence of victim's conscious physical suffering prior to death. 21 Okla. Stat. Ann. §§ 701.11, 701.12.

14. Habeas Corpus ⚷486(5)

State court's determination that petitioner was not denied effective assistance of counsel in his capital murder trial due to trial counsel's failure to present expert rebuttal testimony relating to timing of victim's death was not contrary to, or unreasonable application of, clearly established federal law in *Strickland*, or unreasonable determination of fact, and thus did not warrant federal habeas relief, where expert's testimony that victim could not have been alive during her attempted decapitation had no relevance in guilt stage and, in punishment stage, could have drawn jury's attention away from petitioner's affirmative mitigation case and back to crime's gruesome details. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

15. Constitutional Law ⚷4629
Criminal Law ⚷1980

Prosecutorial misconduct can result in constitutional error in two ways: (1) it can prejudice specific right as to amount to denial of that right, or (2) absent infringement of specific constitutional right, prose-

cutor's misconduct may render trial so fundamentally unfair as to deny defendant due process. U.S. Const. Amends. 5, 14.

16. Constitutional Law ⚷4629

Criminal Law ⚷2117

Sentencing and Punishment ⚷1780(2)

State's closing argument during guilt and punishment phases of capital murder prosecution that evidence established that defendant had partially shaved child victim's pubic area with razor did not violate due process, despite defendant's contention that prosecutor argued facts not in evidence, where criminalist who examined victim's body at medical examiner's office testified that victim's pubic area appeared partially shaven, and remarks about shaving did not unfairly overshadow other depraved things that defendant freely admitted to doing in his confession. U.S. Const. Amend. 14.

17. Sentencing and Punishment ⚷1757

Eighth and Fourteenth Amendments require that sentencer, in all but rarest kind of capital case, not be precluded from considering, as mitigating factor, any aspect of defendant's character or record and any circumstances of offense that defendant proffers as basis for sentence less than death. U.S. Const. Amends. 8, 14.

18. Sentencing and Punishment ⚷1757

Evidence, even if not related specifically to defendant's culpability for crime he committed, must be treated as relevant mitigating evidence if it serves as basis for sentence less than death.

19. Criminal Law ⚷1134.51

Proper inquiry for reviewing jury instruction is whether there is reasonable likelihood that jury has applied challenged instruction in way that prevents consideration of constitutionally relevant evidence.

20. Habeas Corpus ⚷497, 498

State court's determination that jury instruction defining "mitigating circumstances" as "those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame" and prosecutor's argument that it was up to jury to decide what qualified as mitigating evidence did not unconstitutionally limit jury's consideration of mitigating evidence in capital murder prosecution was not contrary to, or unreasonable application of, clearly established federal law in *Lockett v. Ohio* and *Eddings v. Oklahoma*, and thus did not warrant federal habeas relief. U.S. Const. Amends. 8, 14; 28 U.S.C.A. § 2254(d).

21. Sentencing and Punishment ⚷1763

Eighth Amendment allows consideration of victim impact evidence relating to victim's personal characteristics and emotional impact of crimes on victim's family. U.S. Const. Amend. 8.

22. Habeas Corpus ⚷442

Constitutional error may be disregarded on federal habeas review unless found to have had substantial and injurious effect or influence in determining jury's verdict. 28 U.S.C.A. § 2254.

23. Habeas Corpus ⚷442

If federal habeas court is in grave doubt as to harmlessness of state court's constitutional error, petitioner must win. 28 U.S.C.A. § 2254.

24. Habeas Corpus ⚷447

Constitutional errors that rise to level of structural error—in contrast to ordinary trial error—require automatic reversal on federal habeas review. 28 U.S.C.A. § 2254.

25. Criminal Law ⚷1162

Defining feature of "structural error" requiring automatic reversal is that result-

ing unfairness or prejudice is necessarily unquantifiable and indeterminate, such that any inquiry into its effect on case's outcome would be purely speculative.

See publication Words and Phrases for other judicial constructions and definitions.

26. Criminal Law ⚷1162

Categories of structural error requiring automatic reversal of criminal conviction include: total deprivation of right to counsel; lack of impartial trial judge; unlawful exclusion of grand jurors of defendant's race; deprivation of right to self-representation at trial; denial of right to public trial; and erroneous reasonable-doubt jury instruction. U.S. Const. Amends. 5, 6, 14.

27. Sentencing and Punishment ⚷1768, 1789(9)

Admission of child victim's parents' sentence recommendations in capital murder prosecution did not amount to structural error warranting automatic reversal of defendant's death sentence.

28. Habeas Corpus ⚷508

State trial court's erroneous admission of murder victim's parents' sentence recommendations was harmless, and thus did not warrant federal habeas relief reversing petitioner's death sentence, where petitioner admitted that he had murdered 10-year old victim as part of his plan to abduct someone, sexually molest them, eat their flesh, and dispose of their remains, jury was properly instructed on proper role of victim-impact evidence, aggravating case against petitioner was relatively strong, jury was properly instructed on use of mitigating evidence and its role in sentencing deliberations, and petitioner's mitigating evidence was not sufficiently compelling as to put error's harmlessness in grave doubt.

29. Habeas Corpus ⚷701.1

As general rule, federal habeas court will presume that juries follow limiting instructions.

30. Constitutional Law ⚷4694, 4752

Criminal Law ⚷561(1)

Jury ⚷34(6)

Fourteenth Amendment right to due process and Sixth Amendment right to jury trial, taken together, entitle criminal defendant to jury determination that he is guilty of every element of crime with which he is charged, beyond reasonable doubt. U.S. Const. Amends. 6, 14.

31. Habeas Corpus ⚷508

State court's determination that trial court's failure to instruct jury in capital murder prosecution that it had to find that aggravating circumstances outweighed mitigating circumstances beyond reasonable doubt in order to impose death penalty was not contrary to, or unreasonable application of, clearly established federal law in *Apprendi*, and thus did not warrant federal habeas relief. U.S. Const. Amends. 6, 14; 28 U.S.C.A. § 2254(d).

32. Criminal Law ⚷1186.1

In conducting cumulative error review, court must inquire whether identified harmless errors, in aggregate, had substantial and injurious effect or influence in determining jury's verdict.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:12-CV-00111-D)

Sarah M. Jernigan, Assistant Federal Public Defender (Patti Palmer Ghezzi, Assistant Federal Public Defender, Western District of Oklahoma, with her on the briefs), Oklahoma City, Oklahoma, for Petitioner-Appellant.

Jennifer J. Dickson, Assistant Attorney General (Mike Hunter, Attorney General of Oklahoma, with her on the brief), Oklahoma City, Oklahoma, for Respondent-Appellee.

Before MATHESON, KELLY, and BACHARACH, Circuit Judges.

MATHESON, Circuit Judge.

Kevin Ray Underwood appeals from the federal district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. In 2008, a jury convicted Mr. Underwood of first degree murder and sentenced him to death in Oklahoma state court. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Mr. Underwood's conviction and sentence and later denied post-conviction relief.

Mr. Underwood sought federal habeas relief from his death sentence under § 2254. The federal district court denied Mr. Underwood's requests for relief and for a certificate of appealability ("COA") on all eleven grounds raised in the § 2254 application. We granted COAs on six of the eleven grounds for relief.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we affirm the district court's denial of habeas relief on all six grounds.

I. BACKGROUND

We begin with the relevant factual history as presented by the OCCA.[1] We then provide an overview of the procedural history leading to this appeal. We present additional background below as relevant to our discussion of Mr. Underwood's claims.

A. *Factual History*

The OCCA, in addressing Mr. Underwood's direct appeal, set forth the following relevant facts:

> [Mr. Underwood] was charged with murdering ten-year-old [J.B.] on April 12, 2006, in Purcell, Oklahoma. [Mr. Underwood] lived alone in the same apartment complex where [J.B.] lived with her father, Curtis Bolin. Due to her father's work schedule, [J.B.] was typically home alone for a period of time after school. On the day in question, [J.B.] played in the school library with a friend for a short time before going home. She was never seen alive again.
>
> Police, firefighters, and a host of citizen volunteers began a search for [J.B.]. The day after [J.B.]'s disappearance, the Federal Bureau of Investigation [the "FBI"] added over two dozen people to the effort. On April 14, 2006, two days after [J.B.] was last seen, police set up several roadblocks around the apartment complex where she lived, seeking leads from local motorists. Around 3:45 p.m. that day, FBI Agent Craig Overby encountered a truck driven by [Mr. Underwood]'s father at one of the roadblocks; [Mr. Underwood] was a passenger in the truck. [Mr. Underwood]'s father told Overby that they had heard about the disappearance, and that in fact, [Mr. Underwood] was the girl's neighbor. From speaking with other neighbors at the apartment complex, Overby knew that a young man living there may have been the last person to see [J.B.]. Overby asked if [Mr. Under-

1. *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."); *see also Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) ("The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." (quotations omitted)).

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wood] would come to the patrol car to talk for a moment, and [Mr. Underwood] agreed, while his father waited in the truck. In the patrol car, [Mr. Underwood] made statements that piqued Overby's interest.[ ] Overby asked [Mr. Underwood] if he would come to the police station for additional questioning. Again, [Mr. Underwood] agreed, and Overby assured [Mr. Underwood]'s father that he (Overby) would give [Mr. Underwood] a ride home.

At the police station, [Mr. Underwood] was interviewed by Agent Overby and Agent Martin Maag. [Mr. Underwood] told them about seeing [J.B.] on April 12, and discussed his activities on that day and other matters. At the conclusion of this interview, which lasted less than an hour, the agents asked [Mr. Underwood] if they could search his apartment. [Mr. Underwood] agreed. The agents accompanied [Mr. Underwood] to his apartment around 5:00 p.m. While looking around the apartment, Overby saw a large plastic storage tub in [Mr. Underwood]'s closet; its lid was sealed with duct tape. [Mr. Underwood] saw Overby looking at the tub, and volunteered that he kept comic books in it; he said that he had taped the lid to keep moisture out. Overby asked if he could look inside the tub, and [Mr. Underwood] agreed. When Overby pulled back a portion of the tape and lifted a corner of the lid, he saw a girl's shirt—and realized that it matched [Mr. Underwood]'s description of the shirt [J.B.] was wearing on the day she disappeared.[ ] When Overby commented that he saw no comic books in the tub, [Mr. Underwood] interjected, "Go ahead and arrest me." Overby immediately responded, "Where is she?" [Mr. Underwood] replied, "She's in there. I hit her and chopped her up." [Mr. Underwood] then became visibly upset, began hyperventilating, and exclaimed, "I'm going to burn in Hell." He was placed under arrest and escorted out to the agents' vehicle. Agent Overby summoned local authorities to secure the scene.

Back at the police station, [Mr. Underwood] was advised of his right to remain silent, and his right to the assistance of counsel during any questioning, consistent with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because he asked for a lawyer, the interview was concluded. About fifteen minutes later (approximately 5:45 p.m.), police approached [Mr. Underwood] and asked if he would reaffirm, in writing, his original verbal consent to a search of his apartment. [Mr. Underwood] agreed, and spent the next few hours sitting in a police lieutenant's office. He conversed with various officers who were sent to guard him, and made some incriminating statements during that time.

Around 9:30 p.m. that evening, [Mr. Underwood] asked to speak with the two FBI agents he had initially talked to (Overby and Maag). Because [Mr. Underwood] had previously asked for counsel, [Oklahoma State Bureau of Investigation ("OSBI")] Agent Lydia Williams visited with him to determine his intentions. Agent Williams reminded [Mr. Underwood] that he had earlier declined to be questioned, and explained that because of that decision, police could not question him any further. [Mr. Underwood] emphatically replied that he wanted to talk to the agents. Around 10:15 p.m., Agents Overby and Maag interviewed [Mr. Underwood] at the police station. Before questioning began, Overby reminded [Mr. Underwood] of his *Miranda* rights, and [Mr. Underwood] signed a written form acknowledging that he understood them and waived

them. When asked if anyone had offered him anything in exchange for agreeing to talk, [Mr. Underwood] replied that one of the officers had predicted things would go better for him if he cooperated. Besides acknowledging his waiver of *Miranda* rights, [Mr. Underwood] also signed another written consent to a search of his apartment. A video recording and transcript of the interview that followed, which lasted about an hour, was presented to the jury at trial and is included in the record on appeal.

In the interview, [Mr. Underwood] describes how he had recently developed a desire to abduct a person, sexually molest them, eat their flesh, and dispose of their remains. He explains in considerable detail how he attempted to carry out this plan on [J.B.], whom he had decided was a convenient victim. [Mr. Underwood] stated that he invited [J.B.] into his apartment to play with his pet rat. Once [J.B.] was inside, [Mr. Underwood] hit her on the back of the head several times with a wooden cutting board; she screamed in pain and begged him to stop. [Mr. Underwood] proceeded to suffocate the girl by sitting on her and placing his hand across her face. [Mr. Underwood] told the agents that this was not an easy task, and that fifteen to twenty minutes passed before she succumbed. [Mr. Underwood] claimed he then attempted to have sexual relations with the girl's body, but was unable to perform. He then moved her body to the bathtub and attempted to decapitate it with a knife, but was unsuccessful at that task as well. Frustrated, [Mr. Underwood] wrapped [J.B.]'s body in plastic sheeting and placed it in a large plastic container which he hid in his closet. [Mr. Underwood] also dismantled [J.B.]'s bicycle and hid it inside his apartment, to make it look as if she had left the apartment complex.

[J.B.]'s remains were taken to the Medical Examiner's office for an autopsy. The Medical Examiner noted bruises to the back of the girl's head, consistent with [Mr. Underwood]'s claim that he hit her forcefully with a cutting board. The examiner also noted petechia in the girl's eyes, and curved marks on her face, consistent with [Mr. Underwood]'s description of how he had suffocated her. The most pronounced wound on the body was a very deep incision to [J.B.]'s neck, which was also consistent with the injuries [Mr. Underwood] admitted to inflicting. The Medical Examiner also noted trauma to the girl's genital area, including tearing of the hymen. However, the Medical Examiner could not say that [J.B.] was alive, or even conscious, when her neck was cut or when she was sexually assaulted. The official cause of death was declared to be asphyxiation.

Underwood v. State, 252 P.3d 221, 230-31 (Okla. Crim. App. 2011) (footnotes omitted).

B. *Procedural History*

The following proceedings preceded Mr. Underwood's present appeal: (1) jury trial in Oklahoma state court, (2) direct appeal and application for state post-conviction relief in the OCCA, and (3) application for federal post-conviction relief in the United States District Court for the Western District of Oklahoma under § 2254. We provide a brief overview of each proceeding.

1. Trial

In 2008, an Oklahoma jury convicted Mr. Underwood of first degree murder, under Section 701.7(A) of Title 21 of the Oklahoma Statutes, and sentenced him to death.

In the guilt stage, the jury found the evidence sufficient to establish that Mr.

Underwood murdered J.B. *Underwood*, 252 P.3d at 229. Although Mr. Underwood "did not formally concede his guilt . . ., but instead required the State to present its evidence on that issue, neither did he seriously contest the guilt-stage evidence against him." *Id.* at 232. "In fact, defense counsel told the jury in guilt-stage opening statements that it would probably find [Mr. Underwood] guilty, but that there would be reasons to spare his life." *Id.* The guilt evidence presented to the jury included a video recording and printed transcript of Mr. Underwood's interview with the FBI agents, during which he had confessed to the murder. *Id.* at 238.

In the punishment stage, the same jury found one aggravating circumstance and recommended the death penalty after weighing it against any mitigating circumstances established at trial. *Id.* at 229-30, 246. In its aggravation case, the State put evidence of two aggravating circumstances before the jury: (1) the murder was especially heinous, atrocious, or cruel (the "HAC" aggravator); and (2) Mr. Underwood posed a continuing threat to society (the "continuing threat" aggravator). *Id.* at 230 n.1. The jury found the existence of the HAC aggravator but not the continuing threat aggravator. *Id.* at 232. In his mitigation case, Mr. Underwood presented "extensive evidence . . ., including the testimony of family, friends, and three experts who had evaluated [his] mental health." *Id.* The jury recommended the death sentence, which the trial court imposed. *Id.* at 230.

2. Direct Appeal and Application for State Post-Conviction Relief

Mr. Underwood appealed to the OCCA, raising a variety of trial errors, including the six grounds for relief before us in this appeal. In 2011, the OCCA affirmed Mr. Underwood's conviction and sentence. *Id.* at 258.[2] The court also performed a statutorily mandated sentencing review and concluded that "the evidence was sufficient to support the one aggravating circumstance found by the jury" and that no "improper factor" influenced the jury's imposition of the death sentence. *Id.* Mr. Underwood then applied for post-conviction relief, which the OCCA denied in an unpublished summary opinion in 2012.

3. Application for Federal Post-Conviction Relief under § 2254

In 2013, Mr. Underwood filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma. The petition presented eleven grounds for relief, including the six before us in this appeal. The district court denied relief on all eleven grounds. *See Underwood v. Duckworth*, 2016 WL 4059162 (W.D. Okla. July 28, 2016). It also denied a COA on all grounds. *See Underwood v. Duckworth*, 2016 WL 4120772 (W.D. Okla. July 28, 2016).

Mr. Underwood appealed, and this court granted COAs on six of Mr. Underwood's grounds for relief, which we address below.

II. DISCUSSION

We begin with our standard of review. We then analyze the six grounds for relief on which we have granted COA: (1) ineffective assistance of trial counsel, (2) prosecutorial misconduct, (3) improper jury instruction and prosecutor statements on mitigating evidence, (4) admission of unconstitutional victim impact testimony, (5) imposition of the death penalty without a

2. The Supreme Court denied Mr. Underwood's petition for writ of certiorari. *Underwood v. Oklahoma*, 565 U.S. 1121, 132 S.Ct. 1019, 181 L.Ed.2d 752 (2012).

jury finding that the HAC aggravator outweighed any mitigating circumstances beyond a reasonable doubt, and (6) cumulative error. We conclude that Mr. Underwood is not entitled to relief on any of these grounds. Throughout our discussion, we provide additional background information as needed.

A. *Standard of Review*

[1] "Our review is . . . governed by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), which requires federal courts to give significant deference to state court decisions." *Lockett v. Trammel*, 711 F.3d 1218, 1230 (10th Cir. 2013).[3]

Under AEDPA, when a state court has decided a claim on the merits, we must defer to the court's adjudication of the claim unless it:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was 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).[4]

[2, 3] Section 2254(d)(1)'s "contrary to" and "unreasonable application of" language denotes two distinct inquiries. "An OCCA decision is 'contrary to' a clearly established law if it applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts." *Lockett*, 711 F.3d at 1231 (alterations and quotations omitted); *see also Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). "An OCCA decision is an 'unreasonable application' of clearly established federal law if it identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of petitioner's case." *Lockett*, 711 F.3d at 1231 (quotations omitted); *see also Bell*, 535 U.S. at 694, 122 S.Ct. 1843.

[4] "If a claim was not resolved by the state courts on the merits and is not otherwise procedurally barred, . . . § 2254(d) . . . do[es] not apply . . ., [and] we review the [federal] district court's legal conclusions de novo and its factual findings, if any, for clear error." *Cole v. Trammell*, 755 F.3d 1142, 1148 (10th Cir. 2014).

B. *The Six Issues on Appeal*

Having presented our standard of review, we now address each of the six grounds for relief on which we have granted COA: (1) ineffective assistance of trial counsel, (2) prosecutorial misconduct, (3) improper jury instruction and prosecutor statements on mitigating evidence, (4) admission of unconstitutional victim impact testimony, (5) imposition of the death penalty without a jury finding that the HAC aggravator outweighed any mitigating cir-

3. "AEDPA concerns federal court deference to the decisions of state courts. Our review of the federal district court's application of AEDPA is de novo." *Murphy v. Royal*, 875 F.3d 896, 913 n.20 (10th Cir. 2017), *cert. granted*, ––– U.S. ––––, 138 S.Ct. 2026, ––– L.Ed.2d –––– (2018).

4. AEDPA additionally provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). In addressing Mr. Underwood's challenges to the OCCA's factual determinations in our discussion below, we apply the § 2254(d)(2) standard, but his arguments would likewise fail under § 2254(e)(1).

cumstances beyond a reasonable doubt, and (6) cumulative error.

1. **Ineffective Assistance of Counsel**

Mr. Underwood contends that he is entitled to relief from his death sentence based on his trial counsel's failure to present expert rebuttal testimony relating to the timing of J.B.'s death. The OCCA rejected this claim on the merits. *Underwood*, 252 P.3d at 252.

[5] In addressing this claim, we begin with the relevant legal background and additional factual and procedural background. We then examine the OCCA's merits decision under § 2254(d) and conclude that it was not contrary to—or an unreasonable application of—Supreme Court law or based on an unreasonable determination of the facts. We therefore affirm the district court's denial of habeas relief on Mr. Underwood's ineffective assistance claim.[5]

a. *Legal background*

We first discuss the general framework set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to address ineffective assistance claims. We then focus on the deficient performance part of the test, which guides our analysis below.

i. Overview

[6, 7] "The Supreme Court has held that the Sixth Amendment right to counsel includes a right to effective representation." *Frost v. Pryor*, 749 F.3d 1212, 1224 (10th Cir. 2014); *see also Strickland*, 466 U.S. at 686, 104 S.Ct. 2052. Counsel can "deprive a defendant of the right to effective assistance ... by failing to render adequate legal assistance." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052 (quotations omitted). To establish a violation under *Strickland*, a habeas petitioner must show that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. 2052. Because we rely only on deficient performance to resolve this case, we restrict our discussion accordingly. *See Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012) ("These two prongs may be addressed in any order, and failure to satisfy either is dispositive.").

ii. Deficient performance

[8–12] To establish constitutionally deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. 2052 (quotations omitted). In

5. Mr. Underwood also sought—and was denied—an evidentiary hearing on the ineffective assistance claim in both the OCCA and federal district court. *See Underwood*, 252 P.3d at 250; *Underwood*, 2016 WL 4059162, at *33. Mr. Underwood asserts on appeal that "the district court's denial of an evidentiary hearing [on the ineffective assistance claim] was error." Aplt. Br. at 25. We decline to address this issue because it is inadequately briefed. *See Leathers v. Leathers*, 856 F.3d 729, 751 (10th Cir. 2017).

In any event, the Supreme Court has held "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). As discussed above, Mr. Underwood cannot overcome § 2254(d)(1) on the record that was before the OCCA with respect to his ineffective assistance claim. Accordingly, the "district court [was] not required to hold an evidentiary hearing." *Id.* at 183, 131 S.Ct. 1388 (quotations omitted).

other words, counsel's performance "must have been completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999). "Every effort must be made to evaluate the conduct from counsel's perspective at the time." *Littlejohn v. Trammell*, 704 F.3d 817, 859 (10th Cir. 2013) (quotations omitted). "However, while we entertain a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, we nevertheless apply closer scrutiny when reviewing attorney performance during the sentencing phase of a capital case." *Id.* (citations and quotations omitted).

b. *Relevant facts*

In his interview with the FBI agents, Mr. Underwood described J.B.'s murder. He told them he had "hit [J.B.] on the back of the head several times with a wooden cutting board" and that she had "screamed in pain and begged him to stop." *Underwood*, 252 P.3d at 231. He stated that he had "suffocate[d] [J.B.] by sitting on her and placing his hand across her face" and that "fifteen to twenty minutes passed before she succumbed." *Id.* He "claimed he then attempted to have sexual relations with the girl's body, but was unable to perform[,] ... and attempted to decapitate it with a knife, but was unsuccessful at that task as well." *Id.*

During the guilt stage of Mr. Underwood's trial, Dr. Inas Yacoub, the Medical Examiner, testified for the State regarding the possibility that J.B. had survived Mr. Underwood's attempt to suffocate her and was still alive or even conscious when he then attempted to sexually assault and decapitate her. Dr. Yacoub had previously performed J.B.'s autopsy and determined that J.B. died from "asphyxiation." *Id.* at 231, 251. At trial, Dr. Yacoub testified that the injuries observed in J.B.'s genital area and on her neck may have occurred while she was still alive and even conscious. Trial Tr. Vol. VII at 1174-78, 1817-19. On cross-examination, trial counsel for Mr. Underwood elicited Dr. Yacoub's acknowledgement that she could not determine with scientific certainty at what point J.B. lost consciousness. *Id.* at 1817-19.

[13] In the punishment stage of Mr. Underwood's trial, the State "incorporated the testimony from the guilt stage to show that the murder was especially, heinous, atrocious, or cruel." *Underwood*, 252 P.3d at 232.[6] In closing argument, the State referenced Dr. Yacoub's testimony to support its theory that J.B. experienced conscious physical suffering before her death: "And the medical examiner told you there was probably—there's a possibility that there was more that preceded her last breath. And when she talks about the injuries to her vagina, and she talks about the injuries to her throat.... There's a lot of stuff that preceded her last breath." Trial Tr. Vol. X at 2553-54.

Before trial, Mr. Underwood's trial counsel "had retained [a] forensic pathologist, Dr. John Adams, to review the autopsy findings." *Underwood*, 252 P.3d at 251. But trial counsel never called Dr. Adams to testify. *Id.*

c. *OCCA and federal district court decisions*

In his appeal to the OCCA, Mr. Underwood argued that trial counsel's failure to

6. Under Oklahoma law, the HAC aggravator is one of several aggravating circumstances that, if found beyond a reasonable doubt, enables the imposition of the death penalty. Okla. Stat. tit. 21, §§ 701.11, 701.12. The HAC aggravator showing requires "evidence of *conscious physical suffering of the victim prior to death.*" *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995) (emphasis added) (quotations omitted).

call Dr. Adams to rebut Ms. Yacoub's testimony constituted reversible error. *Id.* at 250. He submitted a sworn affidavit, secured by appellate counsel, in which Dr. Adams stated his expert opinion that J.B. could not have been alive during the attempted decapitation. Defendant's Appeal Exhibit A. Dr. Adams based his conclusion in part on his observation that the crime scene photographs showed very little blood spatter, whereas "widespread[ ] [blood spatter] would support a theory of antemortem injury." *Id.* at 3-4. The OCCA denied Mr. Underwood's ineffective assistance claim on the merits, "discern[ing] sound strategic reasons for the defense team not calling its forensic pathologist, and . . . find[ing] no prejudice flowing from that decision." *Underwood*, 252 P.3d at 253. Mr. Underwood then sought federal habeas relief, which the district court denied. *Underwood*, 2016 WL 4059162, at *13.

d. *Analysis*

We review the OCCA's decision under §§ 2254(d)(1) and (d)(2) and conclude that it was not contrary to—or an unreasonable application of—clearly established Supreme Court law or based on an unreasonable determination of the facts. Although the OCCA addressed both deficient performance and prejudice in its *Strickland* analysis, our analysis begins and ends with the former ground, which alone provides a sufficient basis for denying relief. *See Hooks*, 689 F.3d at 1186 ("[F]ailure to satisfy either [*Strickland* prong] is dispositive.").

i. Section 2254(d)(1): Reasonableness of legal determinations

[14] The OCCA's conclusion that Dr. Adams's affidavit did not overcome the presumption of sound trial strategy was consistent with and a reasonable application of *Strickland*. In determining whether counsel's performance was deficient, "[e]very effort must be made to evaluate the conduct from counsel's perspective at the time." *Littlejohn*, 704 F.3d at 859 (quotations omitted). Here, the OCCA reasonably evaluated the value of Dr. Adams's rebuttal testimony from trial counsel's perspective and determined it "might have done more harm than good." *Underwood*, 252 P.3d at 252.

As the OCCA reasoned, Dr. Adams's testimony would have had no relevance in the guilt stage and, in the punishment stage, could have drawn the jury's attention away from Mr. Underwood's affirmative mitigation case and back to the "gruesome" details of the crime. *Id.* For example, Dr. Adams based his conclusion that J.B. was already deceased at the time of the attempted decapitation in part on the absence of widespread blood spatter, as captured in the crime scene photographs. He also noted that "a massive exsanguination," or loss of blood, would support the possibility that J.B. was alive during the attempted decapitation. Defendant's Appeal Exhibit A at 3-4. But in his confession, Mr. Underwood had stated that, when he started cutting J.B.'s neck, "[he] couldn't believe the amount of blood that came out." State's Trial Exhibit 162 at 69. Had Dr. Adams testified, the prosecution likely would have questioned him on cross-examination about this statement. This line of questioning could potentially have discredited Dr. Adams's conclusions and "would arguably have distracted the jury in a way unfavorable to the defense." *Underwood*, 252 P.3d at 252.

We acknowledge Mr. Underwood's concern about the emotional impact of Dr. Yacoub's unrebutted testimony on the jury, and we may even disagree with trial counsel's challenged course of action here.

But under AEDPA's deferential standard, we cannot conclude that the OCCA unreasonably applied *Strickland* in determining that trial counsel's strategy was at least reasonable.

ii. Section 2254(d)(2): Reasonableness of factual determinations

Mr. Underwood contends that the OCCA based its conclusion—that Dr. Adams's affidavit failed to overcome the presumption of sound trial strategy—on unreasonable factual determinations under § 2254(d)(2) because it "completely disregarded [Dr.] Yacoub's key prejudicial testimony" and "ignored Dr. Adams's conclusive condemnation of [her] alternate theories." Aplt. Br. at 24.[7] We need not decide whether § 2254(d)(2), rather than § 2254(d)(1), supplies the appropriate standard of review.[8] Under either standard, Mr. Underwood's argument fails for the same reason—the OCCA did *not* disregard Dr. Yacoub's testimony. Rather, the OCCA observed that her testimony was "inconclusive" and reasoned that it arguably related to "a collateral matter." *Underwood*, 252 P.3d at 252. Likewise, the OCCA did not disregard the testimony Dr. Adams was prepared to offer. Instead, the OCCA reasonably determined, as discussed above, that Dr. Adams's testimony "might have done more harm than good." *Id.*

2. **Prosecutorial Misconduct—Arguing Facts Not in Evidence**

Mr. Underwood contends that he is entitled to relief from his death sentence based on the State's closing argument in both stages of the trial that the evidence established he had shaved J.B.'s pubic region with a razor. The OCCA rejected this claim on the merits. *Underwood*, 252 P.3d at 249.

In addressing this claim, we begin with the relevant legal background and additional factual and procedural background. We assume without deciding that the OCCA's decision was based on an unreasonable determination of the facts under § 2254(d)(2). We therefore review the issue de novo and conclude that Mr. Underwood is not entitled to relief because he has not shown the alleged error violated his due process. We affirm the district court's denial of habeas relief on Mr. Underwood's prosecutorial misconduct claim.

a. *Legal background*

We first provide a general overview of prosecutorial misconduct standards and the framework under *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), for determining when prosecutorial misconduct warrants reversal of state court convictions and sentences. We then focus on case law regarding prosecutorial argument of facts not in evidence, the type of misconduct alleged here.

i. Overview

The Supreme Court has "counselled prosecutors 'to refrain from improper

7. This specific argument does not appear in Mr. Underwood's § 2254 petition. In any event, as we explain below, it lacks merit.

8. We have previously said: "It is clear that, where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable [under § 2254(d)(2)]." *Byrd v. Workman*, 645 F.3d 1159, 1171–72 (10th Cir. 2011) (quotations omitted). But Mr. Underwood argues that the OCCA disregarded—as opposed to misapprehended or misstated—Dr. Yacoub's testimony and Dr. Adams's affidavit.

methods calculated to produce a wrongful conviction [or sentence].' " *United States v. Young*, 470 U.S. 1, 7, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (alterations omitted) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)); *see Le v. Mullin*, 311 F.3d 1002, 1018 (10th Cir. 2002). Although "the adversary system permits the prosecutor to ... 'strike hard blows, he is not at liberty to strike foul ones.' " *Id.* (quoting *Berger*, 295 U.S. at 88, 55 S.Ct. 629).

[15] Prosecutorial misconduct does not necessarily result in constitutional error warranting habeas relief. "Generally, there are two ways in which prosecutorial misconduct ... can result in constitutional error." *Littlejohn*, 704 F.3d at 837. "First, it can prejudice a specific right as to amount to a denial of that right." *Id.* (alterations and quotations omitted). "Additionally, absent infringement of a specific constitutional right, a prosecutor's misconduct may in some instances render a habeas petitioner's trial 'so fundamentally unfair as to deny him due process.' " *Id.* (quoting *Donnelly*, 416 U.S. at 645, 94 S.Ct. 1868). "This determination may be made only after considering all of the surrounding circumstances, including the strength of the state's case." *Malicoat v. Mullin*, 426 F.3d 1241, 1255 (10th Cir. 2005). The fundamental unfairness test applies to instances of prosecutorial misconduct occurring in either the guilt or sentencing stage of trial. *Smallwood v. Gibson*, 191 F.3d 1257, 1275-76 (10th Cir. 1999).

ii. Arguing facts not in evidence

Although "[a] prosecutor may comment on and draw reasonable inferences from evidence presented at trial," *Thornburg v. Mullin*, 422 F.3d 1113, 1131 (10th Cir. 2005), arguing "prejudicial facts not in evidence" is one type of prosecutorial misconduct. *See Berger*, 295 U.S. at 84, 55 S.Ct. 629. As with other types of prosecutorial misconduct, "[t]he line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone." *Young*, 470 U.S. at 7, 105 S.Ct. 1038.

b. *Relevant facts*

In closing argument in both stages of Mr. Underwood's trial, the State interpreted the evidence as showing that Mr. Underwood had shaved J.B.'s pubic region with a razor. Trial Tr. Vol. VII at 1853-54 (guilt stage); Trial Tr. Vol. X at 2522, 2554 (punishment stage). The evidence included a photograph of Mr. Underwood's home, taken by law enforcement, depicting a blue object on a desk. State's Trial Exhibit 90. The evidence also included the testimony of Jolene Russell, an OSBI criminalist. Ms. Russell, after identifying the blue object in the photograph as an "electric razor," had recalled the following observations "about [J.B.]'s vaginal area at the morgue when the body [was] being processed": (1) "loose hairs around the pubic region," (2) "[attached] pubic hair in the vaginal area," and (3) what appeared to be a "clean" area above the vaginal area. Trial Tr. Vol. VI at 1522. Finally, the evidence included the testimony of Dr. Yacoub, who recalled removing "a hair from the pubic area" during J.B.'s autopsy but did not otherwise comment on the presence or absence of hair in that area. Trial Tr. Vol. VII at 1760.

c. *OCCA and federal district court decisions*

In his appeal to the OCCA, Mr. Underwood argued that the prosecution's remarks constituted reversible error. *Underwood*, 252 P.3d at 249.[9] The OCCA denied

9. Because the State allocated different portions of the closing arguments to two different

Mr. Underwood's prosecutorial misconduct claim on the merits, determining that the prosecution's remarks (1) were not improper, because they were "reasonably based on the evidence," and (2) "while [they] may have, to some degree, underscored the vile nature of the entire crime, [they] did not unfairly overshadow the other depraved things [Mr. Underwood] freely admitted to doing." *Id.* In its discussion of this claim, the OCCA stated that "[Ms.] Russell noticed that the girl's pubic area appeared partially shaven." *Id.* Mr. Underwood then sought federal habeas relief, arguing the OCCA had misstated the evidence, and the district court denied relief. *Underwood*, 2016 WL 4059162, at *23.

d. *Analysis*

[16] As previously explained, we review the Mr. Underwood's prosecutorial misconduct claim de novo and conclude that he is not entitled to habeas because he has not shown the alleged error violated his due process under *Donnelly*.[10] Mr. Underwood contends that the OCCA "blatant[ly] misstate[d]" the evidence "when it said '[Ms.] Russell noticed that the girl's pubic area appeared partially shaven.'" Aplt. Br. at 40 (quoting *Underwood*, 252 P.3d at 249). We need not decide whether Mr. Underwood's argument overcomes AEDPA deference. Even assuming we must review the prosecutorial misconduct claim de novo, he is not entitled to habeas relief. Based on our independent review of the record, we agree with the OCCA's determination that the alleged prosecutorial misconduct—the remarks about shaving—"did not unfairly overshadow the other depraved things [Mr. Underwood] freely admitted to doing" in his confession. *Underwood*, 252 P.3d at 249. The remarks therefore did not render his trial "so fundamentally unfair as to deny him due process." *Donnelly*, 416 U.S. at 645, 94 S.Ct. 1868.

3. **Jury Instruction and Prosecutorial Argument on Mitigating Evidence**

Mr. Underwood contends that he is entitled to relief from his death sentence because one of the punishment stage jury instructions, and the State's use of it in closing arguments, unconstitutionally limited the jury's consideration of the mitigating evidence. The challenged instruction—Instruction No. 12—defined "[m]itigating circumstances" as "those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." O.R. at 1491.[11] The OCCA rejected this claim on the merits. *Underwood*, 252 P.3d at 244.

In addressing this claim, we begin with the relevant legal background and additional factual and procedural background. We then examine the OCCA's merits decision under § 2254(d) and conclude that it was not contrary to—or an unreasonable application of—Supreme Court law or based on an unreasonable determination of the facts. We therefore affirm the district court's denial of habeas relief on Mr. Underwood's claim about Instruction No. 12 and the related prosecutorial arguments.

a. *Legal background*

We first provide general background on the Constitution's requirements regarding

prosecutors, we designate them jointly as "the prosecution."

10. Mr. Underwood does not contend—nor do we conclude—that the alleged prosecutorial misconduct infringed any specific constitutional right. He must therefore satisfy the *Donnelly* fundamental unfairness standard to show reversible constitutional error warranting habeas relief. *See Littlejohn*, 704 F.3d at 837.

11. "O.R." refers to the record filed in Mr. Underwood's direct appeal to the OCCA.

the jury's consideration of mitigating evidence in capital sentencing proceedings. We then discuss *Grant v. Royal (Donald Grant)*, 886 F.3d 874 (10th Cir. 2018), in which this court recently considered and rejected a similar claim for habeas relief.

i. Overview

[17, 18] "[T]he Eighth and the Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion) (footnote omitted); *accord Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). "[E]vidence, even if not related specifically to petitioner's culpability for the crime he committed ... must be treated as relevant mitigating evidence if it serves as a basis for a sentence less than death." *Johnson v. Texas*, 509 U.S. 350, 381, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (alterations, citations, and quotations omitted).

[19] "The standard against which we assess whether jury instructions satisfy the rule of *Lockett* and *Eddings* was set forth in *Boyde v. California*, [494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)]." *Johnson*, 509 U.S. at 367, 113 S.Ct. 2658. "[T]he proper inquiry ... is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190. The reasonable likelihood test also governs claims that "arguments by the prosecutor ... reinforced an impermissible interpretation of [the challenged jury instruction] and made it likely that jurors would arrive at such an understanding." *Id.* at 384.

ii. Grant v. Royal

In *Grant*, this court denied a habeas petitioner's *Lockett/Eddings* claim based on punishment stage jury instructions and prosecutorial arguments analogous to those at issue in this case. The petitioner "argue[d] that one of the sentencing-phase jury instructions, Instruction 12, standing alone and in conjunction with the State's closing argument, unconstitutionally limited the jury's consideration of evidence presented in mitigation of his death sentence." *(Donald) Grant*, 886 F.3d at 930-31. The challenged instruction read: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." *Id.* at 931 (quotations omitted). During rebuttal closing argument, the prosecutor specifically employed this language, telling the jury that "what the law says is that before something can be mitigating it must reduce the moral culpability or blame of the defendant." *Id.* at 937 (alterations omitted). And, in discussing the petitioner's mitigating evidence relating to his alleged schizophrenia, the prosecutor argued that it "does not in any way" reduce the petitioner's "moral culpability or blame." *Id.*

Applying AEDPA's deferential standard of review, we held that the OCCA neither contradicted nor unreasonably applied *Lockett/Eddings* and its progeny in rejecting the petitioner's challenge to Instruction 12 and the prosecution's statements relating to the instruction. *Id.* at 936. We reasoned that, "even if ... the [prosecutorial] arguments ... were improper, that would not necessarily mean that the OCCA was *unreasonable* in determining that there was no *Lockett* error because there was no reasonable likelihood that the jury

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was precluded ... from considering ... mitigating evidence ... that did *not* extenuate or reduce [the petitioner's] moral culpability or blame." *Id.* at 938 (emphasis in original).

In reaching this result, we examined the record and found reasonable support for the OCCA's determination. First, in addition to the challenged "moral culpability or blame" language, Instruction 12 also included "language that vested the jury with the responsibility for determining what evidence was mitigating: 'The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.'" *Id.* at 940 (quoting Instruction 12). Second, a separate instruction—Instruction 13—"informed the jury that 'evidence had been introduced as to specified ... *mitigating circumstances*' and then listed ... factors that ordinarily would not be deemed to have extenuated or reduced [the petitioner]'s moral culpability or blame." *Id.* (alterations omitted) (emphasis in original) (quoting Instruction 13). Instruction 13 also "ended with this admonition: 'In addition, you may decide that *other mitigating circumstances exist*, and if so, you should consider those circumstances as well.'" *Id.* (emphasis in original) (quoting Instruction 13). Third, a separate instruction—Instruction 17—"specifically admonished the jury that [the court's] instructions 'contain all the law and rules you must follow.'" *Id.* at 941 (quoting Instruction 17). Fourth, in unchallenged portions of the State's closing argument, the prosecutor "spent the lion's share of her time casting doubt on the veracity, credibility, and weight of the evidence supporting the mitigating circumstances that the court identified in Instruction 13." *Id.* at 942. Fifth, "[a]t no point during her opening closing remarks did [the prosecutor] assert that the jury was not free under the law to consider all of the mitigating factors that the court identified in Instruction 13 on the ground that some of them did not extenuate or reduce moral culpability or blame." *Id.* at 943.

b. *Relevant facts*

This section presents the relevant jury instructions and prosecutorial arguments on the mitigating evidence given in the punishment stage of Mr. Underwood's trial.

i. Jury instructions

Three of the punishment stage jury instructions—12, 13, and 20—are relevant.

Instruction 12—the challenged instruction—contained identical language to Instruction 12 in *Grant*: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, *may extenuate or reduce the degree of moral culpability or blame*. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case." O.R. at 1491 (emphasis added).

Instruction 13 also contained identical language to Instruction 13 in *Grant*: "Evidence has been introduced as to the following mitigating circumstances: [a list of 15 circumstances]. In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well." O.R. at 1492-93.[12]

12. Instruction 13 listed fifteen separate circumstances:

1. Kevin Ray Underwood was exposed to severe trauma and mistreatment by his peers while growing up, and got through life only with the aid of a close circle of "protectors".
2. Kevin Ray Underwood has, except for his crime against [J.B.], no prior history of any violent act.

As in *Grant*, the circumstances enumerated in Instruction 13 included some that "ordinarily would not be deemed to have extenuated or reduced [the petitioner]'s moral culpability or blame." *(Donald) Grant*, 886 F.3d at 940 (quotations omitted). For instance, Instruction 13 listed circumstances pertaining to Mr. Underwood's childhood and the value others place in his life. *Compare* O.R. 1492 ("Kevin Ray Underwood was exposed to severe trauma and mistreatment by his peers while growing up") *with (Donald) Grant*, 886 F.3d at 940 ("A substantial portion of Donald Grant's childhood was spent in a violent and drug-infested neighborhood." (quotations omitted)); *compare* O.R. 1492 ("Kevin Ray Underwood has family and friends who love him, find meaning in his life, and will continue to visit him in prison.") *with (Donald) Grant*, 886 F.3d at 940 ("Donald Grant's life will be of value to other persons besides himself." (quotations omitted)).

Instruction 20 again contained identical language to Instruction 17 in *Grant*, instructing the jury that court's instructions together "contain all the law and rules you must follow." O.R. at 1500.

ii. Prosecutorial arguments

As in *Grant*, the prosecution's closing argument in the sentencing phase of Mr. Underwood's trial used the "moral culpability or blame" language from Instruction 12. In closing, the prosecution addressed the jury as follows: "[T]he law . . . [t]alks to you then about mitigating circumstances. Those are things which, in fairness, sympathy, and mercy, *may extenuate or reduce the degree of moral culpability or blame*. *Reduce the moral culpability or blame*. And you have a *list of a whole*

3. Kevin Ray Underwood has, except for his crime against [J.B.] and a single speeding ticket, no prior history of violating any law.
4. Kevin Ray Underwood suffers from several psychological and psychiatric disorders including, but not limited to: schizotypal personality disorder, bi-polar disorder type II, multiple paraphilias, severe social phobia, anxiety, early onset of neuro-developmental disorder. None of these conditions has ever been appropriately treated by a mental health professional.
5. Kevin Ray Underwood was subjected to emotional and verbal abuse by his parents while growing up.
6. Kevin Ray Underwood has family and friends who love him, find meaning in his life, and will continue to visit him in prison.
7. Kevin Ray Underwood cooperated with law enforcement by giving a full confession to the murder of [J.B.].
8. Kevin Ray Underwood has expressed remorse for the killing of [J.B.]
9. Kevin Ray Underwood has spent most of his life on the fringe of society and constantly subjected to ridicule even into his adult years.
10. Kevin Ray Underwood's multiple psychological and psychiatric problems have prevented him from taking full advantage of his intellect by continuing his education and gaining employment appropriate to his intelligence level.
11. Kevin Ray Underwood will not be around young children if sentenced to prison for life.
12. Kevin Ray Underwood is much more likely to be victimized in prison than posing a risk of violence to others. In fact, his chances of harming anyone in prison are very, very small.
13. The symptoms and effects of Kevin Ray Underwood's mental illnesses can be adequately controlled and lessened through appropriate and low-cost medication and treatment.
14. Kevin Ray Underwood comes from a family with a significant history of mental illness.
15. Kevin Ray Underwood has scored very low on scientific testing instruments designed to predict future violence.

O.R. at 1492-93.

bunch of them." Trial Tr. Vol. X at 2518 (emphasis added).

The prosecution then attacked each of the circumstances listed in Instruction 13. For many of the circumstances, the prosecution attacked the quality and quantity of Mr. Underwood's evidence. *See, e.g.*, *id.* at 2518-19 ("[Defense counsel] talk[s] about that [Mr. Underwood] suffers from the psychological disorders.... He faked the test to look bad. You've got to wonder how you can trust or judge what he says when he's talking to a psychiatrist."). But for some of the circumstances, the prosecution's main or only attack invoked Instruction 12's "moral culpability or blame" framework. Regarding Mr. Underwood's alleged exposure to trauma and mistreatment by his peers, the prosecution stated: "[L]et's say he was. Does that reduce his blame for the killing of [J.B.]?" *Id.* at 2518. Regarding Mr. Underwood's alleged family support, the prosecution stated: "How does that, the fact that you have family and friends, reduce your blame for a crime?" *Id.* at 2520. Regarding Mr. Underwood's alleged inability to obtain appropriate employment due to various psychiatric disorders, the prosecution stated: "So? How does that lessen his blame or culpability for the crime that he didn't have a very good job?" *Id.* at 2523. And regarding Mr. Underwood's alleged significant family history of mental illness, the prosecution stated simply: "So?" *Id.*

After remarking on each of the circumstances listed in Instruction 13, the prosecution concluded by advising the jury to "look at all of those mitigators" and to "decide what that means." *Id.* at 2525. In its rebuttal closing argument, the prosecution repeated many of the same points highlighted above.

c. *OCCA and federal district court decisions*

In his appeal to the OCCA, Mr. Underwood argued that the trial court's wording of Instruction 12 and the prosecution's arguments relating to it constituted reversible error. *Id.* at 244. The OCCA denied Mr. Underwood's *Lockett/Eddings* claim on the merits. *Id.* at 244-45. Mr. Underwood then sought federal habeas relief, which the district court denied. *Underwood*, 2016 WL 4059162, at *26.

d. *Analysis*

[20] We review the OCCA's decision under §§ 2254(d)(1) and (d)(2) and conclude that it was not contrary to—or an unreasonable application of—clearly established Supreme Court law or based on an unreasonable determination of the facts.

i. <u>Section 2254(d)(1): Reasonableness of legal determinations</u>

The OCCA's conclusion that Instruction 12 and the prosecution's related arguments did not warrant relief was consistent with and a reasonable application of *Lockett/Eddings* and its progeny. As discussed above, *Grant* so held on facts indistinguishable from this case in all relevant respects, and Mr. Underwood has offered no reason why we should reverse this precedent.[13] Nor could we, as "[w]e are bound by the prece-

13. *Grant* in turn relied on this court's previous decision in *Hanson v. Sherrod*, 797 F.3d 810 (10th Cir. 2015), which also denied habeas relief on a *Lockett/Eddings* claim involving similar jury instructions and prosecutorial arguments. We stated that "[t]hough the factual circumstances of *Hanson* are not entirely on all fours with [*Grant*], its mode of analysis is instructive and its substantive holding provides cogent support for the conclusion we reach [in *Grant*]." *(Donald) Grant*, 886 F.3d at 939. This statement applies equally here, where the factual circumstances are effectively on all fours with *Grant*. But we need not discuss *Hanson*'s reasoning because *Grant* directly controls this case's resolution.

dent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (quotations omitted). We therefore cannot hold that the OCCA contradicted or unreasonably applied *Lockett/Eddings* and its progeny in adjudicating Mr. Underwood's claim.

ii. Section 2254(d)(2): Reasonableness of factual determinations

The OCCA did not base its conclusion—that Instruction 12 and the prosecution's related arguments do not warrant relief—on an unreasonable factual determination. Mr. Underwood argues that the OCCA made "an unreasonable determination of facts in that it misstate[d] the prosecution's argument." Aplt. Br. at 52 n.18. But the OCCA's opinion nowhere misquoted the prosecution's argument. Rather, the OCCA "found no error" after "[c]onsidering the [prosecutorial] arguments as a whole." *Underwood*, 252 P.3d at 244. The "arguments as a whole" included "the prosecutor['s] t[elling] the jurors that *they* were to decide what qualified as mitigating evidence, and that they could consider factors besides those advanced by the defense." *Id.* This court has previously characterized such statements as " 'encourag[ing] the jury to consider all sorts of mitigating evidence,' including the kind that did not extenuate or reduce moral culpability or blame." *(Donald) Grant*, 886 F.3d at 942 (quoting *Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015)).

4. Unconstitutional Victim Impact Evidence

Mr. Underwood contends that he is entitled to relief from his death sentence based on the trial court's admission of unconstitutional victim impact evidence. The OCCA found no error. *Underwood*, 252 P.3d at 248. In light of *Bosse v. Oklahoma*, ––– U.S. ––––, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016) (per curiam), however, the State concedes that the admission of the challenged evidence here—J.B.'s parents' sentence recommendations—violated the Eighth Amendment. The parties dispute whether this error warrants automatic relief, and, if not, whether this error prejudiced Mr. Underwood's defense.

In addressing this claim, we begin with general legal background on the Constitution's limitations on the admission of victim impact evidence in capital cases, as well as additional factual and procedural background relevant to Mr. Underwood's claim. We then consider the issues disputed by the parties, providing additional background as needed. Because the OCCA found no error and thus had no occasion to address these issues, we consider them de novo. *See Cole*, 755 F.3d at 1148 ("If a claim was not resolved by the state courts on the merits[,] ... § 2254(d) ... do[es] not apply ..., [and] we review the [federal] district court's legal conclusions de novo and its factual findings, if any, for clear error."); *Lockett*, 711 F.3d at 1218 ("Because the OCCA erred in finding no Eighth Amendment violation, we grant no deference to its harmless error analysis and consider the question de novo."). We conclude that the error here neither warrants automatic relief nor prejudiced the defense under the applicable standard. We therefore affirm the district court's denial of habeas relief on Mr. Underwood's claim based on the admission of J.B.'s parents' sentence recommendations.

a. *Legal background*

[21] In *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the Supreme Court "held that 'the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evi-

dence' that does not 'relate directly to the circumstances of the crime.' " *Bosse*, 137 S.Ct. at 1 (quoting *Booth*, 482 U.S. at 501-02, 507, n.10, 107 S.Ct. 2529 (1987)). In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Court overruled *Booth* in part and held that the Eighth Amendment allows consideration of " 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." *Id.* at 817, 827, 111 S.Ct. 2597; *see Bosse*, 137 S.Ct. at 1-2.

The OCCA has long interpreted *Payne* as "implicitly overrul[ing] that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence." *E.g.*, *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997), *abrogated by Bosse*, 137 S.Ct. at 1. This court has long disagreed with the OCCA. Starting with *United States v. McVeigh*, we have interpreted *Booth* and *Payne* to prohibit the prosecution from presenting sentencing recommendations from family members of the victim. 153 F.3d 1166, 1217 (10th Cir. 1998) ("*Payne* did not overrule the prohibitions in *Booth* against the admission of [victim's family members' sentence recommendations]"); *see also Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002) ("To date, three circuits, including our own, have expressly recognized that the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about . . . the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid.").

The Supreme Court recently clarified that the OCCA "remains bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban" and that the OCCA "erred in concluding otherwise." *Bosse*, 137 S.Ct. at 2.

b. *Relevant facts—the sentence recommendations*

In the punishment stage of Mr. Underwood's trial, the trial court admitted victim impact testimony from J.B.'s mother and father that included their opinions about the appropriate sentence.[14] After J.B.'s mother testified to the impact of J.B.'s loss, the following exchange occurred:

> Q: [L]et me ask you, do you have a *recommendation as to the appropriate punishment for this defendant*?
>
> A: Yeah.
>
> Q: And what is that?
>
> A: He—*The death penalty. I don't have my little girl.*

Trial Tr. Vol. VIII at 1949-50 (emphasis added). After J.B.'s father testified to the impact of J.B.'s loss, a similar exchange occurred:

> Q: Do you have a *recommendation for this jury as to what you believe is appropriate punishment for the murder of your daughter*?
>
> A: Yes.
>
> Q: Can you tell me what that is?

14. When the State noticed its intention to present these sentence recommendations, the trial court warned that "the Tenth Circuit is not real favorable to this kind of testimony but that it has been allowed in Oklahoma, but it is one of those things that could be a risk of reversal." Trial Tr. Vol. VIII at 1882. But the court agreed to admit the recommendations "[a]s long as [J.B.'s parents] kn[ew] that and they've made that choice," as was the case. *Id.*

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A: *Would be the death penalty.*

Id. at 1953-54 (emphasis added).

After the presentation of punishment stage evidence, the trial court instructed the jury on the role of victim impact evidence: "This evidence is simply another method of informing you about *the specific harm caused by the crime in question.* You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, *not an emotional response to the evidence.*" O.R. at 1499 (emphasis added).

At no point in its closing argument did the prosecution expressly refer to J.B.'s parents' sentence recommendations. It merely summarized other portions of their victim impact statements, emphasizing that J.B.'s death "is a loss that her family will never recover from." Trial Tr. Vol. X at 2527. It also advised the jury that the impact statements spoke to "the specific harm that [J.B.'s] murder caused" and could be considered in determining the appropriate punishment. *Id.* at 2526. In rebuttal, the prosecution "submit[ted] to [the jury]" that "anything less" than death would be "an injustice for [J.B.]" and "an injustice for that family sitting right there." *Id.* at 2565.

c. *OCCA and federal district court decisions*

In his appeal to the OCCA, Mr. Underwood argued that the trial court's admission of J.B.'s parents' sentence recommendations constituted reversible error. *Underwood*, 252 P.3d at 248. The OCCA denied Mr. Underwood's *Booth* claim on the merits, finding no error. *Id.* Mr. Underwood then sought federal habeas relief, which the district court denied because it determined that the error was harmless under the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *Underwood*, 2016 WL 4059162, at *18-*19.

d. *Structural error, Footnote Nine error, or trial error*

Mr. Underwood contends that he is entitled to automatic relief from his death sentence based on the concededly unconstitutional admission of J.B.'s parents' sentence recommendations at his trial. The State disagrees, arguing that Mr. Underwood is entitled to relief only if the *Booth* error was not harmless under *Brecht*. Mr. Underwood submits that the *Booth* error warrants automatic relief because (1) it was structural error, and (2) it falls under the class of errors that infect a proceeding's integrity, as described in footnote nine of *Brecht* ("Footnote Nine").

In addressing Mr. Underwood's arguments, we first provide additional legal background. We then consider Mr. Underwood's arguments and conclude that he is not entitled to automatic relief based on the conceded *Booth* error here.

i. <u>Additional legal background</u>

[22, 23] On habeas review, we ordinarily apply the *Brecht* standard to determine whether constitutional error warrants relief from the challenged conviction or sentence. Under this standard, constitutional error may be disregarded unless found to have "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710. "If a reviewing court is in 'grave doubt' as to the harmlessness of an error, the habeas petitioner must win." *Crease v. McKune*, 189 F.3d 1188, 1193 (10th Cir. 1999) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)). "In harmless error analysis in a capital case, we are mindful of the need for heightened reliability in determining a

capital sentence." *Mollett v. Mullin*, 348 F.3d 902, 920 (10th Cir. 2003) (quotations omitted); *see also Kyles v. Whitley*, 514 U.S. 419, 422, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." (quotations omitted)).

We provide additional background on two circumstances where constitutional error alone requires reversal and the harmless error doctrine therefore does not apply: (1) structural error, and (2) Footnote Nine error.

1) Structural error

[24] Notwithstanding *Brecht*, constitutional errors that rise to the level of "structural error"—in contrast to ordinary "trial error"—require automatic reversal. As the Supreme Court explained in *Arizona v. Fulminante*, " 'trial error' . . . occur[s] during the presentation of the case to the jury, and . . . may therefore be . . . assessed . . . to determine whether its admission was harmless beyond a reasonable doubt," whereas "structural defects in the constitution of the trial mechanism . . . defy analysis by 'harmless-error' standards." 499 U.S. 279, 307-08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

[25] "A defining feature of structural error is that the resulting unfairness or prejudice is necessarily unquantifiable and indeterminate, such that any inquiry into its effect on the outcome of the case would be purely speculative." *United States v. Solon*, 596 F.3d 1206, 1211 (10th Cir. 2010) (quotations omitted); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) ("[A]s we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error."). In contrast, the effect of ordinary trial errors "may 'be quantitatively assessed in the context of other evidence presented.' " *Gonzalez-Lopez*, 548 U.S. at 148, 126 S.Ct. 2557 (quoting *Fulminante*, 499 U.S. at 307-08, 111 S.Ct. 1246).

[26] The Supreme Court has recognized the following categories of structural error: "a total deprivation of the right to counsel; the lack of an impartial trial judge; the unlawful exclusion of grand jurors of defendant's race; a deprivation of the right to self-representation at trial; the denial of the right to a public trial; and an erroneous reasonable-doubt jury instruction." *Solon*, 596 F.3d at 1211.

2) Footnote Nine error

Apart from structural error, the Supreme Court in *Brecht* suggested another potential type of error warranting automatic relief. In Footnote Nine, the Court stated that *Brecht* "does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." 507 U.S. at 638 n.9, 113 S.Ct. 1710.

This court has not previously had occasion to apply Footnote Nine to a *Booth* error involving the admission of unconstitutional sentence recommendations in a capital case. But we find *Duckett v. Mullin*, 306 F.3d 982 (10th Cir. 2002), in which we applied Footnote Nine to alleged prosecutorial misconduct, instructive.

In *Duckett*, the habeas petitioner argued for application of *Brecht*'s Footnote Nine exception to the harmless error doctrine based on the Oklahoma prosecutor's improper remarks in both the guilt and sentencing stages of the trial. *Id.* at 993. The prosecutor in *Duckett* had made improper

remarks such as, in arguing for the death sentence, asking the jury whether it would serve "justice [to] send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while [the victim] lies cold in his grave?" *Id.* at 992.

This particular prosecutor "ha[d] been chastised for participating in the same type of improper argumentation in other cases." *Id.* at 993. Both the OCCA and federal courts had "repeatedly condemned [him] and prosecutors from his office for their habitual misconduct in argument." *Id.* at 993 n.4 (quotations omitted). Accordingly, "our past experiences with this prosecutor le[ft] us convinced that his inappropriate commentary at trial was intentional and calculated." *Id.* at 993 (quotations omitted). We further observed that the prosecutor's "persistent misconduct ... has without doubt harmed the reputation of Oklahoma's criminal justice system and left the unenviable legacy of an indelibly tarnished legal career." *Id.* at 994. And we emphasized that "[o]ur nation's confidence in the fair and just administration of the death penalty is disserved by prosecutors who cynically test the bounds of the harmless-error doctrine." *Id.*

Even so, we determined that the challenged prosecutorial misconduct did not rise to the level of Footnote Nine error, noting that "[t]he due process concerns flagged by footnote nine of *Brecht* will manifest themselves only in very limited circumstances." *Id.* at 994-95. Specifically, we stated that the key inquiry governing "whether the footnote's exemption will be applicable 'is whether the integrity of the proceeding was so infected that the entire trial was unfair[,]' " and we could not conclude that that was so on *Duckett*'s facts. *Id.* at 995 (quoting *Hardnett v. Marshall*, 25 F.3d 875, 879 (9th Cir. 1994)); *see also Torres v. Mullin*, 317 F.3d 1145, 1159 (10th Cir. 2003) (declining to apply Footnote Nine in a post-*Duckett* case involving the same Oklahoma prosecutor).

ii. Analysis

Mr. Underwood is not entitled to automatic relief because the *Booth* error here constituted neither structural error nor Footnote Nine error. We address each argument in turn.

1) Structural error

[27] The admission of J.B.'s parents' sentence recommendations does not amount to structural error. The error's effect may be evaluated in light of the other evidence at trial and thus is not "necessarily unquantifiable and indeterminate." *Solon*, 596 F.3d at 1211.

Mr. Underwood contends that "judges from this Court have indicated, rightly so, that sentencing recommendations by victim's family members can rise to the level of structural error, requiring automatic reversal." Aplt. Suppl. Br. at 5-6 (citing *Hain*, 287 F.3d at 1239 n.11; *DeRosa v. Workman*, 696 F.3d 1302, 1305 (10th Cir. 2012) (Mem.) (Lucero, J., dissenting from denial of rehearing en banc)). We disagree. In *Hain*, we remarked that "[t]he decision in *Booth* does not expressly indicate whether the [Supreme] Court believed [victim impact] errors to be trial errors subject to harmless error review, or structural error requiring automatic reversal." 287 F.3d at 1239 n.11. We "[n]evertheless ... d[id] not believe the OCCA unreasonably applied *Booth* in concluding that such errors are subject to harmless error review." *Id.*

Since *Hain*, we have repeatedly applied *Brecht*'s harmless error analysis to *Booth* errors on de novo review, thus necessarily concluding that such errors are indeed subject to harmless error review. *See, e.g.*, *Grant v. Trammell (John Grant)*, 727 F.3d

1006, 1016-17 (10th Cir. 2013). Contrary to Mr. Underwood's assertion, Judge Lucero did not disagree with this legal conclusion in his dissent from the denial of rehearing en banc in *DeRosa*. *See DeRosa*, 696 F.3d at 1305 ("*Were the option not foreclosed by precedent*, one could make a strong case that the [OCCA's] pattern of ignoring the United States Supreme Court should be immune from harmless error review as akin to structural error." (emphasis added)).

2) Footnote Nine error

The admission of J.B.'s parents' sentence recommendations does not amount to Footnote Nine error. As discussed above, "[t]he due process concerns flagged by footnote nine of *Brecht* will manifest themselves only in very limited circumstances." *Duckett*, 306 F.3d at 994-95. Mr. Underwood contends that we are faced with such a circumstance here. He asserts that the "OCCA, state trial judges, and prosecutors have repeatedly and deliberately violated capital defendants' Eighth Amendment rights through the admission of victim[s'] family members' sentencing recommendations." Aplt. Suppl. Br. at 6. He further asserts that "this pattern has impugned the very integrity of the fair trial process." *Id.* at 6-7.

We agree that the OCCA has disregarded longstanding Supreme Court precedent and has refused to recognize *Booth* errors. But even in *Duckett*, where we acknowledged that the prosecutor's flagrant and persistent misconduct was "emphatically not condoned by this court ... [and] has without doubt harmed the reputation of Oklahoma's criminal justice system," we nevertheless said that the application of Footnote Nine requires more—it requires that the error "in *the present case* so infected the trial as to make the proceeding fundamentally unfair and thus immune from harmless-error review." 306 F.3d at 994, 995 (emphasis added). *Duckett* therefore compels us to conclude that the trial in *the present case* was not rendered fundamentally unfair by the *Booth* error, notwithstanding the fact, as Mr. Underwood puts it, "that Oklahoma courts and prosecutors have continued to pursue the very victim-impact evidence precluded by *Booth*—for nearly 30 years." Aplt. Suppl. Br. at 6-7.

e. Brecht *harmless error analysis*

[28] Mr. Underwood contends that he is entitled to relief from his death sentence because he can show "substantial and injurious effect" under the *Brecht* standard. We first provide additional background on this court's application of *Brecht* to the admission of unconstitutional sentence recommendations. We then summarize the mitigating and aggravating evidence presented at Mr. Underwood's trial to provide context for our analysis. Guided by our precedents, we evaluate the conceded *Booth* error's prejudicial impact in light of this context and conclude that it does not warrant habeas relief.

i. Additional legal background

This court has held that the admission of unconstitutional victim sentence recommendations required reversal under the *Brecht* standard in only one case: *Dodd v. Trammell*, 753 F.3d 971 (10th Cir. 2013). Before *Dodd*, "no prior panel of this court ha[d] ruled that victim recommendations of the death penalty required reversal." *Id.* at 997. The *Dodd* panel acknowledged ten previous decisions holding "that such testimony was harmless." *Id.*[15] It cited three factors warranting a different result in

15. The panel cited *(John) Grant*, 727 F.3d at 1015–17; *Lockett*, 711 F.3d at 1226, 1238–40; *Lott v. Trammell*, 705 F.3d 1167, 1202, 1214, 1218–19 (10th Cir. 2013); *DeRosa v. Work-*

that case: (1) "the sheer volume of [the unconstitutional] testimony," which included a "drumbeat" of seven death recommendations; (2) that the jury did not find the HAC aggravator or the continuing threat aggravator;[16] and (3) that the defendant's guilt "was not as clear cut" as in previous decisions, due to the prosecution's sole reliance on circumstantial evidence. *Id.* at 997-98. Based on these factors, the panel found itself "in grave doubt about the effect of the error on the jury's sentencing decision" and held that "the admission of the sentence recommendations in this case was not harmless." *Id.* at 999 (citations and quotations omitted).

ii. Additional relevant facts

To determine whether J.B.'s parents' statements had a substantial and injurious effect on the jury's sentencing decision, we must consider them in the overall context of the trial and the "record as a whole." *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710; *see also Lockett*, 711 F.3d at 1239 ("In evaluating whether the unconstitutional portions of the [victim impact] statement had a substantial and injurious effect on the jury, we must consider it in the context of all of the aggravating and mitigating evidence."). We therefore summarize the aggravating and mitigating evidence presented during the sentencing phase of Mr. Underwood's trial.

1) The aggravating case

The State's aggravating case consisted primarily of the guilt stage evidence, which it incorporated into the punishment stage. The guilt stage evidence included, most notably, the video recording and transcript of Mr. Underwood's interview with the FBI, during which, as the OCCA wrote, he "describe[d] how he had recently developed a desire to abduct a person, sexually molest them, eat their flesh, and dispose of their remains" and "explain[ed] in considerable detail how he attempted to carry out this plan on [J.B.], whom he had decided was a convenient victim." *Underwood*, 252 P.3d at 231. These details included that he had (1) "hit [J.B.] on the back of the head several times with a wooden cutting board" and heard her "scream[ing] in pain and beg[ing] him to stop," (2) "suffocate[d] [J.B.] by sitting on her and placing his hand across her face . . . [for] fifteen to twenty minutes," (3) "attempted to have sexual relations with [J.B.]'s body," and (4) "attempted to decapitate [J.B.'s body] with a knife." *Id.* The guilt stage evidence also included crime scene photographs taken at Mr. Underwood's apartment, photographs of J.B.'s body taken at the Medical Examiner's office, and physical items taken from Mr. Underwood's apartment that corroborated his confession.[17]

man, 679 F.3d 1196, 1236–37, 1240 (10th Cir. 2012), *reh'g denied in DeRosa*, 696 F.3d 1302; *Selsor v. Workman*, 644 F.3d 984, 1025, 1027 (10th Cir. 2011); *Welch v. Workman (Gary Welch)*, 639 F.3d 980, 996–1000, 1002–04 (10th Cir. 2011); *Welch v. Sirmons (Frank Welch)*, 451 F.3d 675, 703–04 (10th Cir. 2006); *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002); *Willingham v. Mullin*, 296 F.3d 917, 930–32 (10th Cir.2002); and *Hain*, 287 F.3d at 1234–36, 1239–40. *Dodd*, 753 F.3d 971 at 997.

16. The *Dodd* panel noted that in seven of the ten decisions it reviewed, the jury found the HAC aggravator and that, in two of the remaining three decisions, the jury found the continuing threat aggravator. 753 F.3d at 998. And "[i]n the only case in which the jury did not find either [of these] aggravator[s], the two victim statements 'did not expressly refer to the defendant being put to death; instead, they both simply stated without embellishment that they agreed with the prosecution's "recommended sentence." ' " *Id.* (alterations omitted) (quoting *Selsor*, 644 F.3d at 1027).

17. For example, the State entered into evidence the cutting board that Mr. Underwood

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2) The mitigating case

Mr. Underwood's mitigating case consisted of testimony from 19 witnesses over three days. They included family members, friends, former teachers, supervisors, and coworkers who had known Mr. Underwood at various points in his life, a physician who had treated Mr. Underwood for depression, jail officials who had had contact with Mr. Underwood since his arrest, and three experts who had evaluated Mr. Underwood's psychological and psychiatric health and his likelihood of committing future violence.[18]

After hearing this testimony, the jury was instructed that "[e]vidence ha[d] been introduced as to the following mitigating circumstances:"

1. Kevin Ray Underwood was exposed to severe trauma and mistreatment by his peers while growing up, and got through life only with the aid of a close circle of "protectors".
2. Kevin Ray Underwood has, except for his crime against [J.B.], no prior history of any violent act.
3. Kevin Ray Underwood has, except for his crime against [J.B.] and a single speeding ticket, no prior history of violating any law.
4. Kevin Ray Underwood suffers from several psychological and psychiatric disorders including, but not limited to: schizotypal personality disorder, bi-polar disorder type II, multiple paraphilias, severe social phobia, anxiety, early onset of neuro-developmental disorder. None of these conditions has ever been appropriately treated by a mental health professional.
5. Kevin Ray Underwood was subjected to emotional and verbal abuse by his parents while growing up.
6. Kevin Ray Underwood has family and friends who love him, find meaning in his life, and will continue to visit him in prison.
7. Kevin Ray Underwood cooperated with law enforcement by giving a full confession to the murder of [J.B.].
8. Kevin Ray Underwood has expressed remorse for the killing of [J.B.].
9. Kevin Ray Underwood has spent most of his life on the fringe of society and constantly subjected to ridicule even into his adult years.
10. Kevin Ray Underwood's multiple psychological and psychiatric problems have prevented him from taking full advantage of his intellect by continuing his education and gaining employment appropriate to his intelligence level.
11. Kevin Ray Underwood will not be around young children if sentenced to prison for life.
12. Kevin Ray Underwood is much more likely to be victimized in prison than posing a risk of violence to others. In fact, his chances of harming anyone in prison are very, very small.
13. The symptoms and effects of Kevin Ray Underwood's mental illnesses can be adequately controlled and lessened through appropriate and low-cost medication and treatment.
14. Kevin Ray Underwood comes from a family with a significant history of mental illness.

described using to hit J.B. in his confession. State's Trial Exhibit 171.

18. The State called its own expert to rebut the defense experts' testimony. Trial Tr. Vol. X at 2427-88.

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15. Kevin Ray Underwood has scored very low on scientific testing instruments designed to predict future violence.

O.R. at 1492-93.

iii. Analysis

Based on our careful review of the entire record, we conclude, guided by our precedents, that the admission of J.B.'s parents' sentencing recommendations did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710. Three considerations taken together lead us to this conclusion: (1) the offending statements were relatively brief and emotionally restrained; (2) the aggravating case was relatively strong; and (3) the mitigating case, while not insubstantial, was not sufficient to overcome the aggravating evidence. In discussing these considerations below, we also note that none of the factors that warranted reversal in *Dodd* are present in this case.

1) The sentence recommendations

The offending statements, J.B.'s parents' sentence recommendations, were "relatively pallid in comparison to other victim impact statements this circuit has found harmless." *Lockett*, 711 F.3d at 1239. In response to the prosecution's question eliciting their sentence recommendation, J.B.'s mother stated "The death penalty. I don't have my little girl." and J.B.'s father stated "Would be the death penalty." Trial Tr. Vol. VIII at 1950, 1954. "This court has held far more extensive pleas to lack the required 'substantial and injurious' effect on a jury's verdict when the evidence against the defendant at sentencing was strong." *(John) Grant*, 727 F.3d at 1017; *see also Lockett*, 711 F.3d at 1239 ("The [victim's parents]' request for the death penalty was a single, concise sentence. In contrast, the three victim statements that were held to be harmless in [*Welch v. Workman*, 639 F.3d 980, 990, 999 (10th Cir. 2011)] contained extremely emotional pleas for the death penalty.").

[29] "Further, the jury was properly instructed by the trial court on the ... proper role of victim-impact evidence." *DeRosa v. Workman*, 679 F.3d 1196, 1237 (10th Cir. 2012), *reh'g denied in DeRosa*, 696 F.3d 1302; *see* O.R. at 1499 ("[Y]our consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence."). "As a general rule, we presume that juries follow [limiting] instructions." *United States v. Lane*, 883 F.2d 1484, 1498 (10th Cir. 1989).

Finally, unlike in *Dodd*, in which the State "went to the extraordinary length of eliciting [a death penalty] recommendation from six, and perhaps seven, ... witnesses,"[19] the sentence recommendations presented at Mr. Underwood's trial were more akin to a "one-off or a mere aside" than "a drumbeat." 753 F.3d at 997.

2) The aggravating case

Although the jury found that only one aggravating circumstance—the HAC aggravator—existed beyond a reasonable doubt, the aggravating case against Mr. Underwood was relatively strong. The existence of the HAC aggravator in itself provides a relatively strong basis for the death penalty as compared to the other aggravating circumstances (apart from the continuing threat aggravator). *See Dodd*, 753 F.3d at 998 ("This was also a signifi-

19. In *Dodd*, six of the State's witnesses recommended death in response to a question posed by the prosecutor, while a seventh witness "included her recommendation of the death sentence in the statement she read to the jury." 753 F.3d at 997.

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cantly weaker case for the death penalty. Unlike seven of our precedents, the jury did not find the [HAC] aggravating circumstance."). Moreover, "the evidence of [this] aggravating circumstance[ ] was substantial." *Lockett*, 711 F.3d at 1240. The jury heard Mr. Underwood's confession, in which he acknowledged the planned nature of the crime, exhibited comprehension of its wrongfulness, and recounted its brutal details, including J.B.'s resistance, his feelings of sexual arousal, and his efforts to decapitate her.[20]

Finally, in contrast to *Dodd*, guilt in this case, established in large part by Mr. Underwood's own confession, "was ... as clear cut as in cases in which we have ruled that victim recommendations were harmless." 753 F.3d at 998.

3) The mitigating case

Mr. Underwood's mitigating case, as summarized above, contained substantial testimony addressing multiple mitigating factors. In closing argument, defense counsel emphasized the strongest parts of the case for mitigation. Counsel emphasized Mr. Underwood's various mental health issues, repeatedly describing him as "a disturbed and conflicted, mentally ill young man when he committed this terrible crime." Trial Tr. Vol. X at 2536; *see also id.* at 2538-39, 2541-43, 2546. Counsel also referenced the testimony given by the defense team's psychiatric expert, Dr. Martin Kafka—that proper treatment could potentially lessen the effects of Mr. Underwood's psychiatric disorders and paraphilias. *Id.* at 2545; *see* Trial Tr. Vol. IX at 2262-65.

The mitigation case, in particular the evidence pertaining to his psychiatric disorders and his amenability to treatment, was not, as we have said in another case, "less than compelling." *Selsor v. Workman*, 644 F.3d 984, 1027 (10th Cir. 2011) (finding a *Booth* error harmless under *Brecht* in part based on the weakness of the mitigating evidence, which consisted of testimony from one jail employee and four prison employees, two of whom conceded that the habeas petitioner's prison record was simply "a little better than average" (quotations omitted)). Although stronger than the evidence in *Selsor*, Mr. Underwood's evidence was not sufficiently compelling as to put us in "grave doubt" as to the *Booth* error's harmlessness, in light of the strength of the aggravating circumstance in this case. *See (John) Grant*, 727

20. *See* State's Trial Exhibit 162 at 27 ("I certainly planned this out, I mean I'd been thinkin' about it for at least a month."); *id.* at 41 ("I know what I did was wrong, and ... I know that I deserve to be punished for it."); *id.* at 56 ("[W]hen she first came in [to the apartment], it was like oh, now's my chance, but then, you know, then I had to say no, I can't do it, and I just kinda struggled with myself the whole times she was in there."); *id.* at 59 ("[T]hen finally I was just like you know, either do it or tell her to get the hell out of the apartment, ... and finally I did it."); *id.* at 61 ("I whacked her with [a cutting board], and she's ... like ouww, and started crying and she's like, oh God I'm sorry ... so I whacked her again, and she jumped up, and ... I couldn't believe it didn't knock her out."); *id.* at 62 ("[A]fter I hit her a couple times, I finally just had to, you know jump up and grab her, and ... I couldn't believe how strong she was. I could barely hold her down."); *id.* at 63 ("[O]nce I ... finally got her down to the ground, ... we struggled. [I]t took me probably fifteen, twenty minutes to kill her."); *id.* ("I was, kinda sittin' on her ... clamping ... my hand on her [face and nose]."); *id.* at 67-68 ("I was gonna try to have sex with her ..., but the way she was like laying right on the floor I couldn't really get to her very good."); *id.* at 69-71 ("And so I was like ... I'm just gonna go ahead and drag her into the tub and behead her.... [S]o I started sawing at her neck.... I went to her spine and I, just sawed and sawed and sawed, and could not get through that last."); *id.* at 71 ("I was disgusted at first, but then once I was climbing down on top of her, holding her down and choking her, I got aroused again.").

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F.3d at 1017 ("To be sure, [the petitioner] did respond with evidence of his amenability to treatment and evidence about his troubled childhood. But even viewed in its totality the case against him remained considerable.").[21] "Lastly, the jury was properly instructed on the use of mitigating evidence and its role in the sentencing deliberations," further reducing the likelihood that the admission of J.B.'s parents' testimony prejudiced Mr. Underwood's defense. *Selsor*, 644 F.3d at 1027 (alterations and quotations omitted).

* * * *

Based on the foregoing, Mr. Underwood is not entitled to relief because the *Booth* error here does not warrant automatic reversal and, applying *Brecht*, "[g]iven that this case contains similarly strong evidence [as in previous cases] against the defendant and yet a comparatively muted pair of pleas, we are hard pressed to see how we could, faithful to our precedent, find ... reversible error." *(John) Grant*, 727 F.3d at 1017.

5. Jury's Weighing of Aggravating and Mitigating Circumstances

Mr. Underwood contends that he is entitled to relief from his death sentence because it was unconstitutionally imposed without a jury finding beyond a reasonable doubt that the HAC aggravator outweighed the mitigating evidence. The OCCA rejected this claim on the merits. *Underwood*, 252 P.3d at 246.

In addressing this claim, we begin with the relevant legal background and additional factual and procedural background. We then examine the OCCA's merits decision under § 2254(d) and conclude that it was not contrary to—or an unreasonable application of—Supreme Court law or based on an unreasonable determination of the facts. We therefore affirm the district court's denial of habeas relief on Mr. Underwood's claim that the state trial court failed to require the jury to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

a. *Legal background*

We first provide a general overview of the reasonable doubt standard's applicability to capital sentencing facts. We then discuss *Matthews v. Workman*, 577 F.3d 1175 (10th Cir. 2009), in which this court

21. Mr. Underwood's three expert witnesses generally agreed that he suffered from a variety of psychological and psychiatric disorders, including, most notably: schizotypal personality disorder, the less severe of the two types of bipolar disorder, depression, anxiety, and social phobia. Trial Tr. Vol. IX at 2178-82, 2251-62, 2327-31. The State's rebuttal expert, who did not personally evaluate Mr. Underwood but reviewed the defense experts' work, testified that he "would ... defer to their diagnoses" and "ha[d] no reason to doubt those diagnoses and their competence as examiners." Trial Tr. Vol. X at 2472-73.

But even with these diagnoses, "[the defense experts'] testimony never indicated that Mr. [Underwood]'s [mental health issues] caused his behavior to be 'impulsive' or 'aggressive' in a way that would *meaningfully explain* his involvement in [J.B.'s] murder[ ]," thus reducing the mitigating force of the mental health evidence in this case. *See (Donald) Grant*, 886 F.3d at 922 (emphasis in original). Indeed, Dr. Kafka testified that, "even though [Mr. Underwood's violent and sexual] thoughts themselves were impulsive-like ... in that ... they were just vibrating back and forth in his mind, ... he put them into a plan of action that was *planned out and not impulsive*." Trial Tr. Vol. IX at 2261 (emphasis added). And Mr. Underwood self-reported on a sexual compulsive disorder questionnaire that he "ha[s] much control and [is] usually able to stop or divert sexual obsessions with some effort and concentration." *Id.* at 2226.

previously considered and rejected the same challenge to Oklahoma's capital sentencing scheme before us in this appeal.

i. Overview

[30] The Fourteenth Amendment right to due process and the Sixth Amendment right to a jury trial, taken together, entitle a criminal defendant to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (brackets and quotations omitted). In *Apprendi*, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348.

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court applied the *Apprendi* rule in invalidating Arizona's capital sentencing system. Arizona's system authorized judges to make the factual finding necessary for imposing the death sentence—that at least one aggravating circumstance existed. *Ring*, 536 U.S. at 597-98, 122 S.Ct. 2428. The Court held that "[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense [by increasing the maximum penalty], . . . the Sixth Amendment requires that they be found by a jury." *Id.* at 609, 122 S.Ct. 2428 (citations and quotations omitted).[22]

The Supreme Court likewise applied *Apprendi* in invalidating Florida's capital sentencing scheme in *Hurst v. Florida*, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). Under Florida's scheme, the trial court alone made the findings necessary for imposing the death penalty: that (1) "sufficient aggravating circumstances exist," and (2) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Hurst*, 136 S.Ct. at 622 (quotations omitted). But the Supreme Court's holding in *Hurst* only referenced the first of these required findings: "Florida's sentencing scheme, which required the judge alone to *find the existence of an aggravating circumstance*, is therefore unconstitutional." *Id.* at 624 (emphasis added). The Court thus did not address whether the second of the required findings—that mitigating circumstances do not outweigh the aggravating circumstances—is also subject to *Apprendi*'s rule.

ii. *Matthews v. Workman*

In *Matthews*, this court rejected an *Apprendi* challenge to Oklahoma's capital sentencing scheme. Under Oklahoma's scheme, the death penalty may not be imposed "[u]nless at least one of the statutory aggravating circumstances . . . is [found by a unanimous jury beyond a reasonable doubt] or if it is found that any such aggravating circumstance is outweighed by the finding of one or more

22. The Arizona scheme invalidated in *Ring* required *judge*-made findings of aggravating circumstances beyond a reasonable doubt. 536 U.S. at 597, 122 S.Ct. 2428. In contrast, Oklahoma's scheme requires *jury*-made findings that (1) at least one aggravating circumstance exists and (2) the aggravating circumstance(s) outweigh the mitigating. Mr. Underwood nevertheless contends that Oklahoma's scheme violates *Apprendi* because, although the jury must make the first determination beyond a reasonable doubt, it need not do so as to the second. Even though Oklahoma's scheme does not allow judge-made findings, we consider *Ring* in addressing Mr. Underwood's claim because the *Apprendi* rule entitles a defendant to a determination by the jury and also to a determination beyond a reasonable doubt of "any fact . . . that increases the maximum penalty for a crime." *Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348.

mitigating circumstances." Okla. Stat. tit. 21, § 701.11. The *Matthews* petitioner sought habeas relief based on the trial court's punishment stage jury instructions, arguing that the jury should "have been instructed that it had to find *beyond a reasonable doubt* that aggravating factors outweighed the mitigating." *Matthews*, 577 F.3d at 1195 (emphasis in original). Considering the issue de novo, we held that the weighing of aggravating and mitigating circumstances under Oklahoma's scheme is not subject to the *Apprendi* rule because it "is not a finding of fact . . . but a highly subjective, largely moral judgment regarding the punishment that a particular person deserves." *Id.* (quotations omitted).[23]

b. *Relevant facts*

In the punishment stage of Mr. Underwood's trial, the trial court instructed the jury in accordance with Oklahoma's capital sentencing scheme:

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating circumstances outweigh the mitigating circumstance, you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

O.R. at 1494. The jury was therefore not instructed to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

c. *OCCA and federal district court decisions*

In his appeal to the OCCA, Mr. Underwood argued that the failure to instruct the jury to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt constituted reversible error. *Underwood*, 252 P.3d at 246. The OCCA denied Mr. Underwood's *Apprendi* claim on the merits, citing *Matthews*. *Id.* Mr. Underwood then sought federal habeas relief, which the district court denied. *Underwood*, 2016 WL 4059162, at *31.

d. *Analysis*

[31] We review the OCCA's decision under § 2254(d)(1) and conclude that it was not contrary to—or an unreasonable application of—clearly established Supreme Court law.[24] *Matthews* forecloses us from concluding otherwise. *Matthews* held that Oklahoma's capital sentencing scheme does not violate *Apprendi* even though it does not require the jury to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *Matthews*, 577 F.3d at 1195. We therefore cannot hold that the OCCA

23. Two state supreme courts have taken the opposite approach in applying *Apprendi* to the weighing of aggravating and mitigating circumstances in capital sentencing. *See Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016) (interpreting *Hurst* as requiring that "all critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury," including "the finding that the aggravating factors outweigh the mitigating circumstances"); *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (invalidating Delaware's capital sentencing scheme in part because it did not require a jury to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt).

24. Mr. Underwood does not—nor do we—identify any § 2254(d)(2) unreasonable factual determination underlying the OCCA's adjudication of the *Apprendi* claim.

contradicted or unreasonably applied *Apprendi* in adjudicating Mr. Underwood's claim. *See Meyers*, 200 F.3d at 720 ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." (quotations omitted)); *see also Lockett*, 711 F.3d at 1254-55 (holding that an analogous *Apprendi* claim was "foreclosed by our decision ... in ... *Matthews*").

Mr. Underwood makes much of the Supreme Court's references in *Hurst* to judicial weighing of aggravating and mitigating circumstances under the Florida scheme it invalidated. *Hurst* post-dates the OCCA's decision and thus cannot serve as clearly established federal law for purposes of our review under AEDPA. *See Greene v. Fisher*, 565 U.S. 34, 38, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011) (explaining that § 2254(d)(1) "requires federal courts ... to measure state-court decisions against [the Supreme] Court's precedents as of the time the state court renders its decision." (quotations omitted)). We do not treat it as such in considering whether the OCCA's decision was reasonable under § 2254(d)(1). We instead address whether *Hurst* enables us to overrule *Mathews*, which forecloses Mr. Underwood's argument that the OCCA's decision was contrary to or an unreasonable application of the preexisting Supreme Court decisions, absent en banc reconsideration.

Hurst does not supply a superseding contrary Supreme Court decision that would allow us to overrule *Matthews*. Although *Hurst* contains some preliminary discussion of Florida judges' authority to both find and weigh aggravating circumstances independently of the jury in capital cases, it invalidated Florida's scheme specifically "to the extent [it] allow[s] a sentencing judge to *find an aggravating circumstance* ... that is necessary for imposition of the death penalty." 136 S.Ct. at 622, 624 (emphasis added). Because *Hurst* did not directly address *Apprendi*'s application to the weighing of aggravating and mitigating circumstances, it does not contravene *Matthews*.

6. **Cumulative Error**

[32] Finally, Mr. Underwood contends that the errors he alleges, taken together, deprived him of a fair trial. "Because the OCCA [found no error and thus] did not conduct a cumulative-error analysis ..., we must perform our own de novo, employing the well-established standard found in *Brecht*." *(Donald) Grant*, 886 F.3d at 955. "In doing so, we inquire whether the identified harmless errors, in the aggregate, 'had a substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* (alterations omitted) (quoting *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710). We include the following in our cumulative error analysis: (1) the alleged prosecutorial misconduct—the remarks about shaving;[25] and (2) the conceded

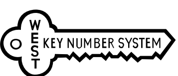
25. In our above discussion of the prosecutorial misconduct claim, we did not determine whether the alleged error constituted actual error but instead concluded that any potential error did not merit habeas relief because it did not rise to the level of a due process violation. If the alleged prosecutorial misconduct constituted actual error, we must include it in our cumulative error analysis. *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003) ("[C]laims of prosecutorial misconduct ... require a showing of fundamental unfairness in order to provide habeas relief, unless they involve the violation of specific constitutional rights.... [S]uch claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice."). For purposes of our cumulative error analysis, we assume without deciding that the alleged prosecutorial misconduct constituted actual error and proceed accordingly.

Booth violation—the sentence recommendations.

Mr. Underwood has failed to show that the alleged prosecutorial misconduct and the conceded *Booth* error, taken together, suffice to meet *Brecht*'s standard for showing prejudice. As discussed above, the aggravating evidence presented in this case—including the gruesome details of Mr. Underwood's plans and the actual murder as described in his confession—was particularly strong, whereas the mitigating evidence was not. And, although we have recognized that "harmless individual errors . . . may be collectively more potent than the sum of their parts, "Mr. [Underwood] makes no argument that the two errors that we have assumed here possess any particularized synergies." *Id.* at 956 (quotations omitted). Mr. Underwood is therefore not entitled to habeas relief based on their cumulative effect on the jury's sentencing determination.

III. CONCLUSION

We affirm the district court's denial of Mr. Underwood's § 2254 petition for writ of habeas corpus.



ALPENGLOW BOTANICALS, LLC, a Colorado Limited Liability Company; Charles Williams; Justin Williams, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

No. 17-1223

United States Court of Appeals,
Tenth Circuit.

Filed July 3, 2018

Background: Taxpayer, a limited liability company that operated a state-sanctioned medical marijuana dispensary, brought action against the United States, seeking a tax refund and alleging that the IRS exceeded its statutory and constitutional authority by denying taxpayer's business tax deductions. The United States District Court for the District of Colorado, Raymond P. Moore, District Judge, 2016 WL 7856477, granted IRS's motion to dismiss for failure to state a claim, and, 2017 WL 1545659, denied taxpayer's motion for reconsideration. Taxpayer appealed.

Holdings: The Court of Appeals, McHugh, Circuit Judge, held that:

(1) IRS did not exceed its authority in denying taxpayer's business deductions;

(2) taxpayer did not plausibly allege a claim that the IRS improperly disallowed the cost of goods sold as an exclusion from income;

(3) Internal Revenue Code provision prohibiting any deduction or credit for any business that consists of trafficking in controlled substances within the meaning of the Controlled Substances Act does not violate the Eighth Amendment;

(4) taxpayer was not entitled to alter or amend district court's judgment that taxpayer was not entitled to amend complaint; and

(5) district court did not abuse its discretion in failing to consider taxpayer's untimely argument that under purported "dead letter rule" IRS was prohibited from denying deductions based on public policy of non-enforcement of the law.

Affirmed.

1. Controlled Substances ⚷9

The federal government classifies marijuana as a controlled substance under

2016 WL 4059162
Only the Westlaw citation is currently available.
United States District Court,
W.D. Oklahoma.

Kevin Ray Underwood, Petitioner,
v.
Kevin Duckworth, Interim Warden,
Oklahoma State Penitentiary, Respondent. [1]

Case No. CIV-12-111-D
|
Signed 07/28/2016

Attorneys and Law Firms

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MEMORANDUM OPINION

TIMOTHY D. DeGIUSTI, UNITED STATES DISTRICT JUDGE

***1** Petitioner, a state court prisoner, has filed a petition for writ of habeas corpus seeking relief pursuant to 28 U.S.C. § 2254. Doc. 19. Petitioner challenges the conviction entered against him in Cleveland County District Court Case No. CF-07-513. [2] Tried by a jury in 2008, Petitioner was found guilty of first degree murder and sentenced to death. In support of his death sentence, the jury found one aggravating circumstance, namely, (1) the murder was especially heinous, atrocious, or cruel. Criminal Appeal Original Record (hereinafter "O.R.") 8, at 1508.

Petitioner has presented eleven grounds for relief. Respondent has responded to the petition and Petitioner has replied. Docs. 19, 32, and 45. In addition to his petition, Petitioner has filed motions for discovery and an evidentiary hearing. Docs. 20 and 27. After a thorough review of the entire state court record (which Respondent has provided), the pleadings filed in this case, and the applicable law, the Court finds that, for the reasons set forth below, Petitioner is not entitled to his requested relief.

I. Procedural History.

Petitioner appealed his conviction and sentence to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). The OCCA affirmed in a published opinion. *Underwood v. Oklahoma*, 252 P.3d 221, 258-59 (Okla. Crim. App. 2011). Petitioner sought review of the OCCA's decision by the United States Supreme Court, which denied his writ of certiorari on January 18, 2011. *Underwood v. Oklahoma*, 132 S. Ct. 1019 (2012). Petitioner also filed a post-conviction application, which the OCCA denied in an unpublished opinion. *Underwood v. Oklahoma*, No. PCD-2008-604 (Okla. Crim. App. Jan. 17, 2012).

II. Facts.

In adjudicating Petitioner's direct appeal, the OCCA set forth a summary of the facts. Pursuant to 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct." Although this presumption may be rebutted by Petitioner, the Court finds that Petitioner has not done so, and that in any event, the OCCA's statement of the facts is an accurate recitation of the presented evidence. Thus, as determined by the OCCA, the facts are as follows:

> [Petitioner] was charged with murdering ten-year-old Jamie Bolin on April 12, 2006, in Purcell, Oklahoma. [Petitioner] lived alone in the same apartment complex where Jamie lived with her father, Curtis Bolin. Due to her father's work schedule, Jamie was typically home alone for a period of time after school. On the day in question, Jamie played in the school library with a friend for a short time before going home. She was never seen alive again.
>
> Police, firefighters, and a host of citizen volunteers began a search for Jamie. The day after Jamie's disappearance, the Federal Bureau of Investigation added over two dozen people to the effort. On April 14, 2006, two days after Jamie was last seen, police set up several roadblocks around the apartment complex where she lived, seeking leads from local motorists.

Around 3:45 p.m. that day, FBI Agent Craig Overby encountered a truck driven by [Petitioner's] father at one of the roadblocks; [Petitioner] was a passenger in the truck. [Petitioner's] father told Overby that they had heard about the disappearance, and that in fact, [Petitioner] was the girl's neighbor. From speaking with other neighbors at the apartment complex, Overby knew that a young man living there may have been the last person to see Jamie. Overby asked if [Petitioner] would come to the patrol car to talk for a moment, and [Petitioner] agreed, while his father waited in the truck. In the patrol car, [Petitioner] made statements that piqued Overby's interest. [FN3] Overby asked [Petitioner] if he would come to the police station for additional questioning. Again, [Petitioner] agreed, and Overby assured [Petitioner's] father that he (Overby) would give [Petitioner] a ride home.

***2** FN3. At trial, Overby testified: "He told me that he was afraid that he was considered a suspect because he'd been hanging around outside his apartment a lot during the last couple of weeks.... He said he was the last person to see Jamie before she disappeared, and that t h e media reports of the clothing that she was wearing when she b e c a m e missing were incorrect."

At the police station, [Petitioner] was interviewed by Agent Overby and Agent Martin Maag. [Petitioner] told them about seeing Jamie on April 12, and discussed his activities on that day and other matters. At the conclusion of this interview, which lasted less than an hour, the agents asked [Petitioner] if they could search his apartment. [Petitioner] agreed. The agents accompanied [Petitioner] to his apartment around 5:00 p.m. While looking around the apartment, Overby saw a large plastic storage tub in [Petitioner's] closet; its lid was sealed with duct tape. [Petitioner] saw Overby looking at the tub, and volunteered that he kept comic books in it; he said that he had taped the lid to keep moisture out. Overby asked if he could look inside the tub, and [Petitioner] agreed. When Overby pulled back a portion of the tape and lifted a corner of the lid, he saw a girl's shirt—and realized that it matched [Petitioner's] description of the shirt Jamie Bolin was wearing on the day she disappeared. [FN4] When Overby commented that he saw no comic books in the tub, [Petitioner] interjected, "Go ahead and arrest me." Overby immediately responded, "Where is she?" [Petitioner] replied, "She's in there. I hit her and chopped her up." [Petitioner] then became visibly upset, began hyperventilating, and exclaimed, "I'm going to burn in Hell." He was placed under arrest and escorted out to the agents' vehicle. Agent Overby summoned local authorities to secure the scene.

FN4. Overby testified: "[D]uring the earlier interview, Mr. Underwood told me that the media reports about what Jamie was last seen wearing were wrong, that he had actually seen her wearing a b l u e shirt. And then I saw the blue shirt inside the box or the tub."

Back at the police station, [Petitioner] was advised of his right to remain silent, and his right to the assistance of counsel during any questioning, consistent with *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because he asked for a lawyer, the interview was concluded. About fifteen minutes later (approximately 5:45 p.m.), police approached [Petitioner] and asked if he would reaffirm, in writing, his original verbal consent to a search of his apartment. [Petitioner] agreed, and spent the next few hours sitting in a police lieutenant's office. He conversed with various officers who were sent to guard him, and made some incriminating statements during that time.

Around 9:30 p.m. that evening, [Petitioner] asked to speak with the two FBI agents he had initially talked to (Overby and Maag). Because [Petitioner] had previously asked for counsel, OSBI Agent Lydia Williams visited with him to determine his intentions. Agent Williams reminded [Petitioner] that he had earlier declined to be questioned, and explained that because of that decision, police could not question him any further. [Petitioner] emphatically replied that he wanted to talk to the agents. Around 10:15 p.m., Agents Overby and Maag interviewed [Petitioner] at the police station. Before questioning began, Overby reminded [Petitioner] of his *Miranda* rights, and [Petitioner] signed a written form acknowledging that he understood them and waived them. When asked if anyone had offered him anything in exchange for agreeing to talk, [Petitioner] replied that one of the officers had predicted things would go better for him if he cooperated. Besides acknowledging his waiver of *Miranda* rights, [Petitioner] also signed another written consent to a search of his apartment. A video recording and transcript of the interview that followed, which lasted about an hour, was presented to the jury at trial and is included in the record on appeal.

***3** In the interview, [Petitioner] describes how he had recently developed a desire to abduct a person, sexually molest them, eat their flesh, and dispose of their remains. He explains in considerable detail how he attempted to carry out this plan on Jamie Bolin, whom he had decided was a convenient victim. [Petitioner] stated that he invited Jamie into his apartment to play with his pet rat. Once Jamie was inside, [Petitioner] hit her on the back of the head several times with a wooden cutting board; she screamed in pain and begged him to stop. [Petitioner] proceeded to suffocate the girl by sitting on her and placing his hand across her face. [Petitioner] told the agents that this was not an easy task, and that fifteen to twenty minutes passed before she succumbed. [Petitioner] claimed he then attempted to have sexual relations with the girl's body, but was unable to perform. He then moved her body to the bathtub and attempted to decapitate it with a knife, but was unsuccessful at that task as well. Frustrated, [Petitioner] wrapped Jamie's body in plastic sheeting and placed it in a large plastic container which he hid in his closet. [Petitioner] also dismantled Jamie's bicycle and hid it inside his apartment, to make it look as if she had left the apartment complex.

Jamie Bolin's remains were taken to the Medical Examiner's office for an autopsy. The Medical Examiner noted bruises to the back of the girl's head, consistent with [Petitioner's] claim that he hit her forcefully with a cutting board. The examiner also noted petechia in the girl's eyes, and curved marks on her face, consistent with [Petitioner's] description of how he had suffocated her. The most pronounced wound on the body was a very deep incision to Jamie's neck, which was also consistent with the injuries [Petitioner] admitted to inflicting. The Medical Examiner also noted trauma to the girl's genital area, including tearing of the hymen. However, the Medical Examiner could not say that Jamie was alive, or even conscious, when her neck was cut or when she was sexually assaulted. The official cause of death was declared to be asphyxiation.

Underwood, 252 P.3d at 230-31.

III. Standard of Review.

A. Exhaustion as a Preliminary Consideration.

The exhaustion doctrine is a matter of comity. It provides that before a federal court can grant habeas relief to a state prisoner, it must first determine that he has exhausted all of his state court remedies. As acknowledged in *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), "in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." While the exhaustion doctrine has long been a part of habeas jurisprudence, it is now codified in 28 U.S.C. § 2254(b). Pursuant to 28 U.S.C. § 2254(b)(2), "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."

B. Procedural Bar.

Beyond the issue of exhaustion, a federal habeas court must also examine the state court's resolution of the presented claim. "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that 'is independent of the federal question and adequate to support the judgment.' " *Cone v. Bell*, 556 U.S. 449, 465 (2009) (quoting *Coleman*, 501 U.S. at 729). "The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30.

C. Merits.

When a petitioner presents a claim to this Court, the merits of which have been addressed in state court proceedings, 28 U.S.C. § 2254(d) governs his ability to obtain relief. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (acknowledging that the burden of proof lies with the petitioner). Section 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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> ***4** (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The focus of Section 2254(d) is on the reasonableness of the state court's decision. "The question under AEDPA [Antiterrorism and Effective Death Penalty Act of 1996] is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

"Under § 2254(d), a habeas court must determine what arguments or theories supported ... the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Relief is warranted only "*where there is no possibility* fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Id.* (emphasis added). The deference embodied in "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (citation omitted). When reviewing a claim under Section 2254(d), review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181.

IV. Analysis.

A. Ground One: Ineffective Assistance of Counsel.

Petitioner alleges that his trial and appellate counsel were constitutionally ineffective for several reasons. Petitioner claims that trial counsel (1) failed to fully present mitigation evidence through lay witnesses; (2) failed to employ and properly utilize expert services, (3) failed to preserve the record via in-trial objections, (4) failed to raise a challenge to the execution of the mentally ill, (5) failed to rebut attacks on expert diagnoses, and (6) failed to rebut the medical examiner's testimony. Petition at 7-25. Petitioner claims that appellate counsel also failed to properly utilize expert services and failed to raise violations of the trial court's gag order on appeal.[3] *Id.* at 11-13, 20.

1. Clearly Established Law.

Counsel is constitutionally ineffective when counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On habeas review, courts must apply the highly deferential standards of *Strickland* and the AEDPA to the facts of the case and decide whether "there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 101, 105. Courts cannot disturb a state court's ruling unless the petitioner demonstrates that the state court applied the highly deferential *Strickland* test in a way that every fair minded jurist would agree was incorrect. *Id.*

***5** Courts analyze counsel's performance for "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. The Supreme Court shuns specific guidelines for measuring deficient performance, as "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel, or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Instead, courts must be highly deferential when reviewing counsel's performance, and the petitioner must overcome the presumption that the "challenged action[s] might be considered sound trial strategy." *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)) (internal quotation marks omitted).

If a petitioner can show deficient performance, he must then also show prejudice by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In Oklahoma, where the jury can only impose a death sentence unanimously, the question is whether there exists a reasonable possibility "that at least one juror would have struck a different balance but for counsel's putative misconduct." *Wackerly v. Workman*, 580 F.3d 1171, 1176 (10th Cir. 2009) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)) (internal quotation marks omitted). When evaluating omitted information, courts

consider both the benefits and the negative effects of that information. *Id.* at 1178.

2. *Failure to fully present mitigation evidence through lay witnesses.*

During the penalty phase, defense counsel presented fourteen lay witnesses who testified to various aspects of Petitioner's personal, social, and family history. Trial Tr. vol. VIII, 1955-2147, vol. IX, 2383-95. Petitioner claims that counsel failed to fully develop the testimony of those witnesses, although counsel knew that the witnesses could share even more information. Petition at 8-9. Petitioner alleges that this "vanilla" presentation prevented the jury from hearing the totality of Petitioner's history and also created a disconnect between the evidence Petitioner's experts referenced and what the jury actually heard. *Id.* at 9-10.

Petitioner raised the issue on direct appeal. *Underwood,* 252 P.3d at 250, 253. Petitioner submitted affidavits and reports that reflected information not presented at trial, although the information came from four individuals who testified at trial, and one who defense counsel listed as a witness but never called. Appl. for Evidentiary Hr'g, *Underwood v. State,* No. D-2008-319, Exs. B-F.[4] The OCCA held that defense counsel fully investigated and presented a comprehensive mitigation case, and declined to second-guess counsel's questioning. *Underwood,* 252 P.3d at 253.[5]

***6** Petitioner's claim of deficient performance is not premised on a lack of investigation, but rather a lack of presentation. Petition at 7-8. Petitioner takes issue with defense counsel's decision to present certain information only in conjunction with expert testimony. *Id.* Therefore, rather than determining whether counsel conducted a thorough investigation, this Court analyzes whether counsel acted reasonably with the information that the investigation uncovered.

Petitioner claims that defense counsel did not elicit information at trial explaining that Petitioner was "different," his family had a history of mental illness, that his father ridiculed him, his mother had fits of rage, schoolchildren bullied him, he was not the same after high school, he experienced anxious fear and isolation in college, he took antidepressants, and his friends thought he acted differently based on whether he took those medications. *Id.*

Fourteen of the lay witnesses who testified consisted of family members, friends, coworkers, and teachers. *Underwood,* 252 P.3d at 253. These witnesses testified extensively about Petitioner's background, including much of the evidence that Petitioner claims his counsel omitted. Petitioner's cousin, friend, employer, and aunt all testified that he was "different." Trial Tr. vol. VIII, 1960-63, 2004, 2030-31, 2065. His father's ridicule was well supported by trial testimony from his cousin and friends. *Id.* at 1963-64, 1976, 2006-07. His mother's temper issues also came out in testimony. *Id.* at 1976-77, 2011, Trial Tr. vol. IX, 2394. Witnesses described Petitioner's encounters with bullying at length. Trial Tr. vol. VIII, 1960, 1975, 2005. His employer and aunt detailed the issues he faced in college. *Id.* at 2035, 2070. His doctor told of his prescription medications for depression. *Id.* at 2057-59. Petitioner discounts this testimony as merely "overviews" that present a "vanilla" version of Petitioner's life. Petition at 9. Even if this Court did assume that defense counsel presented a bland mitigation case, there is no clearly established federal law equating uninspired performance with constitutionally deficient performance. Petitioner had a constitutional right to a rigorous testing of evidence in an adversarial proceeding, not a dynamic presentation.

The purportedly omitted information—the history of mental illness, details of his mother's rage issues, and Petitioner's behavior when on his medications—also fail to show deficient performance on the part of defense counsel. While Petitioner allows no possible strategic reason for defense counsel to avoid those subjects with lay witnesses, this Court must presume that counsel acted reasonably. The record supports that presumption.

Evidence of Petitioner's family history of mental health was sparse. Petitioner's cousin stated that their aunt Gail Coburn had a history of depression, once to the point of hospitalization, and that Petitioner's paternal grandmother also struggled with depression. Appl. for Evidentiary Hr'g, Ex. B at 2. Randy White stated that Petitioner's mother's family had a history of emotional and mental instability. Appl. for Evidentiary Hr'g, Ex. E at 4. Defense counsel could have reasonably concluded that pursuing that subject with those witnesses could cause more harm than good. First, neither Petitioner's

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cousin nor Randy White had any personal knowledge of Petitioner's family history with mental illness, meaning their testimony would rest on hearsay and speculation. Introducing that information through a mental health expert would be a cleaner avenue. Second, Gail Coburn testified at length for the defense and her testimony painted a very sympathetic picture of Petitioner's life. Trial Tr. vol. VIII, 2063-74. It is conceivable that counsel decided to shield Ms. Coburn from impeachment based on her mental health issues.

***7** The lack of detailed testimony regarding Petitioner's mother's rage issues also fails to show deficient performance. As an initial matter, the report of Chris Lansdale's interview and accompanying investigator affidavit, which was submitted on direct appeal, is unquestionably inadmissible hearsay. This Court may therefore disregard the information contained in that affidavit. *See Neill v. Gibson*, 278 F.3d 1044, 1056 (10th Cir. 2001) (courts have the discretion not to consider investigator affidavits regarding discussions with jurors). Still, even considering that report, counsel's performance was not deficient in how they chose to address that issue.

Lansdale testified at trial that he once heard Connie Underwood shouting angrily, and that Petitioner told him to stay in Petitioner's bedroom until the incident passed. Trial Tr. vol. VIII, 1977. On cross-examination, the prosecution asked Lansdale if that was the only incident he had encountered, and Lansdale responded, "That's the only instance I can say I was there for. I'd heard of other instances that Randy and Dave had seen things like that. That's the only one I can personally say I was there for." *Id.* at 1992. As Petitioner points out, this is a flat contradiction of the investigator's report of his interview with Lansdale, which relates an incident where Connie Underwood broke an oak table in a fit of rage. Appl. for Evidentiary Hr'g, Ex. C-1. It is unlikely that Lansdale would forget that incident on the stand. It is instead reasonable to assume from his explicit testimony that Lansdale was not present for that incident. Defense counsel might have reasonably arrived at the same conclusion, and decided not to pursue that line of questioning with Lansdale based on his limited personal knowledge.

Defense counsel also reasonably opted not to call Randy White. Defense counsel told the jury that they had decided not to call two other witnesses, because their testimony would be cumulative. Trial Tr. vol. X, 2536. Defense counsel's decision was a strategic one, and certainly reasonable. White's testimony may have added some information regarding Connie Underwood's temper, but also carried a great impeachment risk. Lansdale identified White as one of the bullies that tormented Petitioner. Appl. for Evidentiary Hr'g, Ex. C-1. Also, White had just been released from prison, where he served time for forgery. Appl. for Evidentiary Hr'g, Ex. E at 1. White's testimony would have been largely cumulative, and would have given the prosecutors ample fodder for impeachment. Defense counsel could have reasonably decided that the best way to present Connie Underwood's rage issues was through their experts. While the prosecution tried to exploit the supposed disconnect between the expert and lay testimony, this Court cannot say that defense counsel performed deficiently by deciding that the evidence would be better conveyed by the experts, rather than by lay witnesses who would face withering cross-examination.

Counsel also could have reasonably decided to avoid evidence of Petitioner's behavior when on his medications. David McDade found Petitioner more "normal" when on his medications, while Lansdale said that Petitioner was more relaxed and social when not on medications. Appl. for Evidentiary Hr'g, Exs. C-1, D. This contradicting testimony would have been unhelpful, especially since one of Petitioner's experts attributed Petitioner's changes in mood and behavior to his bipolarity and hypomania, not his medications. Trial Tr. vol. IX, 2179-81. Defense counsel's focus on Petitioner's mental illness, rather than contradictory evidence of his behavior while on medication was reasonable. Based on the above discussion, it is clear that defense counsel performed reasonably under the prevailing professional norms in presenting the mitigation evidence.

***8** Even if Petitioner could establish that defense counsel's performance was deficient, he cannot show prejudice. Petitioner argues primarily that the omission of the details mentioned above undercut the expert's testimony and made it appear that the experts were relying on exaggerated or inaccurate information. Petition at 9-10. Petitioner also claims that the additional information would support the mitigating factors that the defense offered. *Id.* Neither argument is persuasive.

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First, nothing in the record indicates that the jury doubted Petitioner's experts' diagnoses and testimony. All three experts testified that Petitioner would not pose a continuing threat to society. Trial Tr. vol. IX, 2184-85, 2265-66, 2346. In spite of evidence in the record supporting a finding of a continuing threat, the jury rejected that aggravating circumstance. O.R. 8 at 1508. The jury apparently credited the expert testimony. As Petitioner can only speculate to the contrary, this Court cannot fault the OCCA for rejecting that speculation.

Second, the omitted evidence would have had very little impact on the trial, especially in light of the evidence that did populate the record. This additional information may have shown that Petitioner's mother was somewhat more prone to rage than witnesses said. His father was perhaps a bit harsher on him than the jury heard. Petitioner was more isolated and anxious than the record reflected. Courts do not award habeas relief based on a showing that defense counsel could have presented a little more to the jury. Instead, courts typically find prejudice when counsel completely omits any evidence of sexual abuse, physical abuse, mental illness, and the like. *See Rompilla v. Beard*, 545 U.S. 374, 390-93 (2005); *Williams v. Taylor*, 529 U.S. 362, 396-97 (2000); *Wilson v. Sirmons*, 536 F.3d 1064, 1093-95 (10th Cir. 2008). The OCCA was not unreasonable in determining that counsel's failure to add more detail to an already comprehensive mitigation case prejudiced the defense. Relief is denied on this issue.

3. Failure to Employ and Properly Utilize Expert Services.

Petitioner also claims that although defense counsel called upon three experts to examine him and testify about his mental health, defense counsel did not investigate whether Petitioner suffered from a developmental disorder. Petition at 12. Petitioner claims that defense counsel knew of his clear markers for a developmental disorder, but chose to present evidence of Schizotypal Personality Disorder ("SPD"). *Id.* 12 & n.8. A different expert, Dr. Gary Jones, later diagnosed Petitioner with Asperger's Disorder ("Asperger's"), a diagnosis that Petitioner believes defense counsel should have discovered and presented at trial. *Id.* at 11-12; App. to Appl. for Post-Conviction Relief, *Underwood v. State*, No. PCD-2008-604, Ex. 3. Petitioner raised this issue in his application for post-conviction relief. *Underwood v. State*, PCD-2008-604, slip-op. at 3-4. The OCCA found that Petitioner did not suffer prejudice from counsel presenting his SPD diagnosis rather than an Asperger's diagnosis, and denied the claim. *Id.* at 4-5.

The thrust of Petitioner's argument is that Asperger's is a brain condition and developmental disorder as opposed to a personality disorder, like SPD, and therefore holds more mitigating weight with jurors. Petition at 12 n.8, 14. Petitioner's arguments are unpersuasive for several reasons.

First, the similarities between Asperger's symptoms and SPD symptoms make it improbable that the jury would be swayed just by switching the label. Petitioner argues that Asperger's is characterized by "obsessive preoccupations, emotional immaturity, lack of empathy, poor social judgment, and poor impulse control." *Id.* at 13. At trial, the jury heard that SPD is characterized by odd or eccentric thinking, tendency to think about one's self rather than others, poor social skills, and inability to pick up on social cues. Trial Tr. vol. IX, 2181, 2253. The significant overlap shows that the jury would have heard largely the same information, but with a different diagnosis. In fact, two of the defense experts actually mentioned that Asperger's and SPD were similar, and one even testified that although he did not specifically diagnose him with the disease, he actually thought Petitioner may have Asperger's. *Id.* at 2181, 2287. The jury therefore heard that the disorders were very similar and that one expert actually thought Petitioner might have Asperger's. It is unlikely going one step further and diagnosing Petitioner with Asperger's would alter any juror's perspective.

***9** Second, Petitioner's insistence that the jury would have responded more favorably to Asperger's because it is an "organic brain condition" and a developmental disorder is unfounded. The assertion that Asperger's is an "organic brain condition" is unsupported by the record that the OCCA considered.[6] Also, the trial experts referred to SPD as a "developmental disorder," a "neurodevelopmental disorder," and a "brain condition." *Id.* at 2181, 2252-54. While Petitioner argues that these statements by the experts were inaccurate and confusing, the jury heard evidence that Petitioner had a neurodevelopmental disorder or brain condition that produced nearly the same symptoms as Asperger's. Presenting a different developmental disorder and brain

condition would likely have failed to change a juror's mind.

Third, while the Asperger's diagnosis could not have improved the defense's position regarding the continuing threat aggravator—the jury rejected that aggravator—it could have undercut the defense on that point. Dr. Jones detailed Petitioner's lack of remorse and empathy for his young victim. App. to Appl. for Post-Conviction Relief, Ex. 3 at 8. It is apparent to this Court that rather than persuading jurors to spare him, Petitioner's robotic ruthlessness to an innocent child could have precipitated a finding that he posed a continuing threat.

Finally, the overwhelming weight of the evidence supporting the especially heinous, cruel, and atrocious aggravator makes it highly unlikely that substituting Asperger's for SPD would have changed the trial's outcome. This Court agrees with the logic of the Seventh Circuit:

> [T]his was no crime of anger, no quick burst of uncontrollable rage immediately regretted. The lead-up was cold and calculated, at points terrifyingly clinical. [This Court] cannot fathom what could cause one to desire to [murder and violate this] child. Perhaps that is what we simply call "evil." But [this Court is] certain counsel's failure to throw in a few more tidbits from the past or one more diagnosis of mental illness onto the scale would not have tipped it in [Petitioner's] favor."

Eddmonds v. Peters, 93 F.3d 1307, 1322 (7th Cir. 1996).

The OCCA reasonably found that evidence Petitioner suffered from Asperger's would not have altered the outcome of his trial. For the same reason, Petitioner also cannot show any prejudice from appellate counsel's failure to raise that issue on direct appeal. Regarding appellate counsel ineffectiveness claims, the question is whether, absent the appellate counsel's deficient performance, there is a reasonable probability that the petitioner would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). There is no reasonable probability that Petitioner would have prevailed in his appeal by raising a claim that the OCCA denied as meritless in the post-conviction proceeding. [7]

4. Failure to Make Contemporaneous Objections.

The prosecution introduced many photographs and items into evidence in the guilt stage. While defense counsel objected to many items and photographs, counsel did not object to the introduction of a bowl, meat tenderizer, skewers, handcuffs, a plastic Barbie doll head, the narration of a dissection video, and a blood-soaked towel. Petition at 17-18. Defense counsel made a blanket objection to incorporating all the guilt stage evidence into the penalty stage, but did not specify to which exhibits they objected. *Id.* at 18. Petitioner claims that counsel's failure to properly object allowed the jury to consider highly irrelevant and prejudicial evidence. Petitioner raised this claim on direct appeal. *Underwood*, 252 P.3d at 250-51. The OCCA found that any objections to the evidence would have been properly overruled, therefore Petitioner did not suffer any prejudice from defense counsel's failure to object. *Id.*

***10** As discussed further in Ground Seven, the OCCA reasonably found that this evidence was admissible under Oklahoma law. *Infra* pp. 59-63. These items went to Petitioner's intent and state of mind and to corroborate his detailed and damning confession. While the evidence is certainly inflammatory, Petitioner's was the most inflammatory of crimes. In that context, the prejudicial nature of the evidence did not substantially outweigh its probative value. Therefore, Petitioner cannot show prejudice from counsel's failure to object to admissible evidence. *See Hale v. Gibson*, 227 F.3d 1298, 1321-22 (10th Cir. 2000) (no prejudice when trial counsel fails to object to admissible evidence); *see also Savage v. Bryant*, 636 Fed.Appx. 437, 440-41 (10th Cir. 2015) (same); *Haney v. Addison*, 275 Fed.Appx. 802, 806 (10th Cir. 2008) (same). The OCCA reasonably concluded that counsel's failure to raise a meritless objection to admissible evidence did not prejudice the defense. Relief is denied on this issue.

5. Failure to Raise the Claim that the Eighth Amendment Prohibits the Execution of Mentally Ill Persons.

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Petitioner claims that trial counsel was ineffective for not arguing at trial that Petitioner's death sentence would violate the Eighth Amendment because he was mentally ill. Petition at 19. Petitioner raised this claim on direct appeal. The OCCA rejected the claim, holding that any such challenge would have been properly overruled, and therefore Petitioner could not show prejudice. *Underwood*, 252 P.3d at 250-51.

As discussed further in connection with Ground Ten, the Supreme Court has never prohibited the execution of persons who are mentally ill, but not mentally retarded. *Infra* pp. 70-72. Therefore, any claim advancing that theory is meritless. Although counsel may advocate for expanding the meaning of our "evolving standards of decency," this Court cannot find prejudice where counsel opts not to tilt at that particular windmill. *See Dennis v. Poppel*, 222 F.3d 1245, 1261 (10th Cir. 2000). The OCCA's decision was not unreasonable, and relief is denied on that point.

6. Failure to Raise the Gag Order Violation on Appeal.

Petitioner complains that appellate counsel failed to raise two issues on direct appeal related to pretrial publicity. Early in Petitioner's criminal proceedings, the trial court signed an agreed order that the parties would refrain from making extrajudicial statements regarding the case. O.R. 1 at 33. Later, in response to concerns that the press was disseminating the filed pleadings in the case to the public, the trial court ordered that any filing containing sensational material or that could "lend itself to sensational type of headlines" would be filed under seal. In Camera Hr'g Tr. 12-13, Aug. 30, 2007. In spite of that order, the State publicly filed a "Second Supplemental Notice of Intent to Offer Victim Impact Evidence," which contained Curtis Bolin's proposed victim impact testimony about Miss Bolin. O.R. 5 at 988-90. Also, some of the trial court's ruling on Petitioner's motion to suppress was leaked to the media, although the ruling itself was filed under seal. O.R. 7 at 1212-19; Hr'g Tr. 2-3, Feb. 13, 2008. Trial counsel moved to strike the Bill of Particulars based partially on these issues. O.R. 7 at 1238, 1272, 1327-30. The trial court did not strike the Bill. O.R. 8 at 1435. Appellate counsel did not raise this issue on direct appeal. Petition at 20-21.

In his post-conviction proceeding, Petitioner claimed that appellate counsel was ineffective for not raising the leak of the suppression order on direct appeal. *Underwood*, PCD-2008-604, slip op. at 5. The OCCA denied the claim because there was no evidence of how the leak occurred, and Petitioner offered no explanation for how the leak affected his ability to receive a fair trial. *Id.* at 5-6. Petitioner never challenged the trial court's handling of the victim impact notice in either on direct appeal or in post-conviction proceedings.

***11** A petitioner can show deficient performance based on appellate counsel's failure to raise certain claims on appeal when "the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal." *Upchurch v. Bruce*, 333 F.3d 1158, 1163 (10th Cir. 2003) (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003)). If appellate counsel fails to raise a claim that has some merit, but is not compelling, courts must view the issue in light of the rest of the appeal, and give deference to counsel's professional judgment. *Id.* at 1163-64. There is no deficient performance for omitting meritless claims. *Id.* at 1164.

Appellate counsel cannot be faulted for not challenging the victim impact notice issue on appeal. [8] The trial court's gag order related to "sensational" material, but the victim impact notice only included information about Curtis Bolin's grief and his relationship with the victim. O.R. 5 at 988-90. While certainly emotional, that information is not the type of "sensational" information the trial court sought to restrict. Instead, the trial court intended to avoid publicity about the lurid details of the crime. The victim impact testimony did not relay any such information, and was not the type of information that would undermine Petitioner's right to a fair jury. Petitioner cannot show that appellate counsel's failure to raise that losing proposition prejudiced his appeal.

Petitioner's claim likewise fails regarding the leaked information. Petitioner claims that the leaked evidence was "highly inflammatory" because it contained "vivid details." Petition at 21. But the pertinent facts contained in the media report at issue were that Petitioner's incriminating statements could be admitted into evidence, that Petitioner was charged with Miss Bolin's murder as part of a cannibalistic plot, and that the search that uncovered Miss Bolin's body was legal. Hr'g Tr. 13-14, Feb. 13, 2007. The only "inflammatory" or "vivid" facts

were the reference to the cannibalistic plot. But that information was already in the public realm through the State's More Definite and Certain Statement Regarding Bill of Particulars, which preceded the gag order. O.R. 4 at 612-16. Reporting on a legal ruling, while certainly concerning when that ruling was filed under seal, did not give appellate counsel a meritorious issue that would be unreasonable to omit. The OCCA's denial was not unreasonable.

7. Failure to Rebut Dr. Meloy's Testimony.

Petitioner claims that trial counsel failed to rebut Dr. Meloy's testimony that neuroimaging testing was necessary to confirm Petitioner's diagnoses. Petition at 21. Petitioner also claims that trial counsel did not challenge Dr. Meloy's claim that trial counsel knew the testing was necessary, even though Dr. Meloy agreed in his report that there was no need for such testing. *Id.* at 21-22. Petitioner says that this testimony allowed the prosecution to argue in closing that the testing was omitted on purpose to protect a suspect diagnosis. *Id.* at 21-23. Petitioner raised the claim on direct appeal. *Underwood*, 252 P.3d at 253-54. The OCCA denied the claim, finding that Dr. Meloy's testimony did not affect the outcome of the trial because Dr. Meloy did not disagree with Petitioner's diagnoses. *Id.* at 254. [9] Also, although Dr. Meloy testified in support of the continuing threat aggravator, the jury actually rejected that aggravator. *Id.*

***12** Petitioner fails to show that the OCCA's ruling was unreasonable. Trial counsel established through testimony that Dr. Meloy was not a psychiatrist or a neuropsychologist. Trial Tr. vol. X, 2458. Dr. Meloy admitted that he would defer to the other experts' diagnoses. *Id.* at 2471-72. The main disagreement between Dr. Meloy and Petitioner's experts was whether Petitioner presented a continuing threat to society. And even though the prosecution certainly argued that Dr. Meloy's testimony cast doubt on the diagnoses, the jury's rejection of the continuing threat aggravator indicates that they were not moved by Dr. Meloy's testimony or the prosecutor's argument. Fair-minded jurists would not likely agree that there is a reasonable probability that the failure to rebut Dr. Meloy's testimony prejudiced the defense. [10] Relief is denied on that issue.

8. Failure to Rebut Assistant Medical Examiner's Testimony.

Petitioner claims that trial counsel was ineffective for not offering a forensic pathologist to rebut assistant medical examiner Dr. Yacoub's testimony regarding the victim's autopsy. Petition at 23-24. Trial counsel had retained a forensic pathologist, Dr. Adams, to review Dr. Yacoub's work, but never called him as a witness. *Id.* at 24. Petitioner complains that Dr. Adams could have rebutted key parts of Dr. Yacoub's testimony, including insinuations that Miss Bolin was alive while Petitioner partially decapitated and sexually assaulted her. *Id.* Petitioner raised trial counsel's failure to call Dr. Adams as an issue on direct appeal. *Underwood*, 252 P.3d at 251. The OCCA found that there were sound strategic reasons for trial counsel's decision not to call Dr. Adams, and that the decision did not prejudice the defense. *Id.* at 253.

During the guilt stage, Dr. Yacoub testified that Miss Bolin died of asphyxiation. Trial Tr. vol. VII, 1801. In the course of Dr. Yacoub's testimony, she gave details about the cut on Miss Bolin's neck, the air embolism in her brain, and the bruising of her genital area. *Id.* at 1769-78, 1786-91. Dr. Yacoub testified that the presence of food in Miss Bolin's airway indicated that she lacked the reflex to cough and remove food from the airway. *Id.* at 1773. Dr. Yacoub agreed it was likely that Miss Bolin was unconscious, that food came up into her airway, and she was unable to cough to clear her throat. *Id.* at 1773-74. Dr. Yacoub also testified that the air embolism in the brain could have occurred by introducing air into the blood vessels either pre-or postmortem. *Id.* at 1777.

Dr. Yacoub discussed tears on the outside of Miss Bolin's vagina, and a red mark inside her cervix. *Id.* at 1787. Dr. Yacoub testified that she could not tell if the mark inside the cervix was a contusion or just postmortem lividity. *Id.* Dr. Yacoub opined that since the outside marks were red instead of pale, the injuries were possibly inflicted while Miss Bolin was alive, dying, or immediately after she died. *Id.* at 1791. If the inside mark was a contusion, Dr. Yacoub said the same conclusion applied. *Id.*

On cross examination, Dr. Yacoub admitted that the fracture of Miss Bolin's hypoid bone, located in the upper part of the neck, was probably inflicted postmortem. *Id.*

at 1806-08. Dr. Yacoub also admitted that Miss Bolin could have been deceased when Petitioner cut her throat. *Id.* at 1811-12. Dr. Yacoub agreed that she could not scientifically tell when Miss Bolin became unconscious. *Id.* at 1818-19.

***13** Defense counsel accomplished a great deal on cross examination. While Dr. Yacoub certainly introduced the possibility that Miss Bolin was alive while Petitioner cut her throat and sexually assaulted her, that possibility was qualified as just one of several other scenarios. Yacoub freely admitted on cross-examination that it was possible Miss Bolin was deceased when those events occurred. And defense counsel elicited Yacoub's admission that she could not say with any certainty that Miss Bolin was conscious at that time. Defense counsel emphasized that Miss Bolin was at least not conscious, and possibly dead. At most, Dr. Adams would have added that she was definitely deceased. But a critical question for the jury in deciding whether the murder was especially heinous, atrocious, or cruel was whether Miss Bolin was conscious or unconscious, not whether she was deceased. Counsel ably addressed that issue through cross-examination, and Dr. Adam's further testimony would not have yielded a significant strategic benefit.

Dr. Adams' testimony could, however, present a problem for Petitioner's case. One of Petitioner's mitigating circumstances stated that he was cooperative with the police and confessed to the murder. O.R. 8 at 1492. Part of that confession was that he did not penetrate Miss Bolin postmortem, but only rubbed the tip of his penis on her vagina. State's Ex. 162 at 68. But Dr. Adams' report unequivocally shows that some object did penetrate Miss Bolin's vagina, causing tearing of the hymen. Appl. for Evidentiary Hr'g, Ex. A at 6. Trial counsel likely would not want to confirm for the jury that Petitioner concealed the extent to which he sexually assaulted his victim. Counsel could have reasonably assumed that regardless of whether Miss Bolin was alive or dead, the jury would not only find that Dr. Adams' testimony undermined the mitigating circumstances, but confirmed that Petitioner's actions were more abominable than even his gruesome confession revealed. The OCCA found that counsel acted reasonably when faced with the marginal benefit and the possible detriment of presenting Dr. Adams. This Court cannot find that determination unreasonable.

9. Conclusion.

The OCCA found that the challenged actions of trial and appellate counsel were either reasonable, or that the actions did not prejudice the defense. After a careful review of the materials and record that the OCCA considered, this Court concludes that the OCCA's determinations are not contrary to, or unreasonable applications of, existing federal law. Relief is denied as to Ground One.

B. Ground Two: Trial Court's Failure to Dismiss Three Jurors for Cause.

The trial court conducted individual *voir dire* on the issue of the death penalty and pretrial publicity and then conducted general *voir dire.* Trial Tr. vol. I, 54-vol. V, 1246. Petitioner challenged three prospective jurors for cause, but the trial court allowed those three to stay on the jury panel. Petition at 27. Petitioner then used three of his nine peremptory challenges to remove those jurors. *Id.* As a result, Petitioner claims that three other objectionable jurors remained on the panel, making his jury not impartial. *Id.* at 27, 39. The OCCA denied this claim on direct appeal. *Underwood*, 252 P.3d at 240-42. The OCCA held that the trial court did not abuse its discretion in not excusing the three jurors for cause, and found that Petitioner's use of peremptory challenges to remove those jurors did not violate any constitutional or statutory right. *Id.* at 241-42. [11]

1. Clearly Established Law.

***14** The right to a jury trial requires that criminal defendants be tried by a panel of impartial jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Jurors need not be totally ignorant of the facts and issues involved, but must be able to "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." *Id.* at 722-23. The trial court determines juror impartiality, and those determinations are findings of fact. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). The trial court evaluates prospective jurors' demeanor and credibility, which are important considerations apart from the cold record of questions and answers. *See Uttecht v. Brown*, 551 U.S. 1, 7-8 (2007). When faced with ambiguity in a prospective juror's statements, the trial court is free to resolve that

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ambiguity in favor of the State. *Id.* at 7. Reviewing courts therefore owe deference to a trial court's decision to excuse or not excuse a juror for cause. *Id.* This deference is added to the already "independent, high standard" for habeas review under the AEDPA. *Eizember v. Trammell*, 803 F.3d 1129, 1135-36 (10th Cir. 2015).

Due process requires an impartial jury, but does not mandate specific methods to achieve one. *Brown v. New Jersey*, 175 U.S. 172, 176 (1899). Due process does not protect the "meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal trial.' " *Rivera v. Illinois*, 556 U.S. 148, 157-58 (quoting *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967)). Because there is no freestanding right to peremptory challenges, those challenges only raise due process concerns if a defendant receives fewer than state law affords, or if jurors on the panel would be removable for cause, creating a non-impartial jury. *United States v. Martinez-Salazar*, 528 U.S. 304, 316-17 (2000).

2. Analysis.

In spite of Petitioner's in-depth discussion of jurors Sanderson, Bettes, and Thompson, this Court need not decide whether they should or should not have been excluded for cause, as they ultimately did not sit on the jury panel. *See Ross v. Oklahoma*, 487 U.S. 81, 86 (1988). Instead, this Court must determine whether Petitioner received the number of peremptory challenges provided for by Oklahoma law, and whether the jury that actually decided Petitioner's case was impartial.

Oklahoma law provides parties nine peremptory challenges each in first degree murder cases. OKLA. STAT. tit. 22, § 655. Petitioner received and used nine peremptory challenges. Trial Tr. vol. V, 1258-1260. Petitioner argues, based on OCCA precedent, that he was entitled to more peremptory challenges because he had to use three challenges on Jurors Sanderson, Bettes, and Thompson, forcing him to keep three other "unacceptable jurors." Petition at 41. But supposed "errors of state law do not automatically become violations of due process," and it is the State's prerogative to determine whether jury composition is proper under state law. *Rivera*, 556 U.S. at 160-61. In this case, the OCCA found that Petitioner's use of peremptory challenges to remove jurors Sanderson, Bettes, and Thompson "did not violate any constitutional or statutory rights." [12] *Underwood*, 252 P.3d at 242. It is the OCCA's prerogative to rule on that underlying state law issue. Any good-faith error on the state courts' part "is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws." *Rivera*, 556 U.S. at 157.

Petitioner argues that he does present a federal constitutional concern because the three "objectionable" and "unacceptable" jurors he could not remove undermined his jury's impartiality. Petition at 27, 39-40. But Petitioner fails to show that the jurors on his panel were not impartial.

***15** Petitioner claims that Juror Baldwin "indicated" that he would automatically impose the death penalty when a law enforcement officer was killed. *Id.* at 40. The Court is unsure what Petitioner means by "indicated," as the record clearly shows that Baldwin only believed that the death penalty *could* be appropriate in that situation, and explicitly corrected defense counsel's suggestion that he favored an automatic death penalty for such an act. Trial Tr. vol. I, 147-48. Even accepting Petitioner's incorrect version of facts, the trial court could have reasonably found that Baldwin would still be impartial in Petitioner's case, as there was no law enforcement victim.

Petitioner's complaint about Juror Amber Garrett stems from her reliance on biblical principles for her decision-making. Petition at 40. Petitioner claims that Garrett's answer presented a danger that she would ignore the court's instructions and instead base her decision on "God's law." *Id.* This argument fails for two reasons. First, Garrett unequivocally stated multiple times that she could consider all three punishments and would follow the law. Trial Tr. vol. II, 294-95, 298-99, 305-06. Second, the answer that troubles Petitioner was given in response to a question of whether a sermon at church could sway her belief that the death penalty was a valid punishment. *Id.* at 300-301. Garrett responded that she was a Christian and lived by biblical principles, but she would not base her view of the death penalty solely on what a pastor said. *Id.* at 301. The question and answer were in the context of religious reservations about the death penalty, and how Garrett would personally reconcile her religious beliefs with her beliefs about the death penalty. The answer does not indicate that she would disregard the court's instructions based on her reading of the Bible.

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Finally, Petitioner claims that Juror Williams would not give full consideration to all the sentencing options. Petition at 40. Petitioner bases that claim on two of Williams' answers, where he leaned towards always imposing the death penalty when the crime involved a defenseless victim. Trial Tr. vol. II, 438-39. But once the parties explained the process of a capital murder trial, including the concept of aggravating and mitigating circumstances, Williams affirmed that he could consider all of the punishments. *Id.* at 440-41, 443-45, 449-51. At worst, Williams' answers raised mere ambiguity, which the trial court could resolve in favor of the State. It is telling that the trial court never faced that dilemma because Petitioner never challenged Williams for cause.

Petitioner received the nine peremptory challenges that Oklahoma law provided, and fails to show that his jury was not impartial. Therefore, the OCCA's finding that the loss of peremptory challenges did not violate Petitioner's constitutional rights is not unreasonable. Relief is denied as to Ground Two.

C. Ground Three: Juror Dishonesty.

Petitioner claims that he was denied an impartial jury because Juror Earl Garrett failed to disclose several encounters with the legal system. Petition at 43-45. Through the initial juror questionnaire and general *voir dire*, Garrett shared several of his experiences with the legal system, but did not reveal that he was once involved in a contentious civil suit that resulted in a bar complaint, charges against another party for harassing phone calls, and complaints that Garrett engaged in harassing behavior. *Id.* at 43-44. Garrett also failed to mention that his boat repair shop was twice burglarized and that his wife and daughter were victims of violent crimes. *Id.* at 44. Finally, Petitioner claims that Garret did not disclose a 1979 felony charge for receiving stolen property. *Id.*

***16** Petitioner raised this issue in a motion for new trial before the OCCA, arguing that Garrett was dishonest in his answers, and that honest answers would have shown his implied bias against Petitioner. *Underwood*, 252 P.3d at 254; Petition at 45. The OCCA denied the motion, finding that Petitioner failed to show that Garrett would have been removable for bias, therefore the omissions were not material to Petitioner's ability to receive a fair trial. *Id.* at 256-57. [13]

1. Clearly Established Law.

Voir dire is the mechanism for securing a jury "capable and willing to decide the case solely on the evidence before it." *Gonzales v. Thomas*, 99 F.3d 978, 983 (10th Cir. 1996) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). "The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). A party can therefore obtain a new trial by showing that "a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. Only intentional falsehoods satisfy the first part of the test, as opposed to honest but mistaken responses. *Id.* at 555.

If a juror intentionally answers a *voir dire* question dishonestly, the challenging party must show that an honest response would support a valid challenge for cause. *Id.* at 556. One valid reason to challenge a juror is implied bias. *Gonzales*, 99 F.3d at 985-86. Whether a juror is impliedly biased is a legal determination "that turns on an objective evaluation of the challenged juror's experiences and their relation to the case being tried." *Id.* at 987. The implied bias doctrine is "reserved for those 'extreme and exceptional' circumstances that 'leave serious question whether the trial court ... subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.' " *Id.* (quoting *Smith*, 455 U.S. at 222 & n* (O'Connor, J., concurring)). While courts may consider the juror's dishonesty in determining bias, it is just one factor. *Id.* at 989.

Implied bias exists where a juror is employed by the prosecuting agency, is closely related to a participant of the trial or criminal transaction, or was a witness or otherwise involved in the criminal transaction. *Id.* at 987. Similarities between the juror's experience and the facts giving rise to the trial also indicate implied bias. *Id.* However, the similarities must be more than a superficial resemblance, and even a showing that the juror was the victim of the same crime for which the defendant is on trial is insufficient to establish implied bias. *See id.* at 989-90 (rape victim is not, as a matter of law, incapable of being impartial on a rape trial).

2. Analysis.

It is a close issue of whether Garrett intentionally failed to disclose the additional information. But rather than grapple with that question, this Court can resolve this claim by concluding that the OCCA reasonably found that even if Garrett gave complete answers, there would be no grounds for removing him for implied bias. Complete answers would have shown that Garrett was involved in a contentious civil case, that his boat repair shop was burglarized twice, and that his wife and daughter were victims of violent crime. Petition at 43-44. [14] None of these facts show implied bias.

***17** First, none of those answers connect Garrett to a party, the prosecuting agency, or the criminal transaction. Second, there are no similarities between Garrett's experiences and Petitioner's crime. The closest nexus is the fact that Garrett's wife and daughter were victims of violent crime. But those incidents are too dissimilar to create the extreme and exceptional circumstances needed to invoke implied bias. Garrett's wife was physically abused in 1997 and his stepdaughter experienced screaming threats and an attempt to run her off the road. Mot. for New Trial, *Underwood v. State*, No. D-2008-319, Exs. 17, 18. The only similarity between those crimes and Petitioner's is the violence against females. Those experiences do not establish implied bias.

Petitioner hangs his implied bias claim on two arguments: Garrett was dishonest, and Garrett had a colorful legal history that made him look bad. Petition at 47. Assuming that Garrett was actually dishonest, that fact alone is insufficient by itself to establish that Garrett was biased. *See Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998) (finding that a juror is impliedly biased just from a dishonest response would eradicate *McDonough's* second prong). And Garrett's extensive experiences with the legal system do not automatically render him incapable of serving on a jury. Neither argument persuades this Court that the OCCA's decision was unreasonable. Relief is denied as to Ground Three.

D. Ground Four: Sentence Recommendations By Victim's Family.

Miss Bolin's father and mother both gave victim impact testimony in the penalty stage and recommended a death sentence. Trial Tr. vol. VIII, 1946-54. Petitioner claims that the sentence recommendations violated the Eighth and Fourteenth Amendments. Petition at 48. The OCCA denied this claim on direct appeal, holding that the testimony was appropriate when limited to a simple, unamplified statement recommending punishment. *Underwood*, 252 P.3d at 248.

1. Clearly Established Law.

The Supreme Court at one time prohibited testimony by a murder victim's family that "described the personal characteristics of the victims and the emotional impact of the crimes on the family," and gave "family members' opinions and characterizations of the crimes and the defendant." *Booth v. Maryland*, 482 U.S. 496, 502-03, 509 (1987). The Supreme Court later reversed *Booth* in part, and found that the first category (characteristics of the victims and the impact on the family) was admissible. *Payne v. Tennessee*, 501 U.S. 808, 830 & n.2 (1991). But *Payne* did not open the door for family members to give their opinions regarding the crimes and the defendant. *Selsor v. Workman*, 644 F.3d 984, 1026 (10th Cir. 2011). Therefore, victim impact testimony that provides a punishment recommendation for a capital defendant violates the Eighth Amendment. *Id.* at 1026-27. Since Respondent concedes the violation in this case, this Court need only determine if the violation was harmless.

2. Harmless Error.

When the state court did not address an error, this Court must determine if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Fry v. Pliler*, 551 U.S. 112, 116, 121-22 (2007) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). This test lets habeas petitioners obtain plenary review, but only allows relief if the error caused "actual prejudice." *Brecht*, 507 U.S. at 637. But an "error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* at 634. To grant relief, the reviewing court must have grave doubts as to the error's effect on the verdict, and if the court is in "virtual equipoise as to the harmlessness of the error," the court should "treat the error...as it affected the verdict." *Selsor*, 644 F.3d at 1027 (quoting *Fry*, 551 U.S. at 121 n.3).

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***18** The Tenth Circuit considers the (1) quantity and nature of the recommendations, (2) limiting instructions regarding victim impact testimony, (3) the surety of guilt, and (4) the overwhelming evidence in support of aggravating circumstances when weighing whether a sentence recommendation was harmless. *See Dodd v. Trammell*, 753 F.3d 971, 997-98 (2013); *Grant v. Trammell*, 727 F.3d 1006, 1016-17 (10th Cir. 2013); *Lockett v. Trammell*, 711 F.3d 1218, 1238-39 (10th Cir. 2013); *Lott*, 705 F.3d at 1219; *Selsor*, 644 F.3d at 1027; *Welch v. Workman*, 639 F.3d 980, 1003-04 (10th Cir. 2011).

The Tenth Circuit has only reversed one death sentence due to sentence recommendations by family members. In *Dodd*, the Tenth Circuit found itself in "grave doubt about the effect of the error on the jury's sentencing decision" for several reasons. 753 F.3d at 999 (quoting *Lockett*, 711 F.3d at 1232). First, six or seven of the prosecution's eight penalty phase witnesses recommended death, creating a "drumbeat" in support of the death penalty. *Id.* at 997. Second, the jury did not find either the heinous, atrocious, or cruel aggravator or the continuing threat aggravator. *Id.* at 998. The aggravators the jury did find added "little beyond the findings of guilt." *Id.* Finally, the defendant's guilt was not clear cut, and the case was circumstantial. *Id.* Those factors led the Tenth Circuit to find that the error was not harmless. *Id.* at 999.

3. Analysis.

This case is no *Dodd*. The factors that the Tenth Circuit has identified weigh in favor of harmless error here. First, the sentence recommendations were minimal and noninflammatory. Miss Bolin's father merely referenced the death penalty when asked if he had a punishment recommendation. Trial Tr. vol. VIII, 1954. Her mother only said "the death penalty. I don't have my little girl." *Id.* at 1950. These recommendations were brief and mild compared to the drumbeat in *Dodd*. Second, the judge instructed the jury regarding the weight and use of victim impact testimony. O.R. 8 at 1499. Third, guilt in this case was so clear that the defense informed the trial court that they would not seriously contest guilt. Trial Tr. vol. I, 48-53. Unlike the circumstantial case in *Dodd*, the jury heard Petitioner's graphic confession to the crime at issue.

Fourth, the prosecution presented overwhelming evidence supporting the especially heinous, atrocious or cruel aggravator. The jury heard that Petitioner violently beat the minor victim with a cutting board as she screamed for him to stop. State's Ex. 162 at 61. He tried to smother her with his bare hands, avoiding quick strangulation to keep her body "perfect." *Id.* at 62. He struggled to kill her for fifteen to twenty minutes as she fought desperately to escape and he became sexually aroused in the process. *Id.* at 63-64.

Petitioner attempts to counter this damning evidence by pointing out that the jury rejected the continuing threat aggravator. But as *Dodd* recognized, the especially heinous, atrocious, or cruel aggravator is a vital one, so much so that the Tenth Circuit has found a sentence recommendation harmless although the jury only found that single aggravator. *See Willingham v. Mullin*, 296 F.3d 917, 931(10th Cir. 2002). And not only is that vital aggravator well-supported by the evidence, the jury also heard significant evidence to support the prosecution's theory that Petitioner posed a continuing threat. While the jury ultimately rejected the continuing threat aggravator, the evidence certainly weighed in favor of the death penalty and therefore is relevant to this Court's harmless error analysis. [15] *See Selsor*, 644 F.3d at 1027.

***19** Petitioner's further arguments about jury holdouts, the time of deliberation, and the jury's note are immaterial. Even if this Court were inclined to credit the hearsay testimony regarding what happened in the deliberations, there is no evidence that the recommendations played any significant role in the jury's decision. The length of deliberation likewise provides no insight into the recommendations' effects. The jury sorted through significant evidence, including substantial expert testimony regarding the continuing threat aggravator. This Court cannot divine what caused the lengthy deliberation, and will not find fatal error based on speculation. And the note does not suggest prejudice, as "the jury was left with the same choices with which it began—death, life without parole, or life." *See Welch*, 639 F.3d at 1003.

The brief and unadorned nature of the victim testimony, the trial court's limiting instruction, and overwhelming evidence for both guilt and the especially heinous, atrocious, or cruel aggravator all assure this Court that the punishment recommendations did not have a substantial and injurious effect on the jury's determination

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of Petitioner's death sentence. Relief is denied as to Ground Four.

E. Ground Five: Prosecutorial Misconduct.

Petitioner claims that the prosecutors violated his Fifth Amendment rights by (1) giving misguided explanations of the law; (2) undermining the presumption of innocence; (3) arguing facts not in evidence; (4) engaging in convincing theatrics; (5) manipulating a jury instruction; (6) impugning the defense experts' diagnoses; (7) misrepresenting evidence; (8) advocating for juror sympathy; and (9) giving their personal opinions on the appropriate punishment. Petition at 54-67. Petitioner raised prosecutorial misconduct claims on direct appeal regarding the presumption of innocence, arguing facts not in evidence, engaging in theatrics, and giving personal opinions about punishment. *Underwood*, 252 P.3d at 249-50. The OCCA did not find those actions improper and denied relief. *Id.*

Petitioner also argued on appeal that the prosecution manipulated the jury instruction defining mitigating circumstances. *Id.* at 244-45. But that argument arose in context of Petitioner's claim that the jury instruction itself was infirm. *Id.* Petitioner did not raise the issue as a separate misconduct claim. The OCCA upheld the instruction as proper. *Id.* at 245. As a factor in that decision, the OCCA noted that the prosecutor's arguments did not encourage the jury to ignore mitigating circumstances. *Id.* The factual bases for the remaining claims appear in various places in the state court record, but Petitioner did not raise them as prosecutorial misconduct claims until this proceeding.

1. Unexhausted Claims.

Before bringing a habeas action, petitioners must generally first exhaust their claims by "fairly presenting" them in state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b)(1)(A). A petitioner need not provide "book and verse on the federal constitution," but they must go beyond simply presenting the facts supporting the federal claim or articulating a "somewhat similar state-law claim." *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006) (quoting *Picard*, 404 U.S. at 278, and *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Instead, the petitioner must have raised the substance of the federal claim in state court. *Id.*

Two cases from the Tenth Circuit illustrate the scope of fair presentation. In *Hawkins v. Mullin*, 291 F.3d 658, 668 (10th Cir. 2002), the petitioner prohibited his trial counsel from presenting mitigating evidence. In his state court appeal, the petitioner attacked the trial court for respecting his wishes and barring trial counsel from presenting mitigating evidence. *Id.* at 668-69. The only ineffectiveness claim that the petitioner raised on appeal dealt with trial counsel's failure to challenge the trial court's jurisdiction. *Id.* at 669. In his habeas petition, petitioner raised a new ineffective assistance of counsel claim, arguing that trial counsel was ineffective for not investigating and presenting mitigating evidence. *Id.*

***20** The Tenth Circuit found that the petitioner did not exhaust his ineffective assistance of counsel claim regarding the presentation of mitigating evidence, because while he challenged the trial court's actions in state court, his habeas claim targeted his counsel's actions. *Id.* The Tenth Circuit also found that the petitioner's presentation of other ineffectiveness claims on direct appeal did not exhaust his "significantly different federal habeas claim ...." *Id.*

In *Bland v. Sirmons*, 459 F.3d 999, 1011-12 (10th Cir. 2006), the petitioner presented a prosecutorial misconduct claim in state court based on the prosecutor's mischaracterization of a jury instruction, while conceding that the instruction itself was proper. Yet in his habeas petition, the petitioner challenged the instruction instead. *Id.* The petitioner argued that he exhausted the instruction claim because the state appeals court examined and approved the jury instructions. *Id.* at 1012. But the Tenth Circuit held that the state court's finding on that point dealt with whether the prosecutor's comments caused the jury to disregard the trial court's instructions. *Id.* at 1012. The Tenth Circuit found that a "challenge to the actions of the prosecution differs significantly from a challenge to the instructions given by the court," and the "somewhat similar" claim was not fairly presented to the state court. *Id.* These cases are instructive in considering Petition's claims here.

i. *Issue A: Prosecutors gave misguided explanations of law.*

First, Petitioner claims that prosecutors misguided the jury on what "full consideration" of punishments meant. Petition at 55-56. The prosecutor explained that full consideration meant more than the type of cursory consideration a person that hates Brussels sprouts would give that vegetable in a buffet line. Trial Tr. vol. I, 60. The prosecutor said that while the person might have technically "considered" the Brussels sprouts, they decided not to pick them. *Id.*

The only time that Petitioner mentioned Brussels sprouts on direct appeal was within his juror claim. Br. of Appellant, 50, *Underwood v. State*, No. D-2008-319. Petitioner did not challenge the analogy, but only complained that Juror Sanderson's answer, which referred to the analogy, did not indicate that she would give fair consideration to all punishment options. *Id.* Petitioner did not fairly present a prosecutorial misconduct claim based on the analogy.

ii. *Issue E: Prosecutors manipulated a jury instruction.*

Petitioner claims that prosecutors manipulated the jury instruction defining mitigating circumstances. Petition at 60. In state court, Petitioner claimed that the jury instruction itself was infirm. Br. of Appellant at 64. Within that claim, Petitioner argued that the prosecution exploited the instruction to denigrate the mitigating evidence. *Id.* at 65-67, 69-70. Petitioner never raised a prosecutorial misconduct claim on that issue, although he appealed on other misconduct claims.

Two principles from *Bland* and *Hawkins* convince this Court that Petitioner did not fairly present this claim to the OCCA. First, just as in *Bland* and *Hawkins*, Petitioner's claims are directed at two different types of errors. Petitioner challenged the trial court's actions on direct appeal, but attacks the prosecution in seeking habeas relief. The facts supporting both claims were presented on direct appeal, but the claims are still distinct. Second, Petitioner raised other prosecutorial misconduct claims on direct appeal but omitted this specific claim. In *Hawkins*, the Tenth Circuit specifically noted that while the defendant raised one ineffectiveness claim in state court, he did not raise the claim that he presented in his habeas action. The same is true here. Petitioner explicitly brought some prosecutorial misconduct claims but omitted this specific claim, therefore this Court cannot say that Petitioner fairly presented this misconduct claim.

iii. *Issue G: Prosecutors misrepresented evidence.*

***21** Petitioner claims that the prosecutors misrepresented evidence regarding the necessity of neuroimaging to confirm some of the experts' diagnoses. Petition at 64. While Petitioner discussed the questions and answers regarding neuroimaging at length on direct appeal, it was within his ineffective assistance of counsel claim. Appl. for Evidentiary Hr'g at 41-44. Like the claims above, Petitioner changed targets, despite relying on the same facts. Petitioner challenged defense counsel on direct appeal, but now he zeroes in on the prosecution. And again, Petitioner did not raise this claim with his other prosecutorial misconduct claims on direct appeal. This claim is not exhausted.

iv. *Issue H: Prosecutors advocated for juror sympathy.*

Petitioner complains that the prosecutors compared Petitioner's plight to the plight of the victim's family in an attempt to elicit juror sympathy. Petition at 65. Specifically, the prosecutor asked during closing argument, "How does that, the fact that you have family and friends, reduce your blame for a crime? Jaime Bolin has a family and friends who loved her, who thought her life had meaning, and they visit a grave." *Id.* While Petitioner challenged this statement on direct appeal, he raised it in his jury instruction claim. Br. of Appellant at 66. Petitioner cannot repackage this quote as a new claim when the state court never had a chance to address it in the proper legal context. The closest that Petitioner came to raising this claim on direct appeal was one sentence in his prosecutorial misconduct claim, in which he argued that the prosecution urged the jury to impose the death penalty out of sympathy. *Id.* at 90. But that sentence contains no discussion, no citation to the offending statement, and is an unadorned allegation tacked on the end of a claim that prosecutors injected their personal opinions into closing arguments. Petitioner did not fairly present the claim to the OCCA.

1. Procedural Bar.

Petitioner has not fulfilled the exhaustion requirements of the AEDPA on these four claims. [16] Generally, federal courts will dismiss unexhausted claims without prejudice and allow the petitioner to raise the claim in state court. *Bland*, 459 F.3d at 1012. But when the state court would find the claim procedurally barred under an independent and adequate procedural bar, "there is a procedural default for purposes of federal habeas review." *Id.* Oklahoma does not allow defendants to bring applications for post-conviction relief on issues that a petitioner could have raised "previously in a timely original application or in a previously considered application...." OKLA. STAT. tit. 22, § 1089(D)(8). Petitioner's unexhausted claims arise from the trial court record. Petitioner could have raised the claims either on direct appeal or in his application for post-conviction relief, but failed to do so. Oklahoma law would bar those claims.

The Petitioner attacks the independence and adequacy of Oklahoma's procedural bar based on *Valdez v. Oklahoma*, 46 P.3d 703 (Okla. Crim. App. 2002). Petition at 99-100. Petitioner claims that since *Valdez* gives the OCCA discretion to decide whether to apply the procedural bar, the OCCA necessarily considers the underlying merits of any federal claims before applying the bar. *Id.* Petitioner also argues that this discretion causes the bar to be applied inconsistently. *Id.* at 99. The Tenth Circuit has rejected these arguments several times in recent years. *See Fairchild v. Trammell*, 784 F.3d 702, 719 (10th Cir. 2015); *Banks*, 692 F.3d at 1145-46; *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012). Oklahoma's procedures are both adequate and independent.

***22** Contrary to Petitioner's arguments, appellate counsel ineffectiveness cannot excuse the default. Ineffective assistance of appellate counsel can only serve as cause if the defendant raised that ineffective assistance claim in state court. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Petitioner did not raise appellate ineffectiveness based on omitted prosecutorial misconduct claims in his post-conviction proceeding. Any attempt to raise that ineffectiveness claim in a second post-conviction proceeding would be procedurally barred, as the grounds for that claim would have been apparent at the time the appellate brief was filed. Since appellate counsel ineffectiveness cannot establish cause to excuse the default of the unexhausted prosecutorial misconduct claims, those claims are denied as procedurally barred. [17]

2. Exhausted Claims

Petitioner did fairly present several prosecutorial misconduct claims to the OCCA. Petitioner argues that the OCCA unreasonably rejected those claims.

i. *Clearly established law.*

Prosecutors can advocate with earnestness and vigor, and are allowed to strike hard blows. *Berger v. United States*, 295 U.S. 78, 88 (1935). But prosecutors may not strike foul blows. *Id.* The line between hard and foul is an uncertain one, and even the Supreme Court has admitted that "there is often a gray zone." *United States v. Young*, 470 U.S. 1, 8 (1985). To resolve prosecutorial misconduct claims, courts must first determine whether misconduct even occurred.

If prosecutorial misconduct occurs, it ordinarily warrants habeas relief only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002). This analysis considers the trial as a whole, and factors in the strength of the evidence, cautionary steps to counteract improper remarks, and defense counsel's failure to object. *Id.* The determination of whether the misconduct rendered the trial fundamentally unfair "essentially duplicate[s] the function of harmless-error review." *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003). If the misconduct deprives a defendant of a specific constitutional right, however, proof that the entire proceeding was unfair may not be necessary. *Paxton v. Ward*, 199 F.3d 1197, 1218 (10th Cir. 1999).

ii. *Analysis.*

Petitioner claims that the prosecution undermined the presumption of innocence during *voir dire* by implying that he was not actually innocent, just presumed innocent. Petition at 57. During general *voir dire*, the trial court instructed the jury on the meaning of the

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presumption of innocence, and asked the jury if they were willing to presume Petitioner innocent. Trial Tr. vol. V, 1082-83. Later in *voir dire*, the prosecutor discussed the presumption of innocence, and told the jury that if they had to reach a verdict right then, without hearing any evidence, the verdict would have to be not guilty. *Id.* at 1163-64. The prosecutor explained that the presumption is just a presumption, and that it "doesn't mean that he's actually innocent." *Id.* at 1164. To illustrate, the prosecutor said that even if a bank robber is caught in the bank, wearing a mask, carrying a gun, and holding the marked bills he had stolen, he is still presumed innocent. *Id.* The prosecutor then told the jury that to "erase that presumption, the State has the burden of proof in this case. We must prove the defendant is guilty beyond a reasonable doubt." *Id.* At the close of the guilt stage, the trial court instructed the jury on the presumption of innocence. O.R. 8 at 1453.

***23** The OCCA reviewed the comments for plain error, and did not find them improper. *Underwood*, 252 P.3d at 249. The OCCA held that the prosecutor did not argue that the presumption was destroyed or inapplicable, but only explained that the presumption put the evidentiary burden on the State. This finding is not unreasonable.

The Tenth Circuit encountered a similar claim in *Patton v. Mullin*, where the prosecutor told jurors that the presumption of innocence was just a presumption, and did not amount to actual innocence. 425 F.3d 788, 811-12 (10th Cir. 2005). While the Tenth Circuit found the comment troubling due to the potential to mislead prospective jurors, the Circuit ultimately denied the claim because the trial court corrected the remark and emphasized that the government bore the burden of proving all elements beyond a reasonable doubt, and that meeting the burden was the only way to overcome the presumption of innocence. *Id.* at 812. In this case, like *Patton*, the prosecution said that the presumption of innocence did not mean that Petitioner was actually innocent. But both the trial court and the prosecution later accurately described the burden of proof, and emphasized that the State could only overcome the presumption of innocence by convincing the jury of guilt beyond a reasonable doubt. The jury heard the proper standard, and the prosecutor's isolated comment likely had little effect on the trial. This Court cannot say that the OCCA's conclusion was unreasonable.

Petitioner also claims that the prosecution improperly argued that Petitioner did more to the victim than his confession revealed. Petition at 57-58. The prosecutor argued during guilt stage closing that Petitioner "[left] out the part where he shaved her with that blue razor that's sitting next to his computer." Trial Tr. vol. VII, 1853. The prosecutor based this argument on a crime scene investigator's testimony that the victim's "pubic area appeared partially shaven, and saw loose hairs on that area of her body." *Underwood*, 252 P.3d at 249. The OCCA held that the argument was a proper inference based on the evidence at trial and did not create unfair prejudice. *Id.*

Prosecutors are entitled to "comment on and draw reasonable inferences from the evidence presented at trial." *Thornburg v. Mullin*, 422 F.3d 1113, 1131 (10th Cir. 2005). This Court cannot find the prosecutor's inferences in this situation unreasonable. The jury heard that investigators found a blue razor in Petitioner's bedroom, and they heard an investigator testify that while the minor victim had hairs attached to her vaginal area, she had loose hairs around her pubic area, and the area above her vaginal area appeared clean. Trial Tr. vol. VI, 1522. These facts gave the prosecutors a reasonable basis to infer that Petitioner shaved the victim at some point. Just because the medical examiner did not document that evidence does not change the analysis. An inference need not be supported by every relevant and probative piece of evidence to be reasonable. The OCCA was not unreasonable in denying relief on that issue.

Petitioner claims that the prosecution engaged in theatrics by screaming at the jury and appearing on the verge of tears. Petition at 59. Petitioner claims that the prosecutor's actions improperly focused the jury's attention on the emotion of the case, and not the evidence. *Id.* at 70. The OCCA denied this claim, noting that the prosecutor's argument was directed at the jury, not Petitioner, and while the delivery might have been emotional, it was an emotional case. *Underwood*, 252 P.3d at 250. This Court does not find that conclusion unreasonable. Prosecutors should strive to avoid injecting emotionalism into sensitive cases like this, but the record does not reflect that the prosecutor crossed the line, and the argument did not infect the trial with unfairness.

***24** Petitioner claims that the prosecution improperly questioned Dr. Meloy as to whether he would like to have

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interviewed Petitioner about his mental diagnoses. *Id.* at 61-63. In discussing the defense experts' diagnoses and his agreement with them, Dr. Meloy commented that "we know that defendants will typically distort information that they're providing to examiners in a forensic setting." Trial Tr. vol. X, 2476. The prosecution then asked "So you would actually like to visit with him yourself?" *Id.* At that point, the defense objected. However, rather than object that the prosecutor had done something improper, defense counsel just asked whether the prosecutor was going to imply that Petitioner should have spoken to Dr. Meloy. *Id.* The prosecutor said no, and defense counsel said that he objected to any such suggestion. *Id.* The trial court sustained the objection, although it is unclear whether the defense actually objected to the question asked, or just any future questions in that vein. *Id.* at 2477. The prosecutor then asked Dr. Meloy if he would have liked to talk to people who reported Petitioner's life history, specifically telling Dr. Meloy that he was not referring to the Petitioner when he said "other people." *Id.* Dr. Meloy responded that if his role in the case were different, he would have liked to interview Petitioner. *Id.*

The OCCA found that the record belied impropriety on the prosecutor's part. This Court agrees. The prosecutor asked the offending question in response to Dr. Meloy's suggestion that criminal defendants often lie during mental health evaluations. But when the defense objected and the trial court ruled, the prosecutor did not ask any more questions that could impinge on Petitioner's right against self-incrimination. The prosecutor could not anticipate that Dr. Meloy would mention interviewing Petitioner after the prosecutor specifically limited the question to people other than Petitioner. Further, Dr. Meloy's testimony emphasized that his role in the case did not include evaluating Petitioner. The prosecutor did not attack Petitioner's right to remain silent.

Petitioner also complains that the prosecution used Dr. Meloy's comments to undermine the defense experts' diagnoses. That was not improper. Petitioner's test results themselves showed that he was possibly falsifying his answers. Trial Tr. vol. IX, 2166-70. Dr. Meloy testified that defendants often distort information. Trial Tr. vol. X, 2476. The prosecution is entitled to argue that the defense experts' diagnoses relied on Petitioner's deceit. That is the adversarial process. Petitioner has the right for the jury to give his mitigating evidence consideration, not necessarily credit. The prosecution did not misstate evidence or mislead the jury, therefore they can hardly be faulted for attacking Petitioner's evidence. The OCCA reasonably found that the prosecutor's actions were proper.

Petitioner finally claims that the prosecutors injected their personal opinions by arguing that death "is the only appropriate and just punishment for the murder of Jamie Bolin," and that death "is the just punishment [Petitioner] has earned." Petition at 66; Trial Tr. vol. VIII, 1901, vol. X, 2528. The prosecutor also argued that "[b]ased on what you've heard, justice is death in this case for this defendant. And anything less, I submit to you, is an injustice. It's an injustice for this defendant, it's an injustice for Jamie Bolin, and it's an injustice for that family sitting right there." Trial Tr. vol. X, 2565.

Prosecutors may not "inject their personal opinion on the propriety of the death sentence, but they can argue that "under the facts and the law, capital punishment is appropriate." *Thornburg*, 422 F.3d at 1135. In this case, it appears that the prosecution stayed on the proper side of that rule. The record shows that the prosecutors made the challenged comments directly after explaining what the evidence would show or what the evidence had shown. Trial Tr. vol VIII, 1901, vol. X, 2527-28, 2565. The OCCA held that the prosecutors appropriately argued that the evidence supported the death penalty. *Underwood*, 252 P.3d at 249. That determination was not unreasonable.

1. *Conclusion.*

Four of Petitioner's claims are barred, and Petitioner fails to show that the OCCA unreasonably rejected the exhausted claims. Relief is denied as to Ground Five.

F. Ground Six: Infirm Jury Instruction.

***25** Petitioner claims that Jury Instruction 12, which defined mitigating circumstances, led the jury to ignore his mitigation evidence. Petition at 72. Petitioner also argues that the prosecutors exploited the instruction to further mislead the jury. *Id.* at 73-74. The instruction at issue states:

> Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

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

O.R. 8 at 1491. On direct appeal, the OCCA held that the instructions did not foreclose consideration of mitigating circumstances and that the prosecutors did not imply "that the jury should ignore any of the evidence offered by [Petitioner] in mitigation of the sentence," but "merely argued that this evidence did not warrant a sentence less than death." *Underwood*, 252 P.3d at 245.

1. *Clearly Established Law.*

Capital defendants are entitled to have their sentencer consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a petitioner claims that jury instructions impede that right, courts must ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). If there is no such likelihood, the capital sentencing proceeding is not inconsistent with the Eighth Amendment. *Id.*

Courts cannot judge instructions "in artificial isolation," but must view them "in the context of the overall charge." *Id.* at 378 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)). The Supreme Court has acknowledged a general rule that when (1) a jury hears mitigating evidence, (2) the court instructs the jury to consider all the evidence presented, and (3) the parties address the mitigating evidence in their closing arguments, the jury "is not reasonably likely to believe itself barred from considering the defense's evidence as a factor extenuating the gravity of the crime." *Ayers v. Belmontes*, 549 U.S. 7, 24 (2007) (internal quotations and bracketing omitted).

In *Hanson v. Sherrod*, the Tenth Circuit upheld this specific jury instruction because it allowed the jury to resolve what circumstances were mitigating, other given instructions enumerated specific mitigating circumstances, and other instructions stated that the jury could determine and consider mitigating circumstances other than those enumerated. 797 F.3d 810, 849, 851 (10th Cir. 2015). The Tenth Circuit also held that the prosecutor did not improperly manipulate the instruction, because while he asked whether the circumstances "really extenuate or reduce [petitioner's] degree of culpability or blame in this case," he also "encouraged [the jury] to consider any and all mitigating evidence they thought relevant." *Id.* The Tenth Circuit concluded that "in light of all of the instructions and of the prosecutor's various comments, we find it hard to imagine that the jurors thought they were prohibited from considering any of the mitigating evidence they heard at the resentencing hearing." *Id.* at 852.

2. *Analysis.*

***26** Here, as in *Hanson*, the entire panoply of instructions blunted the danger that the jury might think they could ignore the mitigation evidence. Jury Instruction 12 informed the jury that they determined what circumstances were mitigating. O.R. 8 at 1491. Jury Instruction 13 listed fifteen specific mitigating circumstances for the jury to consider, many of which would not necessarily relate to Petitioner's moral culpability. *Id.* at 1492-93. That instruction also allowed the jury to find other unlisted mitigating circumstances, and instructed them to consider those "as well." *Id.* at 1493. Finally, Jury Instruction 20 allowed the jury to consider "sympathy or sentiment for the defendant in deciding whether to impose the death penalty," giving the jury discretion to give effect to *any* evidence presented, even if its only value was to engender sympathy or sentiment. *Id.* at 1500. The entire charge shows that the trial court properly instructed the jury. [22]

The prosecutors' comments did not undermine those instructions. Prosecutors are "free to comment on the weight the jury should accord to [mitigating evidence]" as long as the jury is properly instructed. *Bland*, 459 F.3d at 1026. The record shows that prosecutors commented on the mitigation evidence, but did not encourage the jury to ignore it. The prosecutors listed the mitigating

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circumstances and argued that the jury should not give them much weight, but the prosecution did not cross the line and argue that the jury could ignore them. Instead, the prosecutor specifically told the jury that they were the judge of whether the mitigating circumstances were supported by the evidence. Trial Tr. vol. X, 2518. While the prosecutors did ask the jury how the mitigating circumstances reduced the culpability or blame for Petitioner's crimes, those arguments went to how the jury weighed those circumstances. Both the defense and the prosecution discussed the mitigating circumstances in great depth, and although the parties obviously disagreed, the jury could have hardly concluded that they could simply ignore the mitigating evidence.

"The jury heard mitigating evidence, the trial court directed the jury to consider all the evidence presented, and the parties addressed the mitigating evidence in their closing arguments." *Ayers*, 549 U.S. at 24. The OCCA was therefore not unreasonable in concluding that Jury Instruction 12 and the prosecutors' arguments regarding the instruction did not prevent the jury from considering Petitioner's mitigating evidence. Relief is denied as to Ground Six.

G. Ground Seven: Inadmissible evidence.

Petitioner claims that the admission of certain pieces of evidence rendered his trial fundamentally unfair. Petition at 80-84. Petitioner specifically complains about a Barbie doll head stuck through with nails and a pin, handcuffs, several sex toys, women's underwear, gruesome books, various knives and swords, barbeque skewers, meat tenderizer, duct tape, a drop cloth, a hacksaw, a toolbox, and pornography videos, all of which the prosecution introduced during the guilt stage. *Id.* at 80-81. The trial court did limit the use of some of these items by allowing their admission, but not their display. Trial Tr. vol. VI, 1547, 1571. In the penalty stage, two computer forensics investigators testified to the contents of some of the pornographic material found on Petitioner's computer. Trial Tr. vol. IV, 1920-26, 1928-30. The trial court also admitted images of pornographic material related to the investigator's testimony. Petition at 80-81.

***27** Petitioner challenged the introduction of the evidence and the testimony of OSBI Agent Anthony Johnston on direct appeal.[18] *Underwood*, 252 P.3d at 243. The OCCA rejected the claim, finding that the evidence was relevant to Petitioner's intent and also corroborated Petitioner's testimony. *Id.* The OCCA further held that the evidence did not prejudice Petitioner, because the evidence of his guilt was overwhelming and the jury did not find Petitioner was a continuing threat, which the vast majority of the evidence was offered to prove. *Id.*

1. Clearly Established Law.

Federal habeas courts do not review the propriety of state court evidentiary rulings. *Wilson*, 536 F.3d at 1114. Instead, federal courts only determine whether the admission of evidence violated the Constitution by "so infect[ing] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id.* (quoting *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994)). This fundamental fairness analysis lacks "clearly definable legal elements," therefore courts must "exercise considerable self-restraint." *Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir. 2003) (quoting *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002)). Courts must consider the evidence's effect in the context of the entire second stage. *See id.* This includes considering the relevance of the evidence and the comparative strength of the aggravating and mitigating evidence. *See id.*

2. Analysis.

The challenged evidence was relevant because it corroborated Petitioner's detailed confession. Petitioner specifically mentioned the Barbie doll head, handcuffs, sex toys, knife and sword collection, barbeque skewers, meat tenderizer, duct tape, hacksaw, drop cloth, toolbox, pornography, and deviant sexual materials in his confession. State's Ex. 162 at 31-36, 38, 41-44, 64-65, 69, 79. Agents Johnston and Cordry's testimony corroborated Petitioner's discussions of the materials on his computer. *Id.* at 38, 41-44.

The evidence also supported the parties' theories of the case. The images taken from Petitioner's computer, the testimony about the materials discovered on Petitioner's computer, his books, and even the women's underwear supported the prosecution's (and defense's) theories that Petitioner displayed several paraphilia, or sexual deviancies. Trial Tr. vol. IX, 2182-83, 2220. The Barbie doll head, handcuffs, sex toys, skewers, tenderizer, duct

tape, drop cloth and hacksaw all reflected Petitioner's planning for the murder. State's Ex. 162 at 31-36, 79. The prosecution relied on the planning element heavily to show that Petitioner would pose a continuing threat under state law, and argued that the evidence of Petitioner's planning presented sufficient evidence to allow the jury to consider the continuing threat aggravator. Trial Tr. vol. VIII, 1866-67.

Finally, the pornography, books, and testimony about the sexual material all revealed Petitioner's mental state, which was a relevant consideration. *See Warner v. Workman*, 814 F. Supp. 2d 1188, 1224-25 (W.D. Okla. 2011). Petitioner's confession detailed his descent into deviant sexual interests, including cannibalism. State's Ex. 162 at 42-44. The evidence painted an accurate, if disturbing, picture of Petitioner's thoughts, feelings, and actions that led up to his crime.

***28** The relevance of the evidence undermines Petitioner's reliance on *Spears*. In *Spears*, the prosecution introduced gruesome photographs of stab wounds on a victim's body to show conscious pain and suffering, although uncontested testimony showed that the victim lost consciousness before he was stabbed. 343 F.3d at 1227. The photographs had practically no probative value compared to the prejudicial effect. Here, the challenged evidence was relevant to many of the theories in the case, especially the continuing threat aggravator.

Not only was the evidence relevant, but the prosecution's aggravation case was strong. The jury heard overwhelming evidence to find that the murder was especially heinous, atrocious, or cruel, largely independent of the challenged evidence. While the guilt stage evidence was incorporated into the penalty stage, the prosecution did not delve into that evidence with any penalty stage witnesses. The only new information was the testimony regarding the materials found on Petitioner's computer. [19] The prosecutors did not argue that the challenged evidence supported the especially heinous, atrocious, or cruel aggravator, but instead, they relied on Petitioner's own confession that he beat and smothered the victim, and was sexually gratified by killing her. Trial Tr. vol. X, 2501-05. [20]

By comparison, Petitioner mounted a weak defense against the especially heinous, atrocious, or cruel aggravator, and instead focused on countering the continuing threat aggravator. His success in defeating that aggravator indicates that the challenged evidence, which showed Petitioner's detailed planning and sexual deviance, had little prejudicial effect. It is unlikely that the challenged evidence had such an effect as to render Petitioner's trial fundamentally unfair. The OCCA's decision was therefore not unreasonable. Relief is denied as to Ground Seven.

H. Ground Eight: Petitioner's Video-Taped Confession. Petitioner claims that police obtained his video-taped confession in violation of his Fifth and Sixth Amendment rights. Petition at 85. The events leading up to this confession are detailed in the statement of facts. *Supra* pp. 2-4. Petitioner claims that he did not voluntarily, knowingly, or intelligently waive his *Miranda* rights because of the coercive atmosphere, a promise of leniency by law enforcement, his isolation, and his mental condition. Petition at 93. Petitioner raised this claim on direct appeal and the OCCA denied the claim, finding that Petitioner voluntarily reinitiated contact with law enforcement and voluntarily waived his *Miranda* rights. *Underwood*, 252 P.3d at 238-39. On post-conviction, Petitioner claimed that appellate counsel was ineffective for not arguing that law enforcement should have provided him a lawyer. *Underwood*, No. PCD-2008-604, slip op. at 6-7. The OCCA denied that claim as well, finding that Petitioner failed to show coercion in a legal sense. *Id.* at 7. [21]

1. *Clearly established law.*

***29** Custodial interrogation must "be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981) (citing *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)). If, after being informed of these rights, a defendant invokes his right to remain silent, the interrogation must cease. *Id.* at 482. If the defendant requests an attorney, the interrogation must cease until an attorney is present. *Id.*

A defendant can later waive his rights after invoking them, but the waiver is invalid when police subject a defendant who invoked his right to counsel to further interrogation without counsel present. *Id.* at 484. Police can only resume questioning if the defendant initiates further

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communication. *Id.* at 484-85. After reinitiating contact, a defendant can then waive his rights under *Miranda*, but the waiver must be voluntary, knowing, and intelligent. *Id.* 483-84. Whether a waiver is voluntary depends on the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 483 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Law enforcement's use of coercion, deception, or promises of leniency is also relevant. *United States v. Lopez*, 437 F.3d 1059, 1063-64 (10th Cir. 2006).

2. Analysis.

Petitioner does not dispute that he asked to discuss the crime with Agents Overby and Maag. Petition at 90. There is no dispute then that Petitioner reinitiated contact with law enforcement at that time. Petitioner only disputes that his choice to reinitiate contact and waive his *Miranda* rights was voluntary, knowing, and intelligent. *Id.*

Petitioner fails to show that his waiver was not voluntary based on coercion. Petitioner argues that an officer's request for Petitioner to execute a written consent to search was renewed interrogation and amounted to coercion. *Id.* at 90-91. The state trial court found this action improper, and the OCCA never addressed the propriety of those actions. Nevertheless, there is no Supreme Court precedent that characterizes a request for consent to search as interrogation. In fact, the Tenth Circuit has held that seeking consent for a search is not "interrogation." The term "interrogation" encompasses words and actions that "police should know are reasonably likely to elicit an incriminating response." *United States v. Gay*, 774 F.2d 368, 379 (10th Cir. 1985). Requests to search generally do not fall in that category, even though the subsequent search may reveal incriminating evidence. *Id.*; *see also United State v. Rhodes*, 30 F.3d 142, 1994 WL 386026 at *5-6 (10th Cir. 1994) (unpublished table opinion). The absence of a Supreme Court case on point and the circuit precedent lead this Court to conclude that the OCCA was reasonable in rejecting any argument that the request for consent to search undermined Petitioner's subsequent *Miranda* waiver.

Petitioner's later conversations with law enforcement also fail to establish coercion. Petitioner does not point to any evidence that officers initiated conversations about his crime. And while Petitioner claims that the environment was coercive because he was isolated in the police station, just being at a police station does not automatically raise coercion concerns; otherwise every suspect being held at a police station would have a colorable coercion claim. [22] Petitioner himself disavowed any coercion or pressure, and instead agreed that everyone had been nice to him. State's Ex. 162 at 2, 6.

***30** Petitioner also fails to show anyone improperly promised him leniency. Petitioner did mention in his interview that some agent said it would "probably [sic] a lot better off for you if you, just cooperated with us and talked right now ...." *Id.* at 6. The agent was never identified, and the claim was never corroborated in any way. *Underwood*, 252 P.3d at 238. Even assuming that an agent did make that statement, it is not a promise of leniency. Petitioner claims that the agent told him it would *probably* be better if he cooperated. This falls short of a "promise" that would render the cooperation involuntary. *See United States v. Morris*, 247 F.3d 1080, 1089-90 (10th Cir. 2001) (showing a defendant pictures of cooperative criminals that received lenient sentences was not a promise of leniency); *United States v. Varela*, 576 Fed.Appx. 771, 777-778 (10th Cir. 2014) (unpublished) (comment that "I think we can...do something" was not a promise of leniency); *compare Lopez*, 437 F.3d at 1064-65 (officer promised leniency by using pieces of paper labeled "mistake," "murder," "6" and "60" to tell a defendant that he could get fifty-four years less in jail by admitting that a killing was a mistake). An unsubstantiated comment that it would probably be better for Petitioner to cooperate is not the sort of promise of leniency that could have overwhelmed Petitioner's will.

Petitioner's complaint that law enforcement held him without providing an attorney is also unpersuasive. Petitioner conflates the Fifth and Sixth Amendments. The Sixth Amendment obligates the government to provide an attorney for future prosecutions, but not until "the initiation of adversary judicial criminal proceedings...." *McNeill v. Wisconsin*, 501 U.S. 171, 175 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). Since Petitioner confessed well before criminal proceedings began, the Sixth Amendment has no application. Rather, Petitioner's claim hinges solely on law enforcement's failure to provide him an attorney after he invoked his Fifth Amendment right to counsel. Under *Miranda*, the police could decide not to provide counsel for a reasonable

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period of time, so long as they did not question Petitioner during that time. *Miranda*, 384 U.S. at 474. The decision to continue the investigation while Petitioner waited at the station did not run afoul of the Fifth Amendment. Petitioner's decision to talk while still waiting for an attorney does not alter the analysis.

Finally, Petitioner's mental condition does not undermine his waiver. While a factor to consider, there is nothing in the record that would indicate that Petitioner's mental condition interfered with his ability to waive his *Miranda* rights. Petitioner's video-taped interview revealed that he was engaged, lucid, and extremely detailed. He responded to questions and exhibited no signs of mental impairment. Petitioner claims that he was not able to pick up on the fact that law enforcement just waited for him to talk, but Petitioner's lack of knowledge of their motives, plans, or strategies has no effect on whether he voluntarily, knowingly, and intelligently waived his *Miranda* rights. *See Moran v. Burbine*, 475 U.S. 412, 422 (1986) (information unknown to a defendant can have "no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."). The OCCA's determination that Petitioner's waiver of *Miranda* rights and subsequent confession were valid is reasonable under clearly established federal law. Relief is denied as to the Ground Eight.

I. Ground Nine: Standard for Weighing Aggravating Circumstances and Presumption of Life.

Petitioner claims the trial court violated his constitutional rights by not instructing the jury that they must find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. Petition at 94. Petitioner also claims that the trial court violated his constitutional rights by not instructing the jury that there is a presumption of life in the sentencing phase. *Id.* at 95. Petitioner raised both claims before the OCCA on direct appeal. *Underwood*, 252 P.3d at 246. The OCCA rejected the claims based on OCCA precedent. *Id.* That decision was not contrary to or an unreasonable application of clearly established federal law.

***31** Petitioner argues that *Apprendi v. New Jersey* and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) require the jury to apply the "beyond reasonable doubt" standard to whether aggravating circumstances outweigh mitigating circumstances, because that finding is a factual predicate for imposing a death sentence. Petition at 94. The Tenth Circuit rejected this same argument in *Matthews v. Workman*, 577 F.3d 1175, 1195 (10th Cir. 2009). The Tenth Circuit characterized the weighing analysis not as a factual finding, but rather a "highly subjective, largely moral judgment regarding the punishment that a particular person deserves." *Id.* (quoting *United States v. Barrett*, 496 F.3d 1079, 1107 (10th Cir. 2007)).

Petitioner argues that the Tenth Circuit was wrong in its analysis. Petition at 94. First, this Court is in no position to grant relief in direct contradiction to binding circuit precedent. Second, even accepting Petitioner's premise, he still fails to show that the OCCA ruled unreasonably by agreeing with the existing federal precedent that directly addresses this issue. Therefore, relief is denied.

Petitioner's other argument is that he was entitled to a jury instruction explaining a "presumption of life." *Id.* at 95. While acknowledging that Tenth Circuit precedent precludes this argument as well, he nevertheless claims that *Apprendi* and *Ring* changed the law by requiring that aggravating factors be proven beyond a reasonable doubt. *Id.* This argument is unpersuasive. In *Smallwood v. Gibson*, the Tenth Circuit held that the Constitution does not require a "presumption of life" instruction. 191 F.3d 1257, 1271 (10th Cir. 1999). The Tenth Circuit further held that even if such a presumption were required, "the instructions given at Mr. Smallwood's trial adequately informed the jury of this fact." *Id.* at 1271. The Tenth Circuit relied on instructions that told the jury that the defendant was entitled to life unless they unanimously found both that the state had proved at least one aggravating circumstance beyond a reasonable doubt and that the aggravating circumstances outweighed the mitigating circumstances. *Id.* at 1272.

Nothing in *Apprendi* or *Ring* alters the Tenth Circuit's analysis. Petitioner's jury was instructed that unless they unanimously found that the state had proved at least one aggravating circumstance beyond a reasonable doubt, and unless they unanimously decided that the aggravating circumstances outweighed the mitigating circumstances, Petitioner could not receive the death penalty. O.R. 8 at 1484. Factually and legally, *Smallwood* remains applicable and dispositive. The OCCA was not unreasonable in rejecting that claim. Relief is denied on this issue, and on Ground Nine in its entirety.

J. Ground Ten: Execution of the Mentally Ill.

Petitioner claims that his death sentence violates the Eighth Amendment because he is severely mentally ill. Petition at 96. The OCCA denied this claim on direct appeal. *Underwood*, 252 P.3d at 248. Petitioner raised the issue again in his post-conviction proceeding, arguing that appellate counsel was ineffective for not basing the Eighth Amendment claim on Petitioner's Asperger's diagnosis. *Underwood*, PCD-2008-604, slip op. at 12.[23] The OCCA denied the relief again. *Id.*

1. *Clearly Established Law.*

***32** States cannot execute mentally retarded criminals under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Supreme Court noted in *Atkins* that the Eighth Amendment's prohibition on cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). The Court identified state legislation as the "clearest and most reliable objective evidence of contemporary values," and concluded that the recent consensus showed a trend of states moving away from executing the mentally retarded. *Id.* at 312, 314-17. The Court found that the consensus mirrored the Court's own judgment, as executing the mentally retarded did not serve any retributive or deterrent aims and because mentally retarded criminals face a higher risk of wrongful execution due to their condition. *Id.* at 318-21.

In *Roper v. Simmons*, the Supreme Court similarly found a consensus of states moving away from executing those who committed their crimes as juveniles. 543 U.S. 551, 564-67 (2005). The Court noted that juveniles lack maturity and a sense of responsibility, are susceptible to peer-pressure, and possess less well-formed character and personalities. *Id.* at 569-70. The Court concluded that the trend in the states and the Court's own judgment weighed in favor of barring the execution of juveniles. *Id.* 578-79.

2. *Analysis.*

Petitioner claims that his death sentence is cruel and unusual punishment because he is severely mentally ill, not because he is a juvenile or is mentally retarded. But this claim has no basis in precedent and does not rest on the same reasoning as *Atkins* and *Roper*. Namely, there are no relevant state trends. This Court has only located one state that bars the execution of the mentally ill, and that state has ended the death penalty for all future offenses. *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier,* 50 B.C. L.Rev. 785, 798 & n. 88 (2009); Conn. Gen. Stat. § 53a-35a. This stands in stark contrast to the trends in *Atkins* and *Roper*, where multiple death penalty states ended executions for juveniles and the mentally retarded.

Petitioner rests his argument on the "evolving standards of decency," and asserts that since the Supreme Court bars execution of juveniles and the mentally retarded, it bars the execution of the mentally ill. But this Court can only grant relief if the OCCA's ruling ran afoul of clearly established Supreme Court precedent. There is no Supreme Court precedent to support this claim, and this Court cannot invent clearly established law to counter the OCCA's reasonable decision. Relief is denied as to Ground Ten.

K. Ground Eleven: Cumulative Error.

Petitioner claims that even if individual errors in his trial were harmless, these errors were not harmless in the aggregate. Petition at 97-98. Petitioner raised this claim on direct appeal. *Underwood*, 252 P.3d at 254. The OCCA denied the claim because the court did not find any error. *Id.* The cumulative-error analysis addresses the possibility that two or more individually harmless errors might "prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). But the cumulative-error analysis requires at least two errors, and is not warranted when a court only identifies one error. *Hooks v. Workman*, 689 F.3d 1148, 1194-95 (10th Cir. 2012). When the state court does not find error, but the federal habeas court does, the federal court reviews that claim *de novo. Lott*, 705 F.3d at 1222-23.

This Court has only identified one error: the sentence recommendations by the victim's family. *Supra* pp. 37-38. With only one error, the cumulative-error analysis is not warranted in this case. Relief is denied as to Ground Eleven.

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V. Motions for Discovery and Evidentiary Hearing.

***33** Petitioner has filed a motion for discovery (Doc. 20) as well as a motion for an evidentiary hearing (Doc. 27). The Court initially denied both motions. Docs 48, 49. After review, the Court sees no reason to change that decision. Petitioner's discovery request is based on generalized suspicions that the prosecutors withheld exculpatory evidence. Petitioner's claims amount to a fishing expedition, searching for materials to support a claim that he has not raised. Petitioner's requested discovery would not affect this Court's conclusion on any of Petitioner's claims. Petitioner has not shown good cause for discovery. *See* Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (requiring good cause to obtain discovery authorization).

In addition to his discovery request, Petitioner requests an evidentiary hearing with respect to his Grounds One (ineffective assistance of trial and appellate counsel) and Three (juror dishonesty). Doc. 27 at 3-5. "The purpose of an evidentiary hearing is to resolve conflicting evidence." *Anderson v. Attorney General of Kansas*, 425 F.3d 853, 860 (10th Cir. 2005). If there is no conflict, or if the claim can be resolved on the record before the Court, then an evidentiary hearing is unnecessary. *Id.* at 859. An evidentiary hearing is unwarranted on Grounds One and Three to resolve the legal issues. No information gained from an evidentiary hearing would affect the legal findings on those grounds. Therefore, the requests for discovery and evidentiary hearing are denied.

VI. Conclusion.

After a thorough review of the entire state court record, the pleadings filed herein, and the applicable law, the Court finds that Petitioner is not entitled to the requested relief. Accordingly, Petitioner's Petition (Doc. 19), motion for discovery (Doc. 20), and motion for an evidentiary hearing (Doc. 27) are hereby **DENIED**. A judgment will enter accordingly.

IT IS SO ORDERED this 28th day of July, 2016.

All Citations

Not Reported in F.Supp.3d, 2016 WL 4059162

Footnotes

1 Pursuant to Fed. R. Civ. P. 25(d), Kevin Duckworth, who currently serves as interim warden of the Oklahoma State Penitentiary, is hereby substituted as the proper party respondent in this case.

2 Petitioner was originally charged in McClain County, under Case No. CF-06-102. The trial court granted a request to change venue, and transferred the case to Cleveland County.

3 Petitioner additionally raises a more generalized appellate ineffectiveness argument, but that argument simply refers back to the claims more specifically set out in the Petition. Petition at 25-26. By addressing his specific appellate ineffectiveness claims, the Court has addressed any complaints Petitioner has raised about appellate counsel.

4 This Court cannot consider the fourteen affidavits (Petition, Exs. 2-15) attached to the Petition, because this Court can only review the OCCA's legal decisions and factual findings based on the record that was before the OCCA. *Pinholster*, 563 U.S. at 181-82; 28 U.S.C. § 2254(d)(2). This Court will only consider affidavits that the OCCA considered.

5 Petitioner attacks the OCCA's factual determinations on this issue, but the Petition is vague regarding which factual determinations Petitioner actually contests. Petitioner refers to a finding that counsel thoroughly investigated and prepared a comprehensive mitigation case, and complains that the OCCA did not consider that counsel must also present the evidence which the investigation uncovers. Petition at 10. This argument does not appear to contradict any factual finding by the OCCA. The record is quite clear that counsel conducted a thorough investigation, and Petitioner has failed to rebut the OCCA's finding on that issue.

6 This Court will not consider Ex. 16-17 for the same reasons stated in Footnote 4, *supra* p. 10.

7 Petitioner did raise appellate counsel ineffectiveness regarding this issue in his post-conviction application. It is unclear from the OCCA's post-conviction order whether the state court specifically considered this claim on its merits, because the order focused on whether *trial* counsel was ineffective. *Underwood*, No. PCD-2008-604, slip op. at 3-5. In any event, this Court finds that Petitioner fails to establish prejudice from appellate counsel's omissions regardless of whether the standard of review was *de novo* or high deference under the AEDPA.

8 Rather than address the exhaustion and procedural bar issues that may apply to the victim impact notice issue, this Court can resolve the issue on the merits. *Romero v. Furlong*, 215 F.3d 1107, 1111 (10th Cir. 2000). Since the state courts

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never addressed this specific claim, this Court addresses the issue *de novo. McCracken v. Gibson*, 268 F.3d 970, 975 (10th Cir. 2001).

9 To the extent that Petitioner is challenging the OCCA's fact-finding by arguing that Dr. Meloy said that neuroimaging was "necessary" to confirm Petitioner's diagnoses, Petitioner fails to rebut the OCCA's findings by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). The testimony at issue does not state or even imply that such testing is necessary to confirm the diagnoses, only that it *could* have confirmed the diagnoses. Trial Tr. vol. X, 2482.

10 Petitioner takes issue with the OCCA's determination that there was not a "strong" possibility that the testimony affected the outcome of the trial, and argues that this formulation does not meet the rigorous standards of *Strickland*. Petition at 22 n.17. *Lott v. Trammell* clearly states that the OCCA's standard is actually less deferential than *Strickland*, and therefore a ruling under the OCCA's standard necessarily operates as an adjudication on the merits of a *Strickland*-based claim. 705 F.3d 1167, 1213 (10th Cir. 2013).

11 Petitioner complains that the OCCA cited *Wainwright v. Witt* but did not quote the standard. Petition at 29. The OCCA cited *Witt* as the basis for its opinion. *Underwood*, 252 P.3d at 240. And while the OCCA focused on whether the jurors could consider all punishments, that question is certainly pertinent to whether the jurors' views on the death penalty would prevent or substantially impair their performance as jurors. The OCCA's emphasis on the relevant inquiry does not mean that the OCCA did not apply the broad constitutional standard. A juror who can give fair consideration to all three possible punishments is necessarily one who is not prevented or substantially impaired from performing their duties by their view of the death penalty.

12 Petitioner claims that the OCCA did not reach his peremptory challenge argument on the merits, but this line from the OCCA's opinion clearly shows that the OCCA did briefly address that issue.

13 Petitioner's claim that the OCCA did not apply federal law to this issue is unfounded. The OCCA not only cited *McDonough Power Equipment, Incorporated v. Greenwood*, 464 U.S. 548 (1984) but also decided the claim on whether Juror Garrett was removable for cause, which is the second prong of the *McDonough* test.

14 Petitioner's claim that Garrett only disclosed a "misunderstanding" with his employer rather than a felony charge for receiving stolen property smacks of linguistic maneuvering. Garrett indeed discussed the issue, and even revealed that he was arrested, but that the charges were later dropped. Trial Tr. vol. V, 1192-93. While Garrett may have never uttered the word "felony," he clearly did not conceal this encounter with the law.

15 Petitioner also makes the curious assertion that the jury's decision indicates that he is not "the worst of the worst." However, it seems a meritless argument that no matter how depraved, no matter how cruel, no matter how ruthless a murder might be, the murderer is only the "worst of the worst" if there is a danger he would do the same again.

16 Respondent claims that issue F, which deals with Dr. Meloy's statements about interviewing Petitioner, is unexhausted. While Petitioner did not raise that claim as a prosecutorial misconduct claim on direct appeal, the OCCA explicitly found that the prosecutorial misconduct theory was belied by the record. *Underwood*, 252 P.3d at 245. This Court is hard-pressed to find the claim unexhausted when the OCCA explicitly addressed the claim.

17 Even if these claims were exhausted, the prosecutor's actions were either proper or did not deprive Petitioner of a fair trial. Therefore those claims would fail on the merits.

22 Petitioner offers *Harris v. Oklahoma*, 164 P.3d 1103 (Okla. Crim. App. 2007), as evidence that Jury Instruction 12 is faulty on its face. In *Harris*, the OCCA noted that this jury instruction was vulnerable to prosecutorial abuse, and recommended changes to the instruction. 164 P.3d at 1114. But the OCCA explicitly stated in *Harris* that the instruction was not constitutionally infirm. *Id. Harris* does not lend weight to Petitioner's argument.

18 Respondent claims that Petitioner failed to raise a challenge to Agent Johnston's testimony, but Petitioner's appellate brief fairly presented that issue, albeit briefly. Br. of Appellant at 63. Petitioner did not challenge Agent Dee Cordry's testimony. Due to the ease of disposition, this Court opts to address the merits of that claim. 28 U.S.C. § 2254(b)(2).

19 This fact also distinguishes this case from *Spears*, in which the prosecution waited until the penalty stage to introduce the inflammatory evidence. 343 F.3d at 1228. And while Agents Cordry and Johnston testified in the penalty stage, their testimony was directly relevant to whether Petitioner's sexual deviance made him a continuing threat.

20 Petitioner claims that the prosecutor pointed to the "salacious evidence" to show that he killed for sexual enjoyment, but the record only reflects that the prosecutor based that argument on Petitioner's own admission of his arousal during the murder. Trial Tr. vol. X, 2505.

21 Petitioner never argued in state court that his mental illness was relevant to whether the waiver was voluntary, knowing, and intelligent. This Court need not decide whether this argument is unexhausted, as the claim is easily disposed of on the merits. 28 U.S.C., § 2254(b)(2).

22 Petitioner cites *Maryland v. Shatzer*, 559 U.S. 98, 105-07 (2010), to argue that coercion is presumed in such environments. However, *Shatzer* discussed the presumed coercion when police continue to interrogate after the suspect invokes his rights. That is not the case here.

23 Petitioner suggests that the OCCA did not address the claim on its merits and confused eligibility to be executed with the insanity defense or his competency to be executed. Petition at 96. But the OCCA's decision on post-conviction very clearly addresses *Atkins*, and found that Petitioner provided no authority for applying *Atkins* to the severely mentally ill. *Underwood*, No. PCD-2008-604, slip op. at 12.

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FILED
United States Court of Appeals
Tenth Circuit

August 17, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KEVIN RAY UNDERWOOD,

Petitioner - Appellant,

v.

MIKE CARPENTER, Interim Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 16-6262

ORDER

Before **MATHESON**, **KELLY**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

APPENDIX C

H

Court of Criminal Appeals of Oklahoma.
Kevin Ray UNDERWOOD, Appellant,
v.
STATE of Oklahoma, Appellee.

No. D–2008–319.
March 25, 2011.

Background: Defendant was convicted by jury in the District Court, Cleveland County, Candace Blalock, J., of first degree murder, for which he was sentenced to death. Defendant appealed.

Holdings: The Court of Criminal Appeals, C. Johnson, J., held that:
(1) police roadblocks around apartment complex where child victim lived were reasonable and did not violate defendant's Fourth Amendment rights;
(2) defendant was not “in custody” for *Miranda* purposes from the time he met police at roadblock;
(3) defendant's confession was admissible under the rescue doctrine;
(4) defendant's re-initiation of contact with police after he had invoked his right to counsel upon being *Mirandized* was voluntary, such that his subsequent incriminating statements to police during interview were admissible;
(5) trial court did not abuse its discretion in refusing to remove prospective jurors for cause;
(6) sufficient evidence supported aggravating circumstance that defendant's murder of ten-year-old victim was especially heinous, atrocious, or cruel;
(7) defense counsel did not render ineffective assistance; and
(8) juror's omission of certain information during voir dire concerning his prior contacts between himself or members of his family and police or the courts did not warrant a new trial.

Affirmed.

Lumpkin, J., concurred in result, with opinion.

West Headnotes

[1] Criminal Law 110 ⚷1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

Criminal Law 110 ⚷1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence wrongfully obtained. Most Cited Cases

On review of trial court's ruling on a motion to suppress evidence, the appellate court reviews the district court's factual findings for clear error, and its analysis of applicable law is reviewed de novo.

[2] Arrest 35 ⚷60.3(2)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(2) k. Particular cases. Most Cited Cases

(Formerly 35k63.5(6))

Police roadblocks around apartment complex where child victim lived, at which all motorists were stopped so that police could ask them for information about the victim's disappearance, were reasonable, and, thus, did not violate Fourth Amendment rights of capital murder defendant, whose stop at roadblock led to his initial conversation with police, and, ultimately, to his arrest for murder; public concerns justifying the roadblocks were grave, in that time was of the essence and child victim's life might have been at stake, roadblocks clearly advanced the public interest of informing people in the area about child victim's dis-

appearance and asking them about anything suspicious they might have seen, and interference with individual liberty occasioned by roadblocks was minimal. U.S.C.A. Const.Amend. 4.

[3] Arrest 35 ⚷60.2(10)

35 Arrest
35II On Criminal Charges
35k60.2 Investigatory Stop or Stop and Frisk
35k60.2(6) Grounds for Stop or Investigation
35k60.2(10) k. Reasonableness; reason or founded suspicion, etc. Most Cited Cases
(Formerly 35k63.5(4))

In determining the reasonableness of seizures that are less intrusive than a traditional arrest, courts must balance several competing factors: (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty. U.S.C.A. Const.Amend. 4.

[4] Automobiles 48A ⚷349(9)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(9) k. Roadblock, checkpoint, or routine or random stop. Most Cited Cases

Police may generally establish a roadblock without any individualized suspicion of criminal activity if the purpose is related to motor safety, such as brief checks for driver's licenses or driver sobriety, provided that the roadblock is sufficiently tailored to that end. U.S.C.A. Const.Amend. 4.

[5] Arrest 35 ⚷60.3(2)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(2) k. Particular cases. Most Cited Cases
(Formerly 35k63.5(6))

Police may not establish roadblocks for "general" interest in crime control, i.e., stopping motorists just to see what illegal activity might be revealed, but police may, consistent with the Fourth Amendment, briefly detain motorists to seek and disseminate information about a recent crime affecting the area; while such "information-seeking" detentions do not involve individualized suspicion of criminal activity, they are designed to be brief in duration, they tend to involve a few general questions of the motorist, and perhaps delivery of a flyer with additional information about the crime being investigated, and if such roadblocks are reasonably tailored to those objectives, they are not unreasonable seizures. U.S.C.A. Const.Amend. 4.

[6] Criminal Law 110 ⚷411.24

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)11 Custody
110k411.21 What Constitutes Custody
110k411.24 k. Particular cases or issues. Most Cited Cases
(Formerly 110k412.2(2))

Capital murder defendant was not "in custody" for *Miranda* purposes from the time he met police at information-gathering roadblock in connection with disappearance of child victim until he was placed under arrest at his apartment, as defendant volunteered to answer questions at the roadblock, volunteered to go to police station, and once there, agreed to let Federal Bureau of Investigation (FBI) agent search his apartment, and en route to police station, which was just a few blocks away, agent told defendant that he was not under arrest, but was considered an important witness to victim's disappearance.

[7] Criminal Law 110 ⚷411.23

110 Criminal Law

110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)11 Custody
110k411.21 What Constitutes Custody
110k411.23 k. Warnings. Most Cited Cases
(Formerly 110k412.2(2))

To determine whether a suspect was "in custody," for *Miranda* purposes, court considers how a reasonable man in the suspect's position would have understood his situation.

[8] Criminal Law 110 411.41

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)13 Interrogation in General
110k411.36 What Constitutes Interrogation
110k411.41 k. Public safety or rescue. Most Cited Cases
(Formerly 110k519(9))

Capital murder defendant's confession to police officer that child victim was inside tub located in defendant's apartment, after officer opened tub and saw girl's clothing inside and asked defendant where victim was, was admissible under the rescue doctrine, pursuant to which strict compliance with *Miranda*' s mandates is not required; urgency of situation was dire, in that victim had been missing for two days, the exchange lasted but a few seconds, the very words the agent used, i.e., "Where is she?" rather than "Is she in there?" were telling, in that, under the circumstances, the agent's spontaneous and general query about victim's whereabouts was entirely reasonable, and was aimed at saving the victim's life, not calculated to build a case against defendant.

[9] Criminal Law 110 411.41

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)13 Interrogation in General
110k411.36 What Constitutes Interrogation
110k411.41 k. Public safety or rescue. Most Cited Cases
(Formerly 110k412.1(4))

The "rescue doctrine" is a recognition that the exigencies of some situations, such as the imminent need to save human life, should forgive, or at least delay, strict compliance with *Miranda*.

[10] Criminal Law 110 411.41

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)13 Interrogation in General
110k411.36 What Constitutes Interrogation
110k411.41 k. Public safety or rescue. Most Cited Cases
(Formerly 110k412.1(4))

In deciding whether an exchange between police and citizen falls under the rescue doctrine, such as to delay strict compliance with *Miranda*, courts generally consider the apparent urgency of the situation, the potential for saving a person in danger, and the motivations of the officers involved.

[11] Criminal Law 110 413.10

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)18 Effect of Prior Illegality
110k413.7 Illegal Arrest or Detention
110k413.10 k. Warnings. Most Cited Cases
(Formerly 110k517(7))

Criminal Law 110 413.96

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)24 Use of Evidence Obtained by Means of Statement, Confession, or Admission
110k413.96 k. In general. Most Cited Cases
(Formerly 110k394.1(3))

Even if Federal Bureau of Investigation (FBI) agent's question asking capital murder defendant the location of child victim absent *Miranda* warnings was impermissible, defendant's confession, along with all of the physical evidence of victim's murder, would have been inevitably discovered, and, thus, was admissible pursuant to the inevitable discovery exception to the exclusionary rule; agent's question was preceded by his lawful observation of highly suspicious evidence, and by defendant's unsolicited, incriminating exclamation that he was worthy of arrest, such that even before agent asked the question, he had probable cause to search defendant's apartment for additional evidence about victim's disappearance. U.S.C.A. Const.Amends. 4, 5.

[12] Searches and Seizures 349 ⚷186

349 Searches and Seizures
349V Waiver and Consent
349k186 k. Scope and duration of consent; withdrawal. Most Cited Cases

Capital murder defendant's oral consent to police to search his apartment was not withdrawn or revoked by virtue of his subsequent arrest and invocation of his right to counsel. U.S.C.A. Const.Amend. 5.

[13] Searches and Seizures 349 ⚷112

349 Searches and Seizures
349II Warrants
349k112 k. False, inaccurate or perjured information; disclosure. Most Cited Cases

Affidavit in support of search warrant for capital murder defendant's apartment provided probable cause for issuance of warrant, despite fact that affidavit did not inform magistrate that defendant had declined to be questioned after his arrest and that his written consent affirming his prior oral consent to search his apartment was executed after he invoked his *Miranda* rights, as Federal Bureau of Investigation (FBI) agent had observed girl's clothing in tub in defendant's closet, at which point defendant simultaneously confessed to murdering child victim, and defendant's refusal to answer questions or whether he had reaffirmed his prior, oral consent to search his apartment had no bearing on probable cause determination. U.S.C.A. Const.Amend. 4; 22 Okl.St.Ann. §§ 1221–1223.

[14] Criminal Law 110 ⚷411.86(6)

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)16 Invocation or Rights
110k411.82 Effect of Invocation
110k411.86 Reinitiating Interrogation
110k411.86(6) k. Initiation by defendant. Most Cited Cases
(Formerly 110k412.2(4))

Capital murder defendant's re-initiation of contact with police after he had invoked his right to counsel upon being *Mirandized* was voluntary, such that his subsequent incriminating statements to police during interview were admissible at trial; while officers were preparing an affidavit in support of a search warrant for defendant's apartment, word was received that defendant wanted to talk, officer went to the room where defendant was being held and asked him to clarify his desires, explaining that because he had previously asked for a lawyer, they were not allowed to talk to him anymore, after which defendant replied emphatically that he wanted to talk and indicated his preference to speak to officers who had accompanied him to his apartment earlier that day. U.S.C.A. Const.Amend. 5.

[15] Criminal Law 110 ⚷411.85

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110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)16 Invocation or Rights
110k411.82 Effect of Invocation
110k411.85 k. Counsel. Most Cited Cases
(Formerly 110k412.2(4))
Once a suspect in custody has asserted his right to speak only through counsel, all attempts at interrogation must cease.

[16] Criminal Law 110 411.86(6)

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)16 Invocation or Rights
110k411.82 Effect of Invocation
110k411.86 Reinitiating Interrogation
110k411.86(6) k. Initiation by defendant. Most Cited Cases
(Formerly 110k412.2(4))

Criminal Law 110 413.36

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)19 Determination of Admissibility of Statement, Confession, or Admission
110k413.30 Presumptions and Burden of Proof
110k413.36 k. Invocation of rights. Most Cited Cases
(Formerly 110k414)
A suspect in custody who has asserted his right to speak only through counsel can change his mind, and decide to speak to police without counsel; if a suspect is interrogated after having invoked his *Miranda* rights, the burden rests on the State to demonstrate that the suspect's change of mind was a voluntary and intelligent choice.

[17] Criminal Law 110 411.54(2)

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)14 Conduct of Interrogation
110k411.52 Promises; Hope of Benefit
110k411.54 Nature of Promise
110k411.54(2) k. Promise of leniency in general. Most Cited Cases
(Formerly 110k412.1(1))
A suspect's custodial statements are not voluntary if they are the product of coercion, including promises of leniency or other benefit.

[18] Criminal Law 110 410.77

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)9 Voluntariness in General
110k410.77 k. What constitutes voluntary statement, admission, or confession. Most Cited Cases
(Formerly 110k412.1(4), 110k412.1(1))
Whether a suspect's statements to police are voluntary in the legal sense depends on an evaluation of all the surrounding circumstances, including the characteristics of the accused and the details of the interrogation; the ultimate inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker.

[19] Criminal Law 110 411.46

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)14 Conduct of Interrogation
110k411.46 k. Admonition to tell the truth in general. Most Cited Cases

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(Formerly 110k520(1))

Mere exhortations to cooperate and tell the truth, not accompanied by any threat or promise, do not render a confession involuntary.

[20] Jury 230 33(2.10)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.10) k. In general. Most Cited Cases

Defendant is entitled to be tried by jurors who can approach the facts of the case impartially, and who can decide the issues before them based on the evidence presented to them in court.

[21] Jury 230 33(2.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.15) k. View of capital punishment. Most Cited Cases

A defendant charged with a capital crime is entitled to jurors who can give fair consideration to all available punishments.

[22] Jury 230 85

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k85 k. Discretion of court. Most Cited Cases

The selection of jurors involves many subtle observations, and trial courts have broad discretion when considering a request to excuse a juror for cause.

[23] Criminal Law 110 1134.7

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.7 k. Summoning, impaneling, or selection of jury. Most Cited Cases

In reviewing a trial court's denial of a defendant's for-cause challenge of a prospective juror, an appellate court looks to the entire record of the juror's voir dire, not just isolated answers.

[24] Jury 230 108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

Trial court did not abuse its discretion in refusing to remove prospective juror for cause, in capital murder prosecution; while isolated answers from voir dire exchange with prospective juror tended to show her initial predilection for the death penalty in cases of intentional homicide, she maintained that she could follow the law on punishment, even in a case involving the intentional murder of a young girl, and she stated that she would weigh a defendant's history, past conduct, and other factors in deciding the appropriate sentence.

[25] Jury 230 108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

To be qualified to sit on a capital jury, a panelist must be unequivocal in her willingness to fairly consider all punishment options, as the law requires.

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[26] Jury 230 ⚷108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

Just as a defendant is not entitled to jurors who are completely ignorant of the circumstances surrounding the crime, so too, the law does not require jurors in a capital case to come to the process with complete indifference about the death penalty.

[27] Jury 230 ⚷97(2)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k97 Bias and Prejudice
230k97(2) k. Personal relations in general. Most Cited Cases

Trial court did not abuse its discretion in refusing to remove prospective juror for cause, in capital murder prosecution; when prospective juror was asked how her mother's death over 40 years earlier by intentional homicide would affect her as a juror, she responded that she did not think one had to do with the other, and several times, when pressed about any predispositions she might have, she qualified her answers with statement that she did not know the facts yet.

[28] Jury 230 ⚷97(1)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k97 Bias and Prejudice
230k97(1) k. In general. Most Cited Cases

Jury 230 ⚷108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

Trial court did not abuse its discretion in refusing to remove prospective juror for cause, in capital murder prosecution; while prospective juror admitted that when he first heard about the murder of child victim, his gut reaction was that he would “like to get his hands on” the person who committed it, this was a frank and not unnatural first response to what defense counsel himself repeatedly described during voir dire as a “horrific” crime, and prospective juror assured court and counsel that he could fairly consider all available punishments in the context of the criminal trial. 22 Okl.St.Ann. § 659.

[29] Criminal Law 110 ⚷1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In general. Most Cited Cases

Appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion.

[30] Criminal Law 110 ⚷438(7)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(7) k. Photographs arousing passion or prejudice; gruesomeness. Most Cited Cases

Trial court did not abuse its discretion in admitting fewer than half a dozen postmortem photographs of child victim's body, in capital murder

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prosecution; while photographs, which depicted condition of victim's body as it was initially discovered, including neck wound and fingernail marks on her face, were gruesome, they accurately depicted the injuries that defendant admitted inflicting on victim. 12 Okl.St.Ann. § 2403.

[31] Criminal Law 110 438(7)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(7) k. Photographs arousing passion or prejudice; gruesomeness. Most Cited Cases

State is not obligated to downplay the shocking nature of the crime as depicted by visual evidence.

[32] Criminal Law 110 438(3)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(3) k. Pictures of accused or others; identification evidence. Most Cited Cases

Trial court's admission of a single school portrait of child murder victim in guilt stage of capital murder trial did not, considering the totality of the circumstances, deny defendant a fair sentencing proceeding. 12 Okl.St.Ann. § 2403.

[33] Criminal Law 110 404.50

110 Criminal Law
110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.35 Particular Objects
110k404.50 k. Instruments or devices used, or suspected of use, in commission of crime. Most Cited Cases

Items seized from capital murder defendant's apartment, most of which were weapons, tools, pornography, or other items of a sexual and/or violent nature, were relevant to defendant's motive and intent, and, thus, were admissible; items corroborated defendant's detailed confession about his plan to subdue child victim, sexually violate her, and perform other gruesome acts upon her body, and about how this plan had evolved in his mind over the preceding months, and many of the items were specifically mentioned by defendant when he spoke with the police, and because they corroborated his expressed intentions, they bore on the veracity of the confession.

[34] Sentencing and Punishment 350H 1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases

Former version of pattern instruction given during punishment phase of capital murder prosecution defining “mitigating circumstances” as those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame, did not improperly imply that the jury should ignore any of the evidence offered by defendant in mitigation of sentence.

[35] Sentencing and Punishment 350H 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases

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Prosecutor's closing arguments during punishment phase of capital murder prosecution did not improperly imply that the jury should ignore any of the evidence offered by defendant in mitigation of sentence, as during the State's first closing argument in the punishment stage, the prosecutor told the jurors that they were to decide what qualified as mitigating evidence, and that they could consider factors besides those advanced by the defense, and similar comments were made in the State's final closing.

[36] Sentencing and Punishment 350H ⚷1769

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1769 k. Expert evidence. Most Cited Cases

State's mental health expert did not insinuate, in testifying during punishment stage of capital murder prosecution, that he had been blocked from interviewing defendant personally; expert made it clear, early in his direct examination, that he had not been hired by the State to personally evaluate defendant, but only to review the evaluations of defense experts, and expert agreed with much, if not most, of defense experts' findings.

[37] Sentencing and Punishment 350H ⚷1658

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1658 k. Manner and effect of weighing or considering factors. Most Cited Cases

In the sentencing phase of a capital murder prosecution, the jury's consideration of aggravators versus mitigators is a balancing process which is not amenable to the “beyond a reasonable doubt” standard of proof.

[38] Sentencing and Punishment 350H ⚷1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases

In the penalty phase of a capital murder proceeding, instruction on presumption of a life sentence is not required.

[39] Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

Sufficient evidence supported aggravating circumstance found by jury during punishment phase of capital murder prosecution that defendant's murder of ten-year-old victim was especially heinous, atrocious, or cruel; victim consciously suffered for an appreciable length of time before her death, in that defendant hit victim on the back of her head several times with a cutting board, defendant hit her so hard that he was surprised the board did not break, despite victim's pleas, defendant proceeded to suffocate her with his bare hands, defendant reported that more than once, victim's body went limp, but then she would come around and resume the struggle for life, and defendant told police that it took some 15 to 20 minutes before victim finally succumbed.

[40] Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

To support a finding that a murder was especially heinous, atrocious, or cruel, as an aggravating

circumstance to support imposition of death penalty, the State must show that the victim's death was preceded by torture or serious physical abuse; “serious physical abuse” requires evidence that the victim experienced conscious physical suffering prior to death.

[41] Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

The crucial aspect of aggravating circumstance that a murder was especially heinous, atrocious, or cruel, such as would support imposition of death penalty, is the victim's awareness; physical acts done to the victim, no matter how vile, will not establish the heinous, atrocious, or cruel aggravator if no rational juror could find, beyond a reasonable doubt, that the victim was conscious of them.

[42] Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

So long as the evidence supports a finding that the victim's death was preceded by torture or serious physical abuse, as necessary to prove aggravating circumstance that a murder was especially heinous, atrocious, or cruel, such as would support imposition of the death penalty, the jury is permitted to consider all the circumstances of the case, including the attitude of the killer and the pitiless nature of the crime.

[43] Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

A capital murder defendant will not be heard to excuse any “serious physical abuse” on his own poor planning; a murder is not mitigated by the fact that the victim put up a fight to save her own life.

[44] Sentencing and Punishment 350H ⚷1625

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 k. Aggravating or mitigating circumstances. Most Cited Cases

Aggravating circumstance that a murder was especially heinous, atrocious, or cruel, such as would support imposition of the death penalty, is constitutional.

[45] Sentencing and Punishment 350H ⚷1641

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1641 k. Mentally ill or incompetent persons. Most Cited Cases

Imposition of death penalty on capital murder defendant who suffered from mental illness did not violate Eighth Amendment, absent any evidence that his mental illness prevented him from comprehending the reasons for the penalty or its implications. U.S.C.A. Const.Amend. 8.

[46] Sentencing and Punishment 350H ⚷1641

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1641 k. Mentally ill or incompetent persons. Most Cited Cases

The Eighth Amendment prohibits execution of a defendant whose mental illness prevents him from comprehending the reasons for the penalty or its implications. U.S.C.A. Const.Amend. 8.

[47] Sentencing and Punishment 350H ⚷1763

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350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim impact. Most Cited Cases

Admission of victim impact testimony from child victim's parents during punishment phase of capital murder prosecution recommending, without amplification, that defendant be put to death for murdering their daughter, was justified, under statute governing admission of victim impact evidence. 22 O.S.2001 § 984.1.

[48] Sentencing and Punishment 350H ⚷ 1789(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(3) k. Presentation and reservation in lower court of grounds of review. Most Cited Cases

Court of Criminal Appeals, on capital murder defendant's appeal of his conviction and death sentence, would review for plain error those comments of the prosecutor that defendant alleged unfairly influenced jury's sentence, where defendant did not object to the comments at trial.

[49] Criminal Law 110 ⚷ 2117

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2117 k. Homicide and assault with intent to kill. Most Cited Cases

Sentencing and Punishment 350H ⚷ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases

Prosecutor's comments during guilt and punishment phases of capital murder prosecution implying that defendant had partially shaved child victim's pubic area with a razor were not improper, as the inference was based on the evidence, including guilt-stage testimony of criminalist, who examined victim's body at medical examiner's office and noticed that victim's pubic area appeared partially shaven.

[50] Sentencing and Punishment 350H ⚷ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases

Prosecutor's arguments in capital murder prosecution that death was the only appropriate punishment were not improper, as prosecutor advanced the State's position that a death sentence was appropriate based on the evidence and testimony submitted.

[51] Criminal Law 110 ⚷ 2089

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2089 k. In general. Most Cited Cases

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Criminal Law 110 2091

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2091 k. Personal knowledge, opinion, or belief of counsel. Most Cited Cases

It is improper for a prosecutor to give personal opinions on the appropriate verdict by alluding to information that has not been properly presented to the jury.

[52] Criminal Law 110 2094

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2094 k. In general. Most Cited Cases

It is entirely proper for a prosecutor, as the State's representative, to argue for a particular outcome based on the evidence introduced at trial.

[53] Criminal Law 110 2086

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2084 Statements Regarding Applicable Law
110k2086 k. In particular prosecutions. Most Cited Cases

Prosecutor's comment during voir dire in capital murder prosecution that the presumption of innocence was a "precious thing," and that it applies with equal force when the facts show that the accused is not "actually innocent," was not improper, as prosecutor certainly did not argue that the presumption of innocence was inapplicable or had been destroyed in the case, and the prosecutor was simply explaining that the presumption was the law's way of placing the burden on the State to produce evidence sufficient for a conviction.

[54] Criminal Law 110 2146

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2146 k. In general. Most Cited Cases

Prosecutor's closing argument in guilt stage of capital murder prosecution involving the murder of a ten-year-old girl, to which defense counsel objected on basis that prosecutor was "prancing around" in front of jury and "screaming" at them, was not improper, as trial court admonished the prosecutor not to get too close to the jury and the prosecutor complied, prosecutor's argument was not aimed at defendant personally, but was properly directed to the jury, and while prosecutor's comments might have been delivered with emotion, no one could deny that emotionally-charged evidence had been presented at trial.

[55] Criminal Law 110 1144.10

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.10 k. Conduct of trial in general. Most Cited Cases

Criminal Law 110 1881

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective As-

sistance in General

110k1881 k. Deficient representation and prejudice in general. Most Cited Cases

When defendant on direct appeal challenges his trial counsel's performance, the Court of Criminal Appeals begins with the presumption that trial counsel rendered reasonable professional assistance, and defendant must establish both deficient performance and prejudice, that is, (1) that his trial counsel's performance was objectively unreasonable under prevailing professional norms, and (2) that counsel's performance undermines confidence in the outcome of the trial. U.S.C.A. Const.Amend. 6.

[56] Criminal Law 110 1931

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1931 k. Experts; opinion testimony. Most Cited Cases

Defense counsel's failure to call defense forensic expert that had been retained to review autopsy findings before trial to testify at trial to refute claims made by medical examiner about possible sequence of injuries to victim was a reasonable strategic decision, and, thus, was not ineffective assistance, in capital murder prosecution; defense counsel made the most relevant point through cross-examination of medical examiner, which was that she could not point to any evidence refuting defendant's description of when child victim lost consciousness, additional rebuttal of medical examiner's admittedly inconclusive findings about the trauma sequence was, arguably, a waste of time, and during punishment stage, defense team focused on showing jury that defendant was not a continuing threat if confined to prison, and on showing why his life was worth sparing, and although State had incorporated guilt-stage exhibits and testimony into punishment stage, actually calling a forensic expert to testify in detail about the same gruesome matters again, when the focus was now squarely on punishment, would arguably have distracted the jury in a way unfavorable to the defense. U.S.C.A. Const.Amend. 6.

[57] Criminal Law 110 1891

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1891 k. Preparation for trial. Most Cited Cases

Criminal Law 110 1922

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1922 k. In general. Most Cited Cases

When counsel is assailed for failing to present evidence, the court considers whether counsel conducted a responsible investigation on the issues involved; a total failure to investigate a viable and relevant aspect of a defense is one thing, a tactical decision not to present certain evidence, after reasonable investigation, is another, and when counsel has made an informed decision to pursue one particular strategy over another, that choice is virtually unchallengeable. U.S.C.A. Const.Amend. 6.

[58] Criminal Law 110 1931

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1931 k. Experts; opinion testimony. Most Cited Cases

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Defense counsel's failure to call defense forensic expert that had been retained to review autopsy findings before trial to testify during pretrial suppression hearing to discredit the State's reliance on the rescue doctrine was a reasonable strategic decision, and, thus, was not ineffective assistance, in capital murder prosecution; defendant claimed officer knew, or should have known, that child victim was already dead, thus rendering the rescue doctrine inapplicable, because, in defense expert's estimation, the "prominent odor of decaying flesh" should have been obvious upon opening the tub, but expert had no personal knowledge of the crime scene, and undisputed evidence was that body had been wrapped in sheets of plastic, that items of clothing lay on top of this bundle, that tub was sealed with duct tape, that a strong odor of air freshener permeated closet where tub was located, and that officer only briefly opened a corner of the tub, and, thus, expert could not say with any degree of certainly what odor officer should have detected. U.S.C.A. Const.Amend. 6.

[59] Criminal Law 110 ⚷1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases

Defense counsel's failure to ask different questions to lay mitigation witnesses, or to ask questions in a different way, did not amount to insufficient presentation of mitigation evidence, and, thus, was not ineffective assistance, in capital murder prosecution; defendant concedes that his trial team conducted extensive mitigation investigation, and that copious anecdotal evidence about his life history was presented through friends, family, coworkers, teachers, and others, the State did not present a single witness to rebut these anecdotes, or to impeach the credibility of those relating them, and insofar as these witnesses illustrated defendant's mental disorders, the State's own mental-health expert generally concurred in the diagnoses that the defense experts had reached after considering the same kind of information. U.S.C.A. Const.Amend. 6.

[60] Criminal Law 110 ⚷1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases

Defense counsel's failure to rebut state's insinuation that neuroimaging testing could have been undertaken to confirm certain diagnoses made by defense experts did not prejudice capital murder defendant, and, thus, was not ineffective assistance, as state's mental health expert did not dispute the diagnoses of the defense experts but merely disagreed with some of their conclusions about whether defendant constituted a continuing threat to society, and, ultimately, the jury rejected that aggravating circumstance. U.S.C.A. Const.Amend. 6.

[61] Criminal Law 110 ⚷938(3)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(3) k. Facts within knowledge of defendant. Most Cited Cases

Juror's omission of certain information during voir dire concerning his prior contacts between himself or members of his family and police or the courts was not "newly discovered evidence," as necessary for capital murder defendant to establish entitlement to a new trial based on newly discovered evidence, as the information omitted by juror was public record, and defendant did not explain why it was not collected and presented previously. 22 Okl.St.Ann. § 952(7).

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[62] Criminal Law 110 ⚷940

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k940 k. Materiality. Most Cited Cases

Juror's omission of certain information during voir dire concerning his prior contacts between himself or members of his family and police or the courts, even if "newly discovered evidence," was not material, and, thus, defendant was not entitled to a new trial based on newly discovered evidence on basis that juror's omission of the information indicated bias in reference to the case; even if were assumed that all of the juror's omissions were intentional, there was no hint that he might have harbored any bias toward or against anyone involved in the trial, nor were juror's omissions so egregious that one might reasonably detect some personal interest in serving on the jury, and a willingness to commit perjury to do so. 22 Okl.St.Ann. §§ 659(2), 952(7).

[63] Criminal Law 110 ⚷938(1)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(1) k. In general. Most Cited Cases

When a defendant claims that newly-discovered evidence warrants a new trial, the Court of Criminal Appeals consider the following factors: (1) whether the evidence could have been discovered before trial with reasonable diligence, (2) whether the evidence is material, (3) whether the evidence is cumulative, and (4) whether the evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome. 22 Okl.St.Ann. § 952(7), 953; Court of Criminal Appeals Rule 2.1(A)(3), 22 O.S.A. Ch. 18, App.

[64] Jury 230 ⚷33(2.10)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.10) k. In general. Most Cited Cases

The right to a fair trial, guaranteed to every litigant, includes the right to a body of impartial jurors.

[65] Jury 230 ⚷85

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k85 k. Discretion of court. Most Cited Cases

Trial judges enjoy considerable discretion in deciding whether to excuse a juror for cause.

[66] Criminal Law 110 ⚷923(1)

110 Criminal Law
110XXI Motions for New Trial
110k923 Competency of Jurors and Challenges
110k923(1) k. In general. Most Cited Cases

Jury 230 ⚷131(13)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) k. Mode of examination. Most Cited Cases

While a trial court may, in its discretion, excuse a prospective juror for omitting, or even intentionally lying about, certain information during voir dire, that does not mean that the same omissions automatically warrant a new trial when they are discovered at a later date.

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[67] Criminal Law 110 ⚷923(1)

110 Criminal Law
110XXI Motions for New Trial
110k923 Competency of Jurors and Challenges
110k923(1) k. In general. Most Cited Cases

Even when a juror's answers in voir dire are shown to have been deliberately misleading, a new trial is only required when the record casts sufficient doubt on the juror's ability to be impartial; the motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

[68] Criminal Law 110 ⚷938(1)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(1) k. In general. Most Cited Cases

As a general rule, a verdict will not be set aside for reasons that would be sufficient to disqualify on a challenge for cause which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the accused suffered injustice from the fact that the juror served in the case.

[69] Jury 230 ⚷133

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k133 k. Trial and determination. Most Cited Cases

Any doubts about a juror's impartiality should be resolved in favor of the accused.

[70] Criminal Law 110 ⚷923(1)

110 Criminal Law
110XXI Motions for New Trial
110k923 Competency of Jurors and Challenges
110k923(1) k. In general. Most Cited Cases

Juror's omission of certain information during voir dire concerning his prior contacts between himself or members of his family and police or the courts did not prevent capital murder defendant from intelligently exercising his peremptory challenges, and, thus, defendant was not entitled to a new trial on this ground, as juror's omissions had no relation to any party, witness, or issue in the case. 20 Okl.St.Ann. § 3001.1; 22 Okl.St.Ann. § 952(7).

[71] Criminal Law 110 ⚷938(1)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(1) k. In general. Most Cited Cases

New information about a juror's background or opinions can only be grounds for relief in the form of a new trial if it raises a doubt about the juror's ability to be fair and impartial.

[72] Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

Sentencing and Punishment 350H ⚷1727

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(F) Factors Related to Status of Victim
350Hk1727 k. Age. Most Cited Cases

Imposition of the death penalty on defendant for murdering ten-year-old victim was justified, as the sentence was imposed based on sufficient evidence that the murder was especially heinous, atro-

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cious, or cruel, and there was no reason to believe that the jury's imposition of the death sentence was the result of any improper factor. 21 Okl.St.Ann. § 701.13.

***229** ¶ 0 An Appeal from the District Court of Cleveland County; The Honorable Candace Blalock, District Judge.L. Wayne Woodyard, Matthew D. Haire, G. Lynn Burch, Norman, OK, attorneys for defendant at trial.

Greg Mashburn, District Attorney, Susan Caswell, Assistant District Attorney, Norman, OK, attorneys for the State at trial.

William H. Luker, Lee Ann Jones Peters, Norman, OK, attorneys for appellant on appeal.

W.A. Drew Edmondson, Attorney General of Oklahoma, Jennifer J. Dickson, Assistant Attorney General, Oklahoma City, OK, attorneys for the State on appeal.

OPINION

C. JOHNSON, Judge.

¶ 1 Appellant, Kevin Ray Underwood, was charged in McClain County District Court (Case No. CF2006–102) with First Degree Murder (21 O.S.Supp.2004, § 701.7(A)). The State alleged three aggravating circumstances in support of the death penalty. The district court granted Appellant's request for a change of venue, and the case was transferred from McClain County to Cleveland County (Case No. CF–2007–513). Jury trial was held February 19 through March 7, 2008 before the Honorable Candace L. Blalock, District Judge. The jury found Appellant guilty as charged. Before the capital sentencing phase of the trial began, the State dismissed one of the three aggravating circumstances it had alleged. The jury rejected a second aggravating circumstance, but did ***230** find that the murder was especially heinous, atrocious, or cruel, and recommended a sentence of death.[FN1] Formal sentencing was held April 3, 2008. Appellant timely appealed the verdict to this Court.[FN2]

FN1. The State had initially alleged that the murder was committed to avoid lawful arrest or prosecution (21 O.S.2001, § 701.12(5)); that the murder was especially heinous, atrocious, or cruel (21 O.S.2001, § 701.12(4)); and that there existed a probability that Appellant would commit other criminal acts of violence such that he was a continuing threat to society (21 O.S.2001, § 701.12(7)). The State ultimately dismissed the “murder to avoid arrest” allegation, and the jury rejected the “continuing threat” allegation.

FN2. Appellant filed his brief-in-chief, and an application for evidentiary hearing on his ineffective-counsel claims, on June 3, 2009. The State filed its response brief on October 30, 2009. Appellant filed a reply brief on November 19, 2009. Oral argument was held October 12, 2010.

FACTS

¶ 2 Appellant was charged with murdering ten-year-old Jamie Bolin on April 12, 2006, in Purcell, Oklahoma. Appellant lived alone in the same apartment complex where Jamie lived with her father, Curtis Bolin. Due to her father's work schedule, Jamie was typically home alone for a period of time after school. On the day in question, Jamie played in the school library with a friend for a short time before going home. She was never seen alive again.

¶ 3 Police, firefighters, and a host of citizen volunteers began a search for Jamie. The day after Jamie's disappearance, the Federal Bureau of Investigation added over two dozen people to the effort. On April 14, 2006, two days after Jamie was last seen, police set up several roadblocks around the apartment complex where she lived, seeking leads from local motorists. Around 3:45 p.m. that day, FBI Agent Craig Overby encountered a truck driven by Appellant's father at one of the roadblocks; Appellant was a passenger in the truck. Appellant's father told Overby that they had heard about the disappearance, and that in fact, Appellant

was the girl's neighbor. From speaking with other neighbors at the apartment complex, Overby knew that a young man living there may have been the last person to see Jamie. Overby asked if Appellant would come to the patrol car to talk for a moment, and Appellant agreed, while his father waited in the truck. In the patrol car, Appellant made statements that piqued Overby's interest.[FN3] Overby asked Appellant if he would come to the police station for additional questioning. Again, Appellant agreed, and Overby assured Appellant's father that he (Overby) would give Appellant a ride home.

> FN3. At trial, Overby testified: "He told me that he was afraid that he was considered a suspect because he'd been hanging around outside his apartment a lot during the last couple of weeks.... He said he was the last person to see Jamie before she disappeared, and that the media reports of the clothing that she was wearing when she became missing were incorrect."

¶ 4 At the police station, Appellant was interviewed by Agent Overby and Agent Martin Maag. Appellant told them about seeing Jamie on April 12, and discussed his activities on that day and other matters. At the conclusion of this interview, which lasted less than an hour, the agents asked Appellant if they could search his apartment. Appellant agreed. The agents accompanied Appellant to his apartment around 5:00 p.m. While looking around the apartment, Overby saw a large plastic storage tub in Appellant's closet; its lid was sealed with duct tape. Appellant saw Overby looking at the tub, and volunteered that he kept comic books in it; he said that he had taped the lid to keep moisture out. Overby asked if he could look inside the tub, and Appellant agreed. When Overby pulled back a portion of the tape and lifted a corner of the lid, he saw a girl's shirt—and realized that it matched Appellant's description of the shirt Jamie Bolin was wearing on the day she disappeared.[FN4] When Overby commented that he saw no comic books in the tub, Appellant interjected, "Go ahead and arrest me." Overby immediately responded, "Where is she?" Appellant replied, "She's in there. I hit her and ***231** chopped her up." Appellant then became visibly upset, began hyperventilating, and exclaimed, "I'm going to burn in Hell." He was placed under arrest and escorted out to the agents' vehicle. Agent Overby summoned local authorities to secure the scene.

> FN4. Overby testified: "[D]uring the earlier interview, Mr. Underwood told me that the media reports about what Jamie was last seen wearing were wrong, that he had actually seen her wearing a blue shirt. And then I saw the blue shirt inside the box or the tub."

¶ 5 Back at the police station, Appellant was advised of his right to remain silent, and his right to the assistance of counsel during any questioning, consistent with *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because he asked for a lawyer, the interview was concluded. About fifteen minutes later (approximately 5:45 p.m.), police approached Appellant and asked if he would reaffirm, in writing, his original verbal consent to a search of his apartment. Appellant agreed, and spent the next few hours sitting in a police lieutenant's office. He conversed with various officers who were sent to guard him, and made some incriminating statements during that time.

¶ 6 Around 9:30 p.m. that evening, Appellant asked to speak with the two FBI agents he had initially talked to (Overby and Maag). Because Appellant had previously asked for counsel, OSBI Agent Lydia Williams visited with him to determine his intentions. Agent Williams reminded Appellant that he had earlier declined to be questioned, and explained that because of that decision, police could not question him any further. Appellant emphatically replied that he wanted to talk to the agents. Around 10:15 p.m., Agents Overby and Maag interviewed Appellant at the police station. Before questioning began, Overby reminded Appellant of his *Miranda* rights, and Appellant signed a written

form acknowledging that he understood them and waived them. When asked if anyone had offered him anything in exchange for agreeing to talk, Appellant replied that one of the officers had predicted things would go better for him if he cooperated. Besides acknowledging his waiver of *Miranda* rights, Appellant also signed another written consent to a search of his apartment. A video recording and transcript of the interview that followed, which lasted about an hour, was presented to the jury at trial and is included in the record on appeal.

¶ 7 In the interview, Appellant describes how he had recently developed a desire to abduct a person, sexually molest them, eat their flesh, and dispose of their remains. He explains in considerable detail how he attempted to carry out this plan on Jamie Bolin, whom he had decided was a convenient victim. Appellant stated that he invited Jamie into his apartment to play with his pet rat. Once Jamie was inside, Appellant hit her on the back of the head several times with a wooden cutting board; she screamed in pain and begged him to stop. Appellant proceeded to suffocate the girl by sitting on her and placing his hand across her face. Appellant told the agents that this was not an easy task, and that fifteen to twenty minutes passed before she succumbed. Appellant claimed he then attempted to have sexual relations with the girl's body, but was unable to perform. He then moved her body to the bathtub and attempted to decapitate it with a knife, but was unsuccessful at that task as well. Frustrated, Appellant wrapped Jamie's body in plastic sheeting and placed it in a large plastic container which he hid in his closet. Appellant also dismantled Jamie's bicycle and hid it inside his apartment, to make it look as if she had left the apartment complex.

¶ 8 Jamie Bolin's remains were taken to the Medical Examiner's office for an autopsy. The Medical Examiner noted bruises to the back of the girl's head, consistent with Appellant's claim that he hit her forcefully with a cutting board. The examiner also noted petechia in the girl's eyes, and curved marks on her face, consistent with Appellant's description of how he had suffocated her. The most pronounced wound on the body was a very deep incision to Jamie's neck, which was also consistent with the injuries Appellant admitted to inflicting. The Medical Examiner also noted trauma to the girl's genital area, including tearing of the hymen. However, the Medical Examiner could not say that Jamie was alive, or even conscious, when her neck was cut or when she was sexually assaulted. The official cause of death was declared to be asphyxiation.

¶ 9 In the punishment stage of the trial, the State presented brief victim-impact testimony***232** from Jamie Bolin's parents. It incorporated the testimony from the guilt stage to show that the murder was especially heinous, atrocious, or cruel. The defense presented extensive evidence in mitigation of sentence, including the testimony of family, friends, and three experts who had evaluated Appellant's mental health. In rebuttal, the State presented its own mental-health expert, who had reviewed the findings of the defense experts. The State's expert did not disagree with the defense experts' diagnoses, and concurred with many of their findings, but disagreed on some points and explained why, in his opinion, Appellant constituted a continuing threat to society. In the end, the jury rejected the “continuing threat” allegation, but found that the heinous nature of the killing warranted the death sentence.

¶ 10 Additional facts will be presented when relevant to the discussion below.

DISCUSSION

¶ 11 Appellant raises thirteen propositions of error. Before turning to them, however, we make a few important observations. First, while Appellant did not formally concede his guilt in the murder of Jamie Bolin, but instead required the State to present its evidence on that issue, neither did he seriously contest the guilt-stage evidence against him. In fact, defense counsel told the jury in guilt-stage opening statements that it would probably

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find Appellant guilty, but that there would be reasons to spare his life.FN5 Appellant does not, on appeal, challenge the sufficiency of the evidence to support his conviction. While Appellant does raise a few claims that go to the fairness of the entire trial, in the remaining claims it is generally conceded that any alleged error only affected the punishment stage. Second, as far as the punishment stage goes, the jury was presented with two aggravating circumstances in support of the death penalty, and it rejected one of them. The defense presented substantial evidence regarding Appellant's background, mental health, and prospects as an inmate of a secure facility for the rest of his life. The jury rejected the State's claim that Appellant posed a continuing threat to society; however, it found that the murder of Jamie Bolin was especially heinous, atrocious, or cruel, and that that single aspect of the crime outweighed the mitigating evidence and warranted a sentence of death. With these facts in mind, we turn to Appellant's claims of error.

FN5. This defense strategy was undertaken with Appellant's understanding and consent, as recorded in an *ex parte* hearing with the court. *See Jackson v. State,* 2001 OK CR 37, ¶¶ 10–16, 41 P.3d 395, 398–99 .

I. ADMISSIBILITY OF APPELLANT'S CONFESSION

[1] ¶ 12 In Proposition 1, Appellant advances several reasons why incriminating statements he made to police, and the physical evidence that those statements led to, should not have been admitted at his trial. Essentially, he claims that his initial encounter with police at the roadblock, his statements during subsequent interviews, his incriminating statements during the search of his apartment, his recorded confession later that evening, and physical evidence eventually seized from his apartment, were all obtained in violation of the state and federal constitutional protections from unreasonable searches and seizures, and the constitutional privilege against self-incrimination. Appellant filed an extensive motion to suppress before trial, raising each of the claims made here. The trial court held a hearing over several days in January 2008, then issued a written order, setting forth a chronology of relevant events, and detailing its findings of fact and conclusions of law on what evidence would be admissible at the upcoming trial. FN6 Appellant timely renewed his motion to suppress at trial. These issues have been preserved for full appellate review. We review the district court's factual findings for clear error; its analysis of applicable law is reviewed *de novo. State v. Pope,* 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287.

FN6. We commend the district court for the manner in which the hearing was conducted, and for the thoroughness of its findings and conclusions.

[2] ¶ 13 The district court concluded, in substance, (1) that the roadblock where Appellant***233** first encountered police was not an unreasonable seizure, as it was reasonably tailored to its stated objective; (2) that Appellant's initial statements to police at the roadblock, and later at the police station, including his verbal consent to a search of his apartment, were all voluntarily made in a non-custodial setting; (3) that Appellant's initial confession to Agent Overby at the apartment was admissible, even in the absence of *Miranda* warnings, under the "rescue doctrine"; (4) that Appellant's subsequent arrest, followed by his invocation of his right to counsel, required the suppression of certain incriminating statements he made to various officers over the next few hours, and also invalidated his written consent to a search of his apartment made during that time, but this had no effect on the validity of his previous verbal consent to such a search; (5) that the search warrant, obtained by police later that evening, was not predicated on false or misleading information; and (6) that Appellant voluntarily reinitiated contact with police, asking to talk with particular officers, and that his subsequent interview with Agents Overby and Maag on the night of April 14, 2006 was voluntary and admiss-

ible at trial. Appellant challenges all of these conclusions, and we review each claim in turn.

a. The police roadblock.

[3][4][5] ¶ 14 Appellant complains that the police roadblock, which led to his initial conversation with police, amounted to an unreasonable seizure under the Fourth Amendment. In determining the reasonableness of seizures that are less intrusive than a traditional arrest, we must balance several competing factors: (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty. *Brown v. Texas,* 443 U.S. 47, 50–51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); *Lookingbill v. State,* 2007 OK CR 7, ¶ 15, 157 P.3d 130, 134. Police may generally establish a roadblock without any individualized suspicion of criminal activity if the purpose is related to motor safety—such as brief checks for driver's licenses or driver sobriety—provided that the roadblock is sufficiently tailored to that end. *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 452–53, 110 S.Ct. 2481, 2486–87, 110 L.Ed.2d 412 (1990). On the other hand, police may not establish roadblocks for "general" interest in crime control, *i.e.,* stopping motorists just to see what illegal activity might be revealed. *Indianapolis v. Edmond,* 531 U.S. 32, 44, 121 S.Ct. 447, 455, 148 L.Ed.2d 333 (2000). But police may, consistent with the Fourth Amendment, briefly detain motorists to seek and disseminate information about a recent crime affecting the area. *Illinois v. Lidster,* 540 U.S. 419, 423, 124 S.Ct. 885, 889, 157 L.Ed.2d 843 (2004). While such "information-seeking" detentions do not involve individualized suspicion of criminal activity, they are designed to be brief in duration; they tend to involve a few general questions of the motorist, and perhaps delivery of a flyer with additional information about the crime being investigated. *Id.* at 424, 124 S.Ct. at 889. If such roadblocks are reasonably tailored to those objectives, they are not unreasonable seizures. *Id.* at 427–28, 124 S.Ct. at 891.

¶ 15 In *Lidster,* the police set up a highway roadblock to find witnesses to, or other information about, a hit-and-run accident that had killed a bicyclist about a week earlier on the same road. The defendant in *Lidster* was arrested at the roadblock on suspicion of driving under the influence of alcohol, and was later convicted of that crime. On appeal in state court, he successfully challenged his conviction on the theory that the roadblock was an unreasonable seizure. However, the United States Supreme Court disagreed. Considering the factors enunciated in *Brown v. Texas,* enumerated above, and noting the "vital role" that the public plays in police investigative work, the Court concluded that the brief delay to motorists, for the purpose of collecting and disseminating information about a recent serious crime in the vicinity, was not an unreasonable seizure under the Fourth Amendment. *Id.* at 422–28, 124 S.Ct at 888–891.

¶ 16 The situation here is similar to the one in *Lidster*—the obvious difference being that the person challenging the roadblock here was actually implicated in the crime ***234** that prompted the roadblock in the first place. FN7 That difference, however, is of no constitutional significance, since the legality of a search or seizure is not dependent on the kind of evidence it produces. At the suppression hearing, Agent Mabry sponsored the guidelines used in this case, known as the FBI's "Child Abduction Response Plan." Mabry testified about the procedures he had been trained to use when deploying roadblocks to canvass for witnesses and generate leads in such cases. The district court found nothing unreasonable about the roadblock and, applying the factor analysis from *Brown* and *Lidster,* we reach the same conclusion. First, the public concerns justifying the roadblock were grave—considerably more so than in *Lidster.* All police knew was that a little girl had been reported missing two days before. Time was of the essence; the girl's life might be at stake. Second, the roadblock clearly advanced the public interest of informing people in the area about the girl's disappearance, and asking them about anything suspicious

they may have seen. The police set up four roadblocks surrounding the immediate vicinity of the apartment where Jamie lived. They were deployed around the same time of day that Jamie had disappeared, on the belief that many local motorists tend to travel the same routes around the same time each day. Finally, the interference with individual liberty occasioned by the roadblocks was minimal. The plan contemplated no vehicle searches, and the record offers no evidence that any motorist was seriously inconvenienced.

> FN7. *Cf. Burns v. Commonwealth,* 261 Va. 307, 541 S.E.2d 872, 883–84 (2001) (implementation of "traffic-canvassing detail," stopping motorists in the vicinity of a recent murder and asking if any suspicious activity had been seen, and which fortuitously resulted in the apprehension of the murderer, did not violate the Fourth Amendment).

¶ 17 Appellant makes several inconsistent arguments about the roadblock. On the one hand, he claims that the procedures used to implement it did not sufficiently limit officer discretion. He relies on our analysis in *Lookingbill,* which involved a roadblock set up for an entirely different purpose—checking driver's licenses.[FN8] we held in *Lookingbill* that public-safety roadblocks (1) should be rationally related to their stated purpose, (2) should be carried out according to guidelines that limit officer discretion and treat all motorists equally, and (3) should strive to minimize invasion of motorist privacy. *Lookingbill,* 2007 OK CR 7, ¶ 27, 157 P.3d at 136. Appellant concedes that the officers in this case were following FBI guidelines, but complains that those guidelines were not restrictive enough. Yet he does not point to any particular action during the agents' encounter with him (or with any other motorist, for that matter) that could be considered unfair, harassing, or unnecessary to the stated objective.

> FN8. In *Lookingbill,* the defendant was arrested after contraband was observed in plain view during the driver's-license check. *Lookingbill,* 2007 OK CR 7, ¶¶ 7–12, 157 P.3d at 133. Although the defendant challenged the propriety of the roadblock, the testimony indicated it was deployed pursuant to rules promulgated by the Oklahoma Highway Patrol and the Department of Public Safety, and no evidence was presented to the contrary. On that record, we affirmed the district court's conclusion that the roadblock was permissible. *Id.* at ¶¶ 21–24, 157 P.3d at 135–36.

¶ 18 Appellant then acknowledges that the roadblock in this case had a different purpose than the one in *Lookingbill.* Nevertheless, he claims the roadblock fails the criteria considered in *Brown* and *Lidster.* He argues that it was unreasonable to set up roadblocks around the area where Jamie lived and was last seen, because police had no idea if she was still there. This argument is frivolous. With no other information about the girl's whereabouts, it was entirely reasonable for police to inquire of those who might have seen her leaving the area where she was last seen.

[6] ¶ 19 After arguing that the roadblock was, logistically, an unreasonable "shot in the dark," Appellant then claims the opposite: that it was really a subterfuge designed to trap him in particular. He suggests that police already suspected him of involvement in Jamie's disappearance, but that they lacked probable cause to arrest him. Police had attempted to question Appellant a day or so before, because neighbors had reported that he claimed to have been the last person ***235** to see Jamie alive. Yet there is no indication that, at the time the roadblock was implemented, Appellant was considered anything but a potential witness to a crime. There is also no indication that Appellant was attempting to flee the area, or that police thought as much.[FN9] More fundamentally, Appellant cites no authority for his insinuation that it is "unreasonable" for police to deploy an information-gathering roadblock if they happen to have some leads that have not yet

been exhausted.[FN10] The very purpose of a *Lidster* -style roadblock is to generate useful leads in a criminal investigation. If, in the process, the police encounter citizens they already wanted to speak with, so much the better. *Lidster* instructs that police may briefly detain motorists in their quest for potential witnesses to serious crimes, provided the means employed are reasonable under the circumstances. The district court was correct in concluding that the police roadblock in this case was reasonable under the Fourth Amendment. *Lidster,* 540 U.S. at 426–27, 124 S.Ct. at 890–891; *Brown,* 443 U.S. at 51, 99 S.Ct. at 2640.

FN9. Appellant claims the roadblocks were called off shortly after he agreed to accompany police to the station for further questioning, but concedes that the record is devoid of evidence on this point. Of course, Appellant was arrested for the murder of Jamie Bolin within about ninety minutes after the roadblocks began, and it would seem pointless to have continued them after that time.

FN10. To the extent Appellant is arguing that police hoped to catch the person who abducted Jamie Bolin by use of the roadblock, that much could hardly be denied. Indeed, it seems obvious that police hoped to find Jamie *alive* via use of the roadblock. But Appellant's argument goes beyond this, implying that police wanted to arrest him but lacked probable cause to do so. Because the police used reasonable methods to further a sound investigative objective, Appellant's suggestion that he might already have been considered, by someone, to be a suspect in Bolin's disappearance, even if true, is simply irrelevant. *See Beckwith v. United States,* 425 U.S. 341, 347, 96 S.Ct. 1612, 1616, 48 L.Ed.2d 1 (1976) (a suspect is not in custody for purposes of *Miranda* simply because he is the "focus" of an investigation).

b. Appellant's initial statements and consent to search apartment.

[7] ¶ 20 Next, Appellant claims that all evidence flowing as a direct consequence of the roadblock encounter should be suppressed as the fruit of the poisonous tree. He claims that he was effectively "under arrest" the entire time, because he was not truly free to leave, and therefore, should have been advised of his right to remain silent before any questions were asked of him. *See Miranda,* 384 U.S. at 444–45, 86 S.Ct. at 1612; *Lewis v. State,* 1998 OK CR 24, ¶ 37, 970 P.2d 1158, 1171. We have concluded that the roadblock itself did not create an illegal seizure. To determine whether Appellant was "under arrest" at any time afterward, we consider "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984).

¶ 21 At the suppression hearing, Agent Overby testified that Appellant volunteered to answer questions at the roadblock, volunteered to go to the police station, and once there, agreed to let Overby search his apartment. Overby testified that on the way to the police station (which was just a few blocks away), he told Appellant he was not under arrest, but was considered an important witness to Jamie's disappearance. Appellant presented no evidence to the contrary. The district court did not err in concluding that Appellant's encounter with police, from the time he met them at the roadblock until he was placed under arrest at his apartment, was consensual. *Andrew v. State,* 2007 OK CR 23, ¶ 72, 164 P.3d 176, 194–95.

c. Appellant's initial confession and the "rescue doctrine."

[8] ¶ 22 Appellant alternatively argues that even if he was not under arrest when he accompanied police on a search of his apartment, he was not free to leave once Agent Overby opened the tub and saw girls' clothing inside. Appellant focuses on the brief period of time between Overby's discovery and Appellant's formal arrest. When Overby saw

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the clothing, Appellant suddenly exclaimed, “Go ahead and arrest me.” Overby ***236** asked, “Where is she?” and Appellant replied, “She's in there. I hit her and chopped her up.” Appellant claims that once Overby saw incriminating evidence in the tub, he (Appellant) was surely no longer free to leave, and thus was effectively under arrest. Therefore, Overby's question, “Where is she?” amounted to custodial interrogation without *Miranda* warnings, and Appellant's incriminating answer should have been suppressed.

[9][10] ¶ 23 The district court concluded that under the “rescue doctrine,” Overby's question was not tantamount to custodial interrogation. The rescue doctrine is a recognition that the exigencies of some situations—such as the imminent need to save human life—should forgive, or at least delay, strict compliance with *Miranda.* It is a natural and logical extension of the “public safety exception” to the *Miranda* rule, recognized by the United States Supreme Court in *New York v. Quarles,* 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). We recently discussed, adopted, and applied the rescue doctrine in *Jackson v. State,* 2006 OK CR 45, ¶¶ 19–22, 146 P.3d 1149, 1157–59. In deciding whether an exchange between police and citizen falls under this doctrine, courts generally consider the apparent urgency of the situation, the potential for saving a person in danger, and the motivations of the officers involved. *See id.* at ¶ 21, 146 P.3d at 1158–59.

[11] ¶ 24 Appellant argues that the rescue doctrine should not apply in this case, and focuses on Overby's possible motivation for asking the question. Appellant supposes that, when Overby opened the tub and saw a girl's shirt on top, he must have known that Jamie's lifeless body was beneath. We disagree. Jamie Bolin had disappeared without a trace; no one had any hint of her whereabouts or condition. Suddenly, Agent Overby was confronted with evidence that Appellant might have been involved in her disappearance. During an earlier discussion, Appellant had told Overby what Jamie was wearing on the day she disappeared, and went so far as to say that the media reports about what she was wearing were wrong. When Overby opened the container, he saw clothing matching the description Appellant had given. The urgency was dire; a young girl had been missing for two days. The exchange lasted but a few seconds. The very words Overby used (“Where is she?” rather than, say, “Is she in there?”) are also telling. Under the circumstances, Overby's spontaneous and general query about Jamie's whereabouts was entirely reasonable, and was aimed at saving the girl's life—not calculated to build a case against Appellant. *Jackson,* 2006 OK CR 45, ¶ 22, 146 P.3d at 1159.[FN11] The trial court did not err in concluding that Appellant's initial confession to murder was admissible.[FN12]

FN11. While *Quarles* permitted brief, uncounseled questions to detainees in the interests of general public safety, the threat in cases such as the one at bar is arguably even more compelling. “If on the facts before it, the *Quarles* court could conclude that the need for answers *to protect the public safety* outweighed the need for *Miranda* warnings, then surely, on the facts before us, it is reasonable to conclude that the need for answers *to protect the life of one person* outweighs the same need.” *State v. Kunkel,* 137 Wis.2d 172, 404 N.W.2d 69, 76 (1987) (permitting questions to suspect about a missing child) (emphasis added).

FN12. Even assuming Overby's question was not permissible under the rescue doctrine, it was preceded by his lawful observation of highly suspicious evidence, and by Appellant's unsolicited, incriminating exclamation that he was worthy of arrest. We are convinced that, even before the question was asked, Overby had probable cause to search Appellant's apartment for additional evidence about Jamie's disappearance; and the fact that Appellant had

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> murdered her, along with all of the physical evidence offered at trial, would have been discovered inevitably. *See Nix v. Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984); *Pennington v. State,* 1995 OK CR 79, ¶ 42, 913 P.2d 1356, 1367.

d. Appellant's consent to search after invoking his right to counsel.

[12] ¶ 25 Appellant next challenges the officers' authority to continue searching his apartment after his arrest. It appears from the record that, from the time Appellant was arrested (around 5:30 p.m.) until a search warrant was obtained (around 10:30 p.m.), police limited their search of Appellant's apartment to briefly confirming his claim— ***237** that Jamie's body was inside the plastic tub. When police attempted to interview Appellant after he was taken into custody, he invoked his right to counsel. Questioning ceased, but a short time later, police asked him to reaffirm, in writing, his consent to the apartment search. He did, and it appears that the officers' brief re-entry into the apartment did not take place until after that written consent was relayed to them. The district court found the written consent to be invalid, given Appellant's invocation of his *Miranda* rights. Nevertheless, the court found no legal or factual reason to conclude that Appellant's prior, verbal consent to the search of his apartment was ever revoked.

¶ 26 Appellant posits that once a suspect has been taken into custody—or at least, by the time he invokes his rights to silence and counsel—any consent to search premises that he may have previously given is "exhausted." Appellant cites no authority for this position.[FN13] We believe this argument confuses rights guaranteed by the Fourth Amendment with those guaranteed by the Fifth Amendment and the *Miranda* rule. *See United States v. Mendez,* 431 F.3d 420, 427 (5th Cir.2005) (homeowner's consent to a search of his house was not automatically 'withdrawn' when police arrested him and read him his *Miranda* rights); *United States v. Mitchell,* 82 F.3d 146, 150–51 (7th Cir.1996) ("[T]he fact that Mr. Mitchell was placed under arrest sometime after the first consent does not work as an automatic withdrawal of the consent previously given"); *see also* Wayne R. LaFave, 4 *Search and Seizure* § 8.1(c) at 631 (4th ed.) ("[A] consent to search is not terminated merely by a worsening of the consenting party's position"). We agree with the trial court's ruling that Appellant never withdrew his original, verbal consent to a search of his apartment.

> FN13. The only case Appellant refers us to is *United States v. Carey,* 172 F.3d 1268, 1274 (10th Cir.1999). *Carey* deals with the reasonable limits inherent in a person's consent to search premises. The court held that the defendant's consent to search his home did not automatically authorize a search through files on his computer. We find *Carey* inapposite to the issues presented here.

e. Alleged faults in the search warrant affidavit.

[13] ¶ 27 As noted, a full-scale search of Appellant's apartment was not undertaken until several hours after his arrest, once police had obtained a search warrant. Appellant complains that the officers seeking the warrant did not inform the magistrate that he had declined to be questioned after his arrest, and that his written consent to search the apartment was executed after he invoked his *Miranda* rights. Appellant claims these omissions evince a reckless disregard for the truth, and should invalidate the warrant itself. *See Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (evidence should be suppressed if obtained pursuant to a search warrant predicated on statements that were materially false, and which were made with knowledge of their falsity, or in reckless disregard for their truth).

¶ 28 When police seek the issuance of a search warrant, the magistrate's task is to determine, from the information presented, whether there is probable cause to believe that evidence of criminal

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activity is present at the place to be searched. 22 O.S.2001, §§ 1221–23. Appellant does not explain how his refusal to answer questions, or whether he had reaffirmed his prior consent to search, had any bearing on the probable-cause determination. *See Jones v. State,* 2006 OK CR 5, ¶¶ 26–27, 128 P.3d 521, 536–37 (validity of warrant to search home of defendant's parents, for evidence defendant was thought to have hidden there, was not affected by information, not presented to the magistrate, suggesting that the defendant was presently not at home). Two simple facts—Agent Overby's observation in Appellant's closet, and Appellant's simultaneous confession to murder—clearly supported the issuance of the search warrant.

¶ 29 In fact, the search of the apartment was independently justified through Appellant's verbal consent which, as explained above, was never withdrawn. FN14 The fact ***238** that police ultimately sought judicial approval for continuing the search is commendable, but ultimately unnecessary under these circumstances. *See Ball v. State,* 2007 OK CR 42, ¶¶ 46–48, 173 P.3d 81, 93 ("We will not pass upon what amounts to a hypothetical challenge to a search warrant that was unnecessary"). The trial court did not err in concluding that the search of Appellant's apartment was lawful.

> FN14. As Appellant observes, shortly after his arrest, officers did re-enter the apartment briefly to confirm that Bolin was deceased. As explained above, this re-entry may have occurred after Appellant was asked to reaffirm his consent to search in writing (and after he had invoked his right to silence), but it was equally justified on Appellant's previous and unrevoked verbal consent to search. The magistrate was aware of the officers' re-entry, but it does not change the result here.

f. Appellant's recorded confession.

[14] ¶ 30 Appellant contends that his incriminating statements to Agents Overby and Maag on the night of April 14, 2006 must be suppressed, because they were involuntarily made. In the interview, Appellant detailed how and why he murdered Jamie Bolin. A video recording of the interview, and a printed transcription for convenience, were presented to the jury in the guilt phase of Appellant's trial.

[15][16][17] ¶ 31 Once a suspect in custody has asserted his right to speak only through counsel, all attempts at interrogation must cease. *Miranda,* 384 U.S. at 473–74, 86 S.Ct. at 1627–28. A suspect can, however, change his mind, and decide to speak to police without counsel. If a suspect is interrogated after having invoked his *Miranda* rights, the burden rests on the State to demonstrate that the suspect's change of mind was a voluntary and intelligent choice. *Id.* at 475, 86 S.Ct. at 1628. A suspect's custodial statements are not voluntary if they are the product of coercion, including promises of leniency or other benefit. *Id.* at 476, 86 S.Ct. at 1629; *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Myers v. State,* 2006 OK CR 12, ¶ 84, 133 P.3d 312, 333.

¶ 32 Appellant concedes that after his original invocation *of Miranda* rights, he reinitiated contact with police, but claims this action must be viewed in context. He points out that in the hours between invoking his right to silence and changing his mind, he conversed with several officers in a police lieutenant's office and made incriminating statements to them. He also points out that despite his initial request for a lawyer, none was provided to him during that time. Appellant notes that when Agent Overby asked him if he had been offered anything in exchange for his cooperation, Appellant commented that one officer had told him it would be "better" for him to cooperate. The identity of this officer was never determined; none of the many officers who testified at the suppression hearing admitted to making the statement, or knowing who did. The trial court concluded that under the totality of circumstances, Appellant's decision to talk to Overby and Maag was voluntary.

[18] ¶ 33 The trial court's conclusions are sup-

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ported by the record. Whether a suspect's statements to police are voluntary in the legal sense depends on an evaluation of all the surrounding circumstances, including the characteristics of the accused and the details of the interrogation. *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). The ultimate inquiry is whether the confession is "the product of an essentially free and unconstrained choice by its maker." *Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961). At the suppression hearing, OSBI Agent Lydia Williams testified that while officers were preparing an affidavit for search warrant, word was received that Appellant wanted to talk. Williams went to the room where Appellant was being held and asked him to clarify his desires, explaining that because he had previously asked for a lawyer, they were not allowed to talk to him anymore. According to Williams, Appellant replied emphatically, "But I want to talk," and indicated his preference to speak to Agents Overby and Maag, who had accompanied him to his apartment earlier that day. This unrefuted evidence shows that Appellant voluntarily reinitiated contact with police on the subject of his detention—the murder of Jamie Bolin. ***239***Edwards v. Arizona,* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981); *Ullery v. State,* 1999 OK CR 36, ¶¶ 16–21, 988 P.2d 332, 343–44. FN15

FN15. Appellant likens his situation to that in *State v. Pope,* 2009 OK CR 9, 204 P.3d 1285. In *Pope,* we held that a trial court did not err in suppressing a defendant's confession. The facts in *Pope* are markedly different from those here. In *Pope,* when the defendant invoked her *Miranda* rights and declined to be interrogated, the detective continued to badger her about why an "innocent person" would want a lawyer. When the defendant repeatedly maintained that she did not want to talk without a lawyer present, the detective placed her under arrest and left the room. In less than an hour, the defendant asked someone to summon the detective, and began writing out a confession. When the detective returned, he let the defendant complete her written confession before reminding her that she had requested an attorney and asking if she had changed her mind. When the defendant said she had, the interview resumed. We agreed with the district court's findings that the totality of circumstances—the continued badgering of the defendant after her request for counsel, the isolation of the defendant, her physical and mental character, and the State's failure to remind her of her *Miranda* rights before receiving her confessions (written and verbal), rendered the statements involuntary in the legal sense. In this case, there is no evidence of badgering; Appellant was not held *incommunicado* (indeed, one of the guarding officers called Appellant's parents for him, at Appellant's request); and when Appellant sought an audience with Agents Overby and Maag, he was explicitly reminded of his previous invocation of *Miranda* rights, and he reviewed those rights again, word for word, before the interview began.

Appellant also likens his case to *Missouri v. Seibert,* 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), which condemned the practice of "pre-interviewing" detainees without first advising them of their *Miranda* rights, and explaining those rights only *after* incriminating evidence had been obtained, in the apparent hope that the suspect, having already confessed, would be more likely to just keep talking. *See id.* at 613, 124 S.Ct. at 2611 ("Upon hearing [*Miranda*] warnings *only in the aftermath of interrogation and just after making a confession,* a suspect would hardly think he had a genuine right to remain silent, let alone

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persist in so believing once the police began to lead him over the same ground again" (emphasis added)). The sequence of events is quite different here. Appellant claims he was "pre-interviewed" without the benefit of *Miranda* warnings, when various officers chatted with him as they stood guard over him in the hours between his arrest and his request to speak with Agents Overby and Maag. What Appellant fails to acknowledge, however, is that he was advised of his *Miranda* rights on the very first interview attempt after his arrest, and that he understood the warning well enough to refuse further questioning at that time. *Seibert* did not seek to supplant the jurisprudence of *Miranda* and *Edwards v. Arizona,* which clearly contemplate that a suspect in custody, having invoked his right to silence, may thereafter change his mind.

[19] ¶ 34 The video recording of the ensuing interview is of great benefit in determining the voluntariness of Appellant's decision. It, too, supports the trial court's conclusions. While Appellant notes during the interview that someone had commented it might be better for him to cooperate, the tone of his voice does not suggest he interpreted the comment as any type of promise. Mere exhortations to cooperate and tell the truth, not accompanied by any threat or promise, do not render a confession involuntary. *Young v. State,* 1983 OK CR 126, ¶ 15, 670 P.2d 591, 595; *United States v. Chalan,* 812 F.2d 1302, 1307 (10th Cir.1987); *United States v. Bailey,* 979 F.Supp. 1315, 1318 (D.Kan.1997). Throughout the interview, Appellant appears calm, even eager to talk about the details of the crime. The agents are friendly but ask few questions; Appellant does the vast majority of the talking. After about an hour of details, Appellant suddenly becomes too nauseated to continue. The agents seek medical attention for him, and the interview is concluded. Given the unrefuted testimony at the suppression hearing, and the particular circumstances of the interview itself, the trial court did not err in concluding that Appellant's interview with Agents Overby and Maag was voluntary. *McHam v. State,* 2005 OK CR 28, ¶ 31, 126 P.3d 662, 672; *Wisdom v. State,* 1996 OK CR 22, ¶ 26, 918 P.2d 384, 392.

¶ 35 In summary, the trial court conducted an extensive hearing on the admissibility of physical evidence and incriminating statements made by Appellant. The trial court made detailed findings of fact, and properly applied the applicable law. We find no error in the trial court's analysis regarding the admissibility of Appellant's incriminating statements and evidence seized from his apartment. Proposition 1 is denied.

***240 II. JURY SELECTION ISSUES**

¶ 36 In Proposition 2, Appellant claims that the trial court erred in refusing to excuse three prospective jurors for cause, and that he was forced to use peremptory challenges (provided by state law to be used at the party's discretion) to cure these mistakes. Appellant timely challenged the ability of each of the three panelists to be impartial, and renewed his challenges at the conclusion of *voir dire.* After using peremptory challenges to remove these panelists, he identified three other panelists, explained why they too were unacceptable to him, and asked for additional peremptory challenges to remove them as well. The trial court denied this request. Appellant's complaint has thus been preserved for appellate review.[FN16] *Grant v. State,* 2009 OK CR 11, ¶ 18, 205 P.3d 1, 11.

FN16. Appellant does not claim that any of the three "unacceptable" jurors were removable for cause. In fact defense counsel conceded at trial that they were not.

[20][21][22][23] ¶ 37 A defendant is entitled to be tried by jurors who can approach the facts of the case impartially, and who can decide the issues before them based on the evidence presented to them in court. *Irvin v. Dowd,* 366 U.S. 717, 721–23, 81 S.Ct. 1639, 1642–43, 6 L.Ed.2d 751 (1961). Addi-

tionally, a defendant charged with a capital crime is entitled to jurors who can give fair consideration to all available punishments. *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Eizember v. State,* 2007 OK CR 29, ¶ 42, 164 P.3d 208, 222. The selection of jurors involves many subtle observations, and trial courts have broad discretion when considering a request to excuse a juror for cause. *Witt,* 469 U.S. at 425, 105 S.Ct. at 853. When reviewing such claims, we consider the entire record of the panelist's *voir dire,* not just isolated answers. *Rojem v. State,* 2009 OK CR 15, ¶ 3, 207 P.3d 385, 388.

[24] ¶ 38 The first panelist Appellant complains about is Panelist S. Appellant claims that S. could not fairly consider any penalty other than death. We disagree. The trial court permitted juror questionnaires prior to trial; counsel possessed important information about each prospective juror before *voir dire* proceedings began. Even more importantly, the court permitted individual "death-qualification" *voir dire,* to determine which panelists could give fair consideration to all punishment options. During that process, each panelist was able to speak to the court and counsel with as much candor as possible.FN17

FN17. We also note that when counsel reargued the for-cause challenges, on the fifth day of jury selection, neither counsel nor the court had to rely on memory alone concerning what the panelists said. Transcriptions of previous *voir dire* sessions had already been prepared.

¶ 39 Appellant contends that Panelist S. was unqualified to sit, because she had "preconceived notions about death being the appropriate punishment for an intentional murder." The colloquy with Panelist S. comprises about twenty pages of transcript. Appellant cites isolated answers from the exchange which tend to show S.'s initial predilection for the death penalty in cases of intentional homicide. However, Appellant concedes that when S. was reminded that any decision on punishment would be guided by the court's legal instructions, she was confident that she could follow those rules, even if it resulted in a sentence other than death. FN18

FN18. For example, when defense counsel asked S. if she understood that the law required her to fully and fairly consider all punishment options, she replied:

> I understand that. That's why I'm saying at this point, that's why I asked is there a set—because I am not into law and all of the things of law. But I am a scientist by—that's my job. And so I understand the rules. You know, A leads to B leads to C. And so if I have a set of rules, I can play within the rules. If I am told this must happen for this to happen, this must happen for this, then I don't have a problem staying inside my boundary, if that's what....

[25][26] ¶ 40 To be qualified to sit on a capital jury, a panelist must be unequivocal in her willingness to fairly consider all punishment options, as the law requires. But just as a defendant is not entitled to jurors who are completely ignorant of the circumstances surrounding the crime, *see* ***241** *Plantz v. State,* 1994 OK CR 33, ¶ 18, 876 P.2d 268, 275, so too, the law does not require jurors in a capital case to come to the process with complete indifference about the death penalty. It is inconceivable that citizens called for jury duty could come to court without some general opinions about capital punishment. And it is unfair to fault such panelists for giving honest answers when asked to provide factors that might warrant that penalty. FN19 Panelist S. maintained that she could follow the law on punishment, even in a case involving the intentional murder of a young girl. She stated that she would weigh a defendant's history, past conduct, and other factors in deciding the appropriate sentence. The trial court did not abuse its discretion in refusing to remove Panelist S. for cause. *Harris v. State,* 2004 OK CR 1, ¶ 18, 84 P.3d 731, 742.

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FN19. Panelist S. was very frank about her feelings on punishment. She was also frank about being confused by the way in which questions were posed to her, depending on which party was posing the questions ("Why does it sound different when you ask me, and then you ask me?"). At one point, defense counsel asked S., "When it comes to thought, particularly thoughts of an adult male who has killed intentionally a 10–year–old child, your thoughts are death, am I correct?" S. answered:

> Yes, my thoughts are, but not necessarily my conviction. Does that make sense? ... And I don't know why I feel different when you ask me that and when you ask me that. I can't explain that, because I don't have a problem considering all three equally and fairly.

> Then, at defense counsel's request and over the State's objection, S. listed several specific factors that could convince her not to impose the death penalty.

[27] ¶ 41 Appellant next claims that Panelist B. should have been removed for cause, because of her feelings about the death penalty, and because B.'s own mother had been the victim of an intentional homicide over forty years earlier. When asked how her mother's death would affect her as a juror in this murder trial, B. succinctly responded: "I don't really think one has anything to do with the other." Several times, when pressed about any predispositions she might have, B. qualified her answers with statements like, "I don't know the facts yet." She believed the death penalty was appropriate under certain circumstances, but in answer to defense counsel's hypothetical, she did not believe it was necessarily the only appropriate sentence for the intentional murder of a young girl. Panelist B. assured defense counsel that she could consider all punishment options, and agreed that mitigating evidence could make a difference in her decision. The trial court did not abuse its discretion in refusing to remove Panelist B. for cause.[FN20] *Harris,* 2004 OK CR 1, ¶ 16, 84 P.3d at 742.

FN20. In fact, defense counsel's concerns about Panelist B. appear to be in spite of her answers, not because of them. Counsel's only specific objection to B. at the time of *voir dire* involved the murder of her mother, and whether she was being "realistic" in assuring the parties that that event had no bearing on her ability to follow the law in this case. Appellant now observes that B. did not relate any details surrounding her mother's death. Defense counsel, who was aware of the event from B.'s questionnaire, had a perfect opportunity to explore this subject during individual *voir dire,* but chose not to.

¶ 42 Finally, Appellant claims Panelist T. should have been removed for cause for actual bias. During individual *voir dire,* T. admitted that when he first heard about the murder of Jamie Bolin, his gut reaction was that he would "like to get his hands on" the person who committed it. Panelist T. had two children about the same age as the victim, and he said that he became more protective of them after hearing about this crime.

[28] ¶ 43 Appellant's complaint centers not on T.'s feelings about the death penalty in general, but on T.'s alleged "bias" against the perpetrator of this crime, particularly on the issue of punishment.[FN21] We do not read T.'s initial reaction to news about the murder as having anything to do with the death penalty. He did not proclaim that whoever committed the crime should automatically be put to death. Rather, T.'s admission—that his gut reaction was a desire to "get his hands on" the perpetrator—seems to us a ***242** frank (and not unnatural) first response to what defense counsel himself repeatedly described in *voir dire* as a "horrific" crime. Indeed, it is difficult to imagine any person being literally "indifferent" to the basic facts of this case. Initial reactions aside, T. assured the court and counsel that he could fairly consider all avail-

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able punishments in the context of the criminal trial. The trial court did not abuse its discretion in refusing to excuse Panelist T. for cause. *Browning v. State,* 2006 OK CR 8, ¶ 12, 134 P.3d 816, 829–830.

FN21. *See* 22 O.S.2001, § 659 (defining "actual bias," with reference to juror disqualification, as "the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging").

¶ 44 In summary, Appellant identified three panelists that he believed were removable for cause based on their feelings about the death penalty. We have examined the record on all three, and conclude that the trial court did not abuse its discretion in refusing to remove any of them. The fact that Appellant chose to use some of his peremptory challenges to remove these three panelists did not violate any constitutional or statutory right *Harris,* 2004 OK CR 1, ¶ 18, 84 P.3d at 742. Proposition 2 is denied.

III. ADMISSIBILITY OF CERTAIN PHYSICAL EVIDENCE

[29] ¶ 45 In Proposition 3, Appellant claims he was denied a fair trial by the introduction of irrelevant and highly inflammatory evidence, specifically, (1) an excessive number of postmortem photographs of the victim; (2) a single premortem photograph of the victim; and (3) various items of physical evidence seized from Appellant's apartment. Appellant objected to all of this evidence, filing a general motion *in limine* and timely making objections when the evidence was actually offered. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Pavatt v. State,* 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286.

a. Postmortem photographs of the victim.

[30] ¶ 46 Prior to the testimony of the Medical Examiner, the State offered into evidence several photographs of Jamie Bolin's body. The trial court was keenly aware of the shocking nature of the photographs, but it was not required to exclude them on that basis alone. The court carefully considered the photographs in *in camera* hearings, and questioned the State as to the relevance or necessity of many of them. The State withdrew some photographs, and the court excluded others. Certain photographs were admitted as court exhibits only, to aid the Medical Examiner in her testimony, but were not to be displayed to the jury. Due to the gruesome nature of the photographs, the court determined that those which would be published to the jury would not be displayed on the video monitor which had been used for other exhibits.

[31] ¶ 47 In the end, the court admitted fewer than a half-dozen photographs of Jamie's body, depicting the condition in which it was initially discovered, the neck wound, and the fingernail marks on her face, which corroborated Appellant's claim as to how he killed the girl. The State was not obligated to downplay the shocking nature of the crime. *Warner v. State,* 2006 OK CR 40, ¶ 168, 144 P.3d 838, 887. Evidence is not objectionable simply because it is prejudicial, but only if it is substantially and unfairly so. 12 O.S.Supp.2003, § 2403. The photographs were indeed gruesome, but they accurately depicted the injuries that Appellant admitted to inflicting on his victim. *Grant,* 2009 OK CR 11, ¶¶ 49–50, 205 P.3d at 21. They were not needlessly cumulative to one another, and the trial court did not abuse its discretion in admitting them.

b. Premortem photograph of the victim.

[32] ¶ 48 Over Appellant's objection, the trial court admitted a single school portrait of Jamie Bolin during the guilt phase of the trial. Appellant claims, as he did at trial, that this photograph was not relevant to any material issue, and that because all guilt-stage evidence was incorporated into the sentencing stage, it injected passion and prejudice into the jury's verdict on punishment. We have rejected similar claims in the past. The Evidence Code permits the introduction of an "appropriate" photograph of a homicide victim, "to show the gen-

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eral appearance and condition of the victim while alive." 12 O.S.Supp.2003, § 2403. As we have repeatedly held, because this provision requires ***243** the photograph to be "appropriate" to its purpose, the trial court must still consider whether any proffered photograph is so unfairly prejudicial that it should be excluded. *See Grant,* 2009 OK CR 11, ¶ 52, 205 P.3d at 22; *Marquez–Burrola v. State,* 2007 OK CR 14, ¶¶ 28–33, 157 P.3d 749, 759–761; *Coddington v. State,* 2006 OK CR 34, ¶¶ 53–58, 142 P.3d 437, 452–53. The trial court did not abuse its discretion in admitting this single photograph in the guilt stage of trial; and considering the totality of evidence offered at sentencing, we cannot say its admission denied Appellant a fair sentencing proceeding. *Coddington,* 2006 OK CR 34, ¶¶ 57–58, 142 P.3d at 453.

c. Items seized from Appellant's apartment.

[33] ¶ 49 Appellant also complains that various items of evidence seized from his apartment were irrelevant to the issues in the case and should not have been admitted. Most of these items were weapons, tools, pornography, or other items of a sexual and/or violent nature. Conceding that a knife was used to cut Jamie's throat, Appellant claims that admission of other sharp weapons found in his apartment was unnecessary. He claims the jury did not need to see the clothing that the girl wore on the day he murdered her, or the plastic sheet and blood-soaked towel that he wrapped her body in. Appellant also complains that materials of a sexual or violent nature found in his apartment (*e.g.* sex toys, handcuffs, pornographic videos, and various perverse images printed from the Internet) only served to humiliate him in front of the jury. Appellant objected to many of these items, but not to all of them. He claims much of this evidence (such as a jar of meat tenderizer) was inadmissible because it illustrated only things he "may have thought of, but never did."

¶ 50 We disagree. These items were relevant to Appellant's motive and intent. They corroborated his detailed confession about his plan to subdue his victim, sexually violate her, and perform other gruesome acts upon her body, and about how this plan had evolved in his mind over the preceding months. *See Warner,* 2006 OK CR 40, ¶ 68, 144 P.3d at 868 (sexually-explicit video and lubricants were properly admitted to show what the defendant was watching and thinking about prior to the rape and murder of infant girl); *see also Slaughter v. State,* 1997 OK CR 78, ¶¶ 22–27, 950 P.2d 839, 849–850 (various pieces of evidence tending to show defendant's interest in the occult, and unexpected comments about killing and mutilation, were properly admitted, as they tended to show the defendant's state of mind and how he might have been capable of murdering an infant and mutilating her mother's body). Many of these items were specifically mentioned by Appellant when he spoke with the police, and because they corroborated his expressed intentions, they bore on the veracity of the confession. As with the photographs of the victim's body, the trial court carefully considered each article offered into evidence, excluded some, and placed restrictions on the display of others. The trial court did not abuse its discretion in admitting any of these items. *Jackson,* 2006 OK CR 45, ¶ 56, 146 P.3d at 1156.

¶ 51 Furthermore, we fail to see how Appellant was harmed by the admission of this evidence. He claims that offering these items into evidence was overkill, because it was "obvious," from his confession and the testimony of his own experts, that he is a "sexually and mentally disturbed individual." And indeed, Appellant's many bizarre, violent, and gruesome sexual obsessions were discussed in detail, both in his statements to police (presented in the guilt stage), and in the extensive testimony of his own mitigation experts (presented in the punishment stage). Yet, these same facts convince us that the introduction of corroborating physical evidence did not unfairly contribute either to the finding of guilt or the assessment of punishment in this case. The evidence of Appellant's guilt was overwhelming and essentially uncontested; and while his sexual obsessions arguably showed he was a continuing

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threat to society, the jury rejected that aggravating circumstance before imposing the death sentence. *See Mitchell v. State,* 2010 OK CR 14, ¶ 55, 235 P.3d 640, 654–55 (admission of defendant's prior testimony was harmless, as jury rejected the aggravating circumstance the statements ***244** were offered to prove). There is no error here. Proposition 3 is denied.

IV. PUNISHMENT–STAGE INSTRUCTIONS

[34][35] ¶ 52 In Proposition 4, Appellant complains that the trial court's punishment-stage instructions did not allow the jury to fully consider all of the evidence he presented in mitigation of sentence. Appellant objected to these instructions and proposed one of his own, which he believed would broaden the definition of mitigating circumstances to more clearly include the kinds of evidence he had presented in the punishment stage. The trial court rejected the instruction proffered by the defense, preserving this issue for review.

¶ 53 The trial court gave the Uniform Jury Instruction, OUJI–CR (2nd) No. 4–78, which defined mitigating circumstances as those which, "in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." Appellant argues that his mitigation evidence was intended to show he was deserving of a sentence less than death, *despite* his "moral culpability or blame" for the murder of Jamie Bolin. He claims that under the court's definition, his mitigation strategy was essentially worthless because none of the evidence he presented did, in fact, reduce his moral culpability or blame, and he claims that the prosecutors' closing arguments invited the jury to reach the same conclusion.

¶ 54 We have rejected similar attacks on OUJI–CR (2nd) No. 4–78 many times in the past. *See e.g. Glossip v. State,* 2007 OK CR 12, ¶¶ 119–120, 157 P.3d 143, 161–62; *Rojem v. State,* 2006 OK CR 7, ¶¶ 57–58, 130 P.3d 287, 299; *Primeaux v. State,* 2004 OK CR 16, ¶¶ 90–96, 88 P.3d 893, 909–910; *Fitzgerald v. State,* 2002 OK CR 31, ¶ 17, 61 P.3d 901, 906; *Williams v. State,* 2001 OK CR 9, ¶ 109, 22 P.3d 702, 727–28. However, as Appellant points out, several months before his trial, in *Harris v. State,* 2007 OK CR 28, 164 P.3d 1103, we recommended changes in the wording of this instruction. Nevertheless, in *Harris* we reiterated that the instruction, as it had existed for many years, was not "legally inaccurate, inadequate, or unconstitutional," and that "cases in which the current OUJI–CR (2nd) No. 4–78 has been used and applied are not subject to reversal on this basis." *Id.* at ¶ 26, 164 P.3d at 1114.[FN22]

FN22. Before the revision recommended in *Harris,* the instruction read, in relevant part, as follows:

> Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

The revised instruction reads, in relevant part, as follows:

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

The revised instruction was not promulgated by the OUJI Commission until a few weeks after Appellant's trial.

¶ 55 Like Appellant, the defendant in *Harris* complained that the prosecutors had exacerbated the perceived faults in the instruction, by arguing that the defendant's second-stage evidence should

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be completely disregarded as it did not meet the definition of "mitigating evidence" given by the court. Considering the arguments as a whole, we found no error. Similarly, we find no cause for relief here. During the State's first closing argument in the punishment stage, the prosecutor told the jurors that *they* were to decide what qualified as mitigating evidence, and that they could consider factors besides those advanced by the defense.[FN23] Similar comments were made in the State's final closing. As we wrote in *Grant v. State,* 2009 OK CR 11, ¶ 48, 205 P.3d at 21:

> FN23. "[L]ook at all those mitigators, and you decide what that means.... I submit to you that our aggravators that we have alleged in this case absolutely, absolutely outweigh any of the mitigators. And you can think of other mitigators if you want besides what's on the list."

> Appellant claims the prosecutor misstated the law by telling the jurors that the evidence he had presented as "mitigating" did nothing to justify a sentence less than death. Appellant confuses what kind of ***245** information may be offered as mitigating evidence, with whether that information successfully serves its intended purpose. While there is no restriction whatsoever on what information might be considered mitigating, no juror is bound to accept it as such, and the State is free to try to persuade the jury to that end. The prosecutor's arguments did not misstate the law on this point.

¶ 56 Neither the trial court's instructions, nor the prosecutor's argument, implied that the jury should ignore any of the evidence offered by Appellant in mitigation of sentence. The prosecutors merely argued that this evidence did not warrant a sentence less than death. The trial court did not err in rejecting the alternative instruction offered by Appellant. Proposition 4 is denied.

V. STATE EXPERT TESTIMONY

[36] ¶ 57 In Proposition 5, Appellant claims he was denied a fair sentencing proceeding by certain comments of the State's mental health expert. In the punishment stage, the defense presented extensive expert testimony about Appellant's mental health, based to a significant degree on in-person psychological evaluations. In response, the State presented the testimony of Dr. Reid Meloy, who never personally interviewed Appellant, but who was retained only to critique the methods used and conclusions drawn by the defense experts. Appellant claims that Dr. Meloy insinuated he had been blocked from interviewing Appellant personally, and Appellant likens this to an improper comment on a defendant's right to remain silent. *See e.g. Doyle v. Ohio,* 426 U.S. 610, 618–19, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976). The analogy simply does not fit here.

¶ 58 Interestingly, Appellant does not claim that the *prosecutor* deliberately sought to insinuate that Dr. Meloy was not allowed to interview him, but rather, that the witness improperly made the implication on his own. Both theories, however, are belied by the record. Dr. Meloy made it clear, early in his direct examination, that he was not hired by the State to personally evaluate Appellant, but only to review the evaluations of the defense experts. In fact, he agreed with much, if not most, of the defense experts' findings. He stated that he had no reason to disagree with their diagnoses about Appellant's disorders. On re-direct examination, when the prosecutor asked Meloy if he would have liked to have visited with Appellant himself, defense counsel objected, believing that the prosecutor was headed toward an improper comment. The trial court sustained the objection, and the prosecutor (while denying any improper intentions) clearly abided by the court's ruling, rephrasing the question thus:

> So you would have actually liked to have talked to those people who reported—*not talking about the defendant,* but those other people who made these reportings of his life history, you'd actually like to talk to them yourself, if you were going to

make that diagnosis?

(Emphasis added.) Dr. Meloy's reply is the crux of Appellant's complaint:

Well, yes, *if my role was different in the case. If I'd been asked* to be an evaluator, I would have wanted to interview Mr. Underwood, to test him, to review any evidence in the case—

(Emphasis added.) When defense counsel objected again, the court sustained it, and again the prosecutor kept the focus off of Appellant:

I'm sorry. We're not talking about the defendant. We're talking about the friends and family that he was around growing up.

To which Meloy replied, "If that was my role in the case, yes." FN24

FN24. The defense experts had based their testimony, in part, on anecdotal information about Appellant's family and childhood, attributed to friends and family members. On cross-examination, the prosecutors had attacked the credibility of the defense experts by pointing out that they had not personally interviewed many of their sources, and noting that while some of Appellant's friends and family had testified in the punishment stage, the picture they had painted was not as grim as the defense attorneys had promised.

¶ 59 The limitations on Dr. Meloy's role in the case were made clear to the jury. They were made clear again in cross-examination ***246** by defense counsel. Dr. Meloy did not interview Appellant because he was never asked to do so by the State. Appellant was not unfairly prejudiced by this testimony. Proposition 5 is denied.

VI. CONSTITUTIONALITY OF CAPITAL SENTENCING PROCEDURE

¶ 60 In Proposition 6, Appellant complains that Oklahoma's capital-sentencing scheme is unconstitutional in how it instructs juries to consider aggravating and mitigating circumstances, and in the fact that it does not instruct the jury on a presumption that a life sentence is the appropriate punishment. Appellant raised these issues prior to trial, and renewed his concerns in the punishment stage, thus preserving them for review. *Wilkins v. State,* 1999 OK CR 27, ¶ 5, 985 P.2d 184, 185.

[37] ¶ 61 Appellant concedes that before his jury could even consider the death sentence, it had to unanimously find the existence of at least one alleged aggravating circumstance by proof beyond a reasonable doubt. He admits that before his jury could consider a death sentence, it also had to find that the aggravating circumstance(s) unanimously found to exist outweighed any mitigating circumstances. And he does not deny his jury was properly instructed that, despite such an analysis, it was never *required* to impose a death sentence. Rather, Appellant's complaint is that his jury was not instructed that, when weighing aggravating and mitigating circumstances, it could not consider a death sentence unless the aggravating circumstances outweighed any mitigating circumstances "beyond a reasonable doubt." As support for this claim, Appellant relies on the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which held that any fact rendering a defendant eligible for the death penalty—much like any fact necessary to support a conviction for the predicate crime—must be established by proof beyond a reasonable doubt.

¶ 62 Appellant acknowledges that we have considered this issue many times and consistently rejected it, before and after *Ring*. *See e.g. Torres v. State,* 2002 OK CR 35, ¶¶ 6–7, 58 P.3d 214, 216; *Romano v. State,* 1993 OK CR 8, ¶¶ 111–12, 847 P.2d 368, 392. The jury's consideration of aggravators *versus* mitigators is a balancing process which is not amenable to the "beyond a reasonable doubt" standard of proof. *Id.* at ¶ 112, 847 P.2d at 392. As the Tenth Circuit has noted, it is a "highly subjective" and "largely moral" judgment about the punishment that a particular person deserves. FN25

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United States v. Barrett, 496 F.3d 1079, 1107 (10th Cir.2007) (rejecting similar claim) (citing *Caldwell v. Mississippi,* 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *see also Matthews v. Workman,* 577 F.3d 1175, 1195 (10th Cir.2009) (rejecting similar claim). We are not persuaded to revisit this issue.

> FN25. The unique, subjective nature of this particular aspect of capital sentencing is evidenced by the fact that, while jurors must unanimously agree on any aggravating circumstances that make the death penalty possible (again, by proof beyond a reasonable doubt), there need be no unanimity on the existence of, or weight assigned to, any mitigating factors. Each juror, individually and privately, weighs the unanimously-agreed-upon aggravators against whatever circumstances they believe might warrant a sentence less than death. *See* OUJI–CR (2nd) No. 4–78.

[38] ¶ 63 As for his claim that the jury should have been instructed on a "presumption" of a life sentence, Appellant concedes that we have consistently rejected this notion as well. *See e.g. Warner,* 2006 OK CR 40, ¶ 142, 144 P.3d at 882 (citing cases). The instructions given by the trial court appropriately explained the prerequisites to finding Appellant eligible for a death sentence. Proposition 6 is denied.

VII. SUFFICIENCY OF EVIDENCE TO SUPPORT DEATH SENTENCE

[39][40][41][42] ¶ 64 In Proposition 7, Appellant claims the evidence presented at his trial was insufficient, as a matter of law, to support the single aggravating circumstance found by the jury: that the murder of Jamie Bolin was especially heinous, atrocious, or cruel. To prove this aggravating circumstance, the State must show that the victim's death was preceded by torture or serious physical ***247** abuse. *DeRosa v. State,* 2004 OK CR 19, ¶ 96, 89 P.3d 1124, 1156. "Serious physical abuse" requires evidence that the victim experienced conscious physical suffering prior to death. *Warner,* 2006 OK CR 40, ¶ 129, 144 P.3d at 880; OUJI–CR (2nd) No. 4–73. The crucial aspect of this aggravator is the victim's awareness. Physical acts done to the victim, no matter how vile, will not establish the "heinous, atrocious, or cruel" aggravator if no rational juror could find, beyond a reasonable doubt, that the victim was conscious of them. Nevertheless, so long as the evidence supports a finding that death was preceded by torture or serious physical abuse, the jury is permitted to consider all the circumstances of the case, including "the attitude of the killer and the pitiless nature of the crime." *Lott v. State,* 2004 OK CR 27, ¶ 172, 98 P.3d 318, 358.

¶ 65 The fact that Jamie Bolin consciously suffered for an appreciable length of time before her death was firmly established by Appellant's confession, which was in turn corroborated by the medical evidence. Appellant told police that he hit Jamie on the back of her head several times with a cutting board, and that he hit her so hard that he was surprised the board did not break. Despite Jamie's pleas, Appellant proceeded to suffocate her with his bare hands. Appellant reported that more than once, Jamie's body went limp, but then she would come around and resume the struggle for life. Appellant told police it took some fifteen to twenty minutes before Jamie finally succumbed. The Medical Examiner observed trauma to the back of Jamie's head consistent with Appellant's statements. Scratches, consistent with fingernails being pressed into the skin, were observed on her face. The Medical Examiner concluded that the cause of Jamie's death was asphyxiation. Appellant did not contest this conclusion at trial.

[43] ¶ 66 In fact, Appellant does not deny that Jamie experienced conscious physical suffering before her death. Rather, he argues that the length of time it took to kill her was an "unintended circumstance," as he had planned to end her life quickly and quietly, but things just did not work out that way. Actually, Appellant's original plan (according to what he told police) was to tape his victim's

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mouth so she could not scream, make her watch pornographic movies, rape her, torture her in various despicable ways, and then, while she was "still alive and gagged" (and presumably conscious), decapitate her. This plan can scarcely be called merciful. In any event, a defendant will not be heard to excuse any "serious physical abuse" on his own poor planning; a murder is not mitigated by the fact that the victim put up a fight to save her own life. *See Le v. State,* 1997 OK CR 55, ¶ 36, 947 P.2d 535, 550.[FN26] Jamie's resistance might have come as a surprise to Appellant, but sadly, it did not dissuade him from his murderous goal, no matter how much the child pleaded and struggled.

FN26. "Le also claims this circumstance should not apply because he did not intend to torture Nguyen or inflict gratuitous pain. He argues that he merely intended to knock Nguyen out and rob him and things got out of hand.... Le mistakes this Court's finding of sufficient evidence in individual cases for requirements of proof. Evidence of a killer's intent to inflict torture or pitiless attitude may in some cases support the jury's finding of this aggravating circumstance, but that evidence is certainly not required in every case." *Le,* 1997 OK CR 55, ¶ 36, 947 P.2d at 550.

¶ 67 Appellant also claims that the jury's finding on this aggravating circumstance was improperly influenced by evidence of the gruesome things he planned to do but didn't, and things he did to Jamie's body after her death. Yet, as mentioned, Appellant concedes that the evidence establishes conscious physical suffering before death. So long as the evidence supports that finding, the jury's consideration of all the circumstances of the case is not grounds for relief. *See Lott,* 2004 OK CR 27, ¶ 172, 98 P.3d at 358. The evidence Appellant complains of as unfairly distracting was, in fact, properly admitted. The evidence was sufficient to support the jury's verdict that Jamie Bolin's murder was especially heinous, atrocious, or cruel.[FN27] Proposition 7 is denied.

FN27. *See Lott,* 2004 OK CR 27, ¶ 173, 98 P.3d at 358 ("heinous, atrocious, or cruel" aggravator supported by evidence that the victim was suffocated, and put up resistance before capitulating); *Marshall v. State,* 1998 OK CR 30, ¶ 29, 963 P.2d 1, 10 ("heinous, atrocious, or cruel" aggravator supported by evidence that the victim struggled as defendant held her under water until she asphyxiated); *Harjo v. State,* 1994 OK CR 47, ¶ 59, 882 P.2d 1067, 1078 (aggravator established by evidence that victim's strangulation and suffocation was preceded by struggle); *Woodruff v. State,* 1993 OK CR 7, ¶ 105, 846 P.2d 1124, 1147 (aggravator supported by evidence that victim struggled with his assailants, was beaten with blunt instrument, and then strangled).

***248 VIII. CONSTITUTIONALITY OF "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE**

[44][45] ¶ 68 In Proposition 8, Appellant claims that Oklahoma's "heinous, atrocious, or cruel" aggravating circumstance is unconstitutionally vague and overbroad. Appellant preserved this issue for review by a general objection before trial, and by submitting his own proposed instruction, which was denied. On numerous occasions, we have rejected similar attacks on the current formulation of this aggravator, and the Uniform Jury Instructions that explain it. *See e.g. Wood v. State,* 2007 OK CR 17, ¶ 20, 158 P.3d 467, 475; *Browning,* 2006 OK CR 8, ¶ 52, 134 P.3d at 843–44. We decline to revisit the issue here.[FN28] Proposition 8 is denied.

FN28. Appellant concedes that his jury received the most recent definition of "heinous, atrocious, or cruel," as formulated in *DeRosa,* 2004 OK CR 19, ¶ 96, 89 P.3d at 1156.

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IX. CONSTITUTIONALITY OF EXECUTING THE MENTALLY ILL

[46] ¶ 69 In Proposition 9, Appellant contends that his death sentence should be vacated because the execution of the mentally ill violates the ban on cruel and unusual punishments, found in the Eighth Amendment to the United States Constitution. He contends that he was mentally ill at the time he murdered Jamie Bolin, and points out that all of the experts who examined him agreed that he suffers from one or more mental problems. However, at trial Appellant did not raise an insanity defense, or otherwise argue that he suffered a diminished capacity to understand the nature of his conduct at the time of the crime. Rather, Appellant presented evidence of mental illness as a circumstance in mitigation of sentence. Apparently, the jury concluded that whatever mental illness Appellant might have, the death penalty was still the most appropriate sanction for his conduct. While the Eighth Amendment prohibits execution of a defendant whose mental illness "prevents him from comprehending the reasons for the penalty or its implications," *Ford v. Wainwright,* 477 U.S. 399, 417, 106 S.Ct. 2595, 2606, 91 L.Ed.2d 335 (1986), there is no evidence that Appellant falls into that category. Despite evidence that Appellant suffers from some sort of mental illness, we accept the jury's conclusion that he was morally culpable for his actions and deserving of the death penalty. *See Grant,* 2009 OK CR 11, ¶¶ 59–61, 205 P.3d at 23–24; *Lockett v. State,* 2002 OK CR 30, ¶ 42, 53 P.3d 418, 431. Proposition 9 is denied.

X. VICTIM–IMPACT TESTIMONY

[47] ¶ 70 In Proposition 10, Appellant complains that improper victim-impact evidence denied him a fair sentencing proceeding. Appellant's only complaint on this subject is that the two victim-impact witnesses—Jamie Bolin's mother and father-were allowed to recommend, without amplification, that Appellant be put to death for murdering their daughter. Appellant preserved this issue for review through a pretrial motion; he asked the trial court to declare 22 O.S.2001, § 984.1 unconstitutional insofar as it permits sentence recommendations by victims' families. The trial court refused. Appellant acknowledges that we have rejected this same claim many times before. *Jones v. State,* 2009 OK CR 1, ¶ 84, 201 P.3d 869, 890 ("This Court has previously upheld admission of the opinion of a victim impact witness as to the appropriateness of the death penalty as long as it is limited to the simple statement of the recommended sentence without amplification") (citations omitted). Appellant's arguments do not persuade us to revisit the issue. Proposition 10 is denied.

XI. PROSECUTOR MISCONDUCT

[48] ¶ 71 In Proposition 11, Appellant claims the jury's sentence was unfairly influenced by several instances of prosecutor misconduct. Defense counsel timely objected to some of these comments; the others we review***249** only for plain error. *Pavatt,* 2007 OK CR 19, ¶ 61, 159 P.3d at 291.

a. Arguing facts not in evidence.

[49] ¶ 72 Appellant complains that in both stages of the trial, the prosecutor improperly implied that he had partially shaved the victim's pubic area with a razor. The inference was based on the guilt-stage testimony of OSBI Criminalist Jolene Russell, who examined Jamie's body at the Medical Examiner's office. Russell noticed that the girl's pubic area appeared partially shaven, and saw loose hairs on that area of her body.[FN29] Also, an electric razor was found in Appellant's apartment. The inference was not improper, because it was reasonably based on the evidence. *Pavatt,* 2007 OK CR 19, ¶ 64, 159 P.3d at 291–92. While the inference surely had no effect on the jury's finding of guilt, the prosecutor was also free to use the inference in the punishment stage to show that perhaps Appellant was not entirely forthcoming in his interview with police. And while the inference may have, to some degree, underscored the vile nature of the entire crime, it did not unfairly overshadow the other depraved things Appellant freely admitted to doing. There is no improper conduct or unfair prejudice here.

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FN29. In guilt-stage closing argument, the prosecutor mistakenly referred to this observation as being made by the Medical Examiner. Appellant makes much of the fact that no "expert" determined that the victim's pubic area had been shaven, even though lay witnesses are competent to relate their own personal observations about such matters. 12 O.S.2001, §§ 2602, 2701; *see Rogers v. Sells,* 178 Okl. 103, 61 P.2d 1018, 1020 (1936) ("A lay witness may testify to an objective fact; he certainly has the right to use his senses the same as an expert witness").

b. Personal opinions on appropriate punishment.

[50][51][52] ¶ 73 Appellant complains that at various times and in various ways, the prosecutor argued that death was the only appropriate punishment in this case. Appellant did not object to these comments, so we review them only for plain error. It is improper for a prosecutor to give personal opinions on the appropriate verdict, by alluding to information that has not been properly presented to the jury. *Glasgow v. State,* 88 Okl.Cr. 279, 289, 202 P.2d 999, 1004 (1949). However, it is entirely proper for a prosecutor, as the State's representative, to argue for a particular outcome based on the evidence introduced at trial. *Pavatt,* 2007 OK CR 19, ¶ 63, 159 P.3d at 291. We have reviewed the prosecutor's comments and find nothing improper about them. The prosecutor advanced the State's position that a death sentence was appropriate based on the evidence and testimony submitted. There was no misconduct, and hence no plain error here.

c. Comments on the presumption of innocence.

[53] ¶ 74 Appellant faults the prosecutor for commenting, during *voir dire,* on the presumption of innocence. The prosecutor explained that the presumption was a "precious thing," and then went on to explain that it applies with equal force when the facts show that the accused is not "actually innocent." Appellant did not object to this comment, and reading the entire passage that Appellant quotes from, we find nothing improper about it. FN30 The prosecutor certainly did not argue that the presumption of innocence was inapplicable or had been destroyed in this case; as noted, the comment was made in *voir dire,* before any evidence had been presented. The prosecutor was simply explaining that the presumption was the law's way of placing the burden on the State to produce evidence sufficient for a conviction. We find nothing improper or incorrect in this comment. *Dodd v. State,* 2004 OK CR 31, ¶ 24, 100 P.3d 1017, 1029.

FN30. For example, in the same passage, the prosecutor corrects some panelists' misunderstanding of the presumption: "[T]he reality is right now, you'd have to vote not guilty, because he's presumed innocent of the charges. Okay? You don't hear any evidence that convinces you otherwise, you have to find him not guilty is what the law says. Are you okay with that ...?"

d. Displays of emotion.

[54] ¶ 75 During the prosecutor's closing argument in the guilt stage of the trial, defense***250** counsel objected, claiming that the prosecutor was "prancing around" in front of the jury and "screaming" at them. Defense counsel noted that the prosecutor appeared to be on the verge of tears. The trial court admonished the prosecutor not to get too close to the jury, and the prosecutor complied. Appellant claims the prosecutor's deportment was unfairly prejudicial to him, and relies on *Mitchell v. State,* 2006 OK CR 20, ¶¶ 96–101, 136 P.3d 671, 708–710 as authority. We find *Mitchell* to be quite distinguishable from the present case. In *Mitchell,* the prosecutor stood at the defense table, pointed directly at the defendant, and angrily addressed arguments to him personally. This conduct went on for some time, despite several objections by the defense. Here, however, the prosecutor's argument was not aimed at Appellant personally, but was properly directed to the jury. Appellant does not claim that the substance of the argument itself was

improper. The prosecutor's comments may have been delivered with emotion, but no one could deny that emotionally-charged evidence had been presented in this trial. We review the trial court's handling of such matters for an abuse of discretion, *see Garrison v. State,* 2004 OK CR 35, ¶ 124, 103 P.3d 590, 611, and find that the court's discretion was not abused here.

¶ 76 Whether considered individually or cumulatively, the comments complained of above did not deny Appellant a fair trial. *Powell v. State,* 2000 OK CR 5, ¶ 151, 995 P.2d 510, 539. Proposition 11 is denied.

XII. INEFFECTIVE ASSISTANCE OF COUNSEL

[55] ¶ 77 Proposition 12, Appellant alleges that certain acts and omissions of his trial defense team denied him the right to effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution. In conjunction with this claim, Appellant has timely submitted an Application for Evidentiary Hearing, pursuant to Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2011).[FN31] When a defendant on direct appeal challenges his trial counsel's performance, we employ the analysis promulgated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We begin with the presumption that trial counsel rendered reasonable professional assistance. The defendant must establish both deficient performance and prejudice, that is, (1) that his trial counsel's performance was objectively unreasonable under prevailing professional norms, and (2) that counsel's performance undermines confidence in the outcome of the trial. *Littlejohn v. State,* 2008 OK CR 12, ¶ 27, 181 P.3d 736, 744–45.[FN32]

FN31. Appellate counsel has also filed a Motion to Supplement the Application for Evidentiary Hearing with materials intended to rebut portions of the State's response to his ineffective-counsel claims. The motion to supplement is hereby **GRANTED.**

FN32. While *Strickland* is our guide, we stress that, at this juncture, we do not attempt to substitute a review of written materials presented by one party for full-blown adversarial testing. Our task here is make the preliminary determination of whether there is even reason to remand for such testing. Our rules only require that Appellant raise a "strong possibility" that trial counsel was ineffective—a burden less onerous than *Strickland's* Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2011); *Simpson v. State,* 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–06.

¶ 78 Appellant claims trial counsel was deficient for (1) failing to object to certain physical evidence that he now claims was inadmissible; (2) failing to object to certain arguments by the prosecutors that he now claims were improper; (3) failing to challenge the application of the death penalty to the mentally ill; (4) failing to rebut claims made by the Medical Examiner about the possible sequence of injuries to the victim; (5) failing to present additional mitigating evidence; and (6) failing to rebut a suggestion that certain mental-health diagnoses could have been confirmed with neuroimaging testing, but were not. We have rejected the first three claims on their merits, finding (1) that the physical evidence seized from Appellant's apartment was properly admitted (Proposition 3); (2) that the prosecutors' arguments were not improper (Proposition 11); and (3) that the execution of those who may be mentally ill, but who are not legally insane, does not run afoul of the Constitution ***251** (Proposition 9). Because timely challenges on these issues by trial counsel would properly have been overruled, Appellant cannot show any prejudice from counsel's failure to make them. *Eizember,* 2007 OK CR 29, ¶ 155, 164 P.3d at 244.

[56] ¶ 79 We turn next to Appellant's claim that his trial counsel failed to present evidence to rebut

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aspects of the Medical Examiner's testimony. During direct examination in the guilt stage of the trial, the Medical Examiner, Dr. Yacoub, testified that based on her examination, she could not conclusively say whether Jamie Bolin was alive when Appellant sexually assaulted her, or when he attempted to decapitate her. This testimony was based on trauma to the girl's vaginal area, food material found in her airway, and embolism (air bubbles) detected in the blood vessels of her brain. Appellant had told police that after he suffocated Jamie, he did no more than touch his penis to her vagina, then attempted to decapitate her in the bathroom. The defense team had retained its own forensic pathologist, Dr. John Adams, to review the autopsy findings before trial. However, this expert was not called to testify. Appellant now claims his trial counsel should have presented Dr. Adams to explain why, in his opinion, it would have been impossible for Jamie to have been alive when her body was sexually assaulted or when she received severe injuries to her neck. The Application for Evidentiary Hearing includes reports from Dr. Adams to this effect.

¶ 80 Dr. Yacoub concluded that Jamie Bolin died from asphyxiation. Appellant does not contest that conclusion. Dr. Yacoub never offered detailed alternative scenarios for the order of traumatic injuries; she simply said she could not determine the exact sequence from her autopsy. She did, however, make it clear that the food matter in the girl's airway was probably due to unconscious regurgitation—not from the effects of having one's throat cut. FN33 As for the genital trauma, Dr. Yacoub concluded that she "could not tell" whether it was inflicted when Jamie was "alive or dying or immediately after she died." As for the embolism, Dr. Yacoub could not say whether it occurred premortem or postmortem; she noted that it could have occurred from decomposition of the body. FN34 She did conclude, however, that the fracture to Jamie's hyoid bone, in the neck, was a postmortem injury.

FN33. Dr. Yacoub testified: "*If a person was conscious* and food was trying to get into the airway, that person would cough out that food so the airway would be protected and only the air would be in the airway. If that reflex is absent, for whatever reason, then food can get into the airway." (Emphasis added.) "Q. So if I'm following what you're saying, it is more likely that the person was unconscious and that food came up and they were unable to—she was unable to get it out, clear her airway? A. That would be my opinion."

FN34. Dr. Yacoub testified: "Well, I observed air in the blood vessels of the brain. So that's a fact. How did this happen? There are potential scenarios. That air could have happened when the neck was being cut. The body was starting to decompose, and that's another possibility. This is just a postmortem change.... I could not tell if she was alive or dead when the air went to her blood vessels in the brain."

¶ 81 Appellant claims that Dr. Yacoub's testimony "undoubtedly strengthened" the State's case on the "heinous, atrocious, or cruel" aggravator. But if the Medical Examiner could not say whether Jamie was alive when certain injuries were inflicted, she certainly did not suggest that the girl was *conscious* when those injuries were inflicted. This is an important point—one that defense counsel made clear to the jury, several times, when cross-examining Dr. Yacoub. FN35 The medical evidence corroborated Appellant's confession regarding Jamie's conscious and fierce struggle while being suffocated. In punishment-stage closing, the prosecutors argued, consistent with Appellant's confession, that Jamie's conscious physical suffering was supported by evidence of suffocation. While they also pointed out that the medical evidence left some questions about the completeness of Appellant's confession, those comments were fairly based on the evidence. *Robinson v. State,* 1995 OK CR 25, ¶

26, 900 P.2d 389, 399. And as we have observed in ***252** our discussion of Proposition 7, Appellant does not dispute that Jamie did, in fact, experience conscious physical suffering. The exact timing of the other injuries to the girl's body was not material to the single aggravating circumstance found by the jury.[FN36]

FN35. *E.g.,* "Q. You don't know, do you, Doctor, at what point, if any, Jamie Bolin was conscious, do you? A. Not being an eyewitness, I do not know when she became unconscious."

FN36. After recapping Appellant's own description of the suffocation, the prosecutor said, "And as horrible as it is, that's what you have to think about when you decide if Jamie Bolin, 10–year–old Jamie Bolin, suffered. There is no doubt, ladies and gentlemen, that she suffered great physical anguish and extreme mental cruelty." While trial defense counsel did not expressly concede that Bolin consciously suffered before her death, he offered only a general and half-hearted challenge to the "heinous, atrocious, or cruel" aggravator, saying its elements were "problematic" and the facts open to dispute.

[57] ¶ 82 Under *Strickland,* we must begin with the presumption that trial counsel performed reasonably, and we must give due deference to strategic decisions made during the course of the trial. *Grant,* 2009 OK CR 11, ¶ 53, 205 P.3d at 22. When counsel is assailed for failing to present evidence, we consider whether counsel conducted a responsible investigation on the issues involved. A total failure to investigate a viable and relevant aspect of a defense is one thing; a tactical decision not to present certain evidence, after reasonable investigation, is another. When counsel has made an informed decision to pursue one particular strategy over another, that choice is "virtually unchallengeable." *Strickland,* 466 U.S. at 690–91, 104 S.Ct. at 2066; *Harris,* 2007 OK CR 28, ¶ 33, 164 P.3d at 1116.

¶ 83 It is not difficult to imagine a sound strategic reason for not calling Dr. Adams. First, defense counsel already made the most relevant point through cross-examination of Dr. Yacoub: that she could not point to any evidence refuting Appellant's description of when Jamie lost consciousness. Additional rebuttal of Dr. Yacoub's *admittedly inconclusive* findings about the trauma sequence was, arguably, a waste of time. If such rebuttal had been presented in the guilt stage (where Dr. Yacoub testified), it would have had no bearing on the jury's verdict that Appellant had murdered Jamie Bolin—a fact the defense had all but conceded. If it had been presented in the punishment stage, such testimony would have shifted the focus of the defense to what could reasonably be considered a collateral matter. In the punishment stage, the defense team focused on showing the jury that Appellant was not a continuing threat if confined to prison, and on showing why his life was worth sparing. Although the State had incorporated the guilt-stage exhibits and testimony into the punishment stage, actually calling a forensic expert to testify in detail about the same gruesome matters again—when the focus was now squarely on punishment—would arguably have distracted the jury in a way unfavorable to the defense. Appellant admitted to beating, suffocating, molesting, and practically decapitating Jamie Bolin. The exact order in which he committed these acts was not material, because by his own admission, Jamie struggled for some time before losing consciousness. Furthermore, regardless of timing, Dr. Adams's own forensic review firmly corroborates Dr. Yacoub's conclusion of vaginal trauma. This finding contradicts Appellant's version of events, and supports the prosecutor's claim that he was not entirely honest in his confession.[FN37] In several ways, having Dr. Adams testify might have done more harm than good. *Hanson v. State,* 2009 OK CR 13, ¶ 37, 206 P.3d 1020, 1031–32.

FN37. Dr. Adams concluded, "with reasonable medical certainty," that the child's

> vagina was, in fact, penetrated "by some object which produced tears in the hymen."

[58] ¶ 84 Appellant also claims that Dr. Adams should have been called during the pretrial suppression hearing to discredit the State's reliance on the "rescue doctrine" (see Proposition 1). He claims Agent Overby knew, or should have known, that Jamie was already dead (rendering the rescue doctrine inapplicable) because, in Dr. Adams's estimation, the "prominent odor of decaying flesh" should have been obvious upon opening the tub. Yet Dr. Adams had no personal knowledge of the crime scene. The undisputed evidence was that the body had been wrapped in sheets of plastic, that items of clothing lay on top of this bundle, that the tub was sealed with duct tape, that a strong ***253** odor of air freshener permeated the closet, and that Overby only briefly opened a corner of the tub. In our view, Dr. Adams could not say with any degree of certainly what odor Overby should have detected.

¶ 85 In short, we discern sound strategic reasons for the defense team not calling its forensic pathologist, and in any event, we find no prejudice flowing from that decision. We find no strong possibility that the failure to present Dr. Adams as a witness affected the outcome of Appellant's trial.

[59] ¶ 86 Next, we consider Appellant's claim that trial counsel failed to present sufficient mitigating evidence. Appellant concedes that his trial team conducted extensive mitigation investigation, and that copious anecdotal evidence about his life history was presented through friends, family, co-workers, teachers, and others. The mitigation case comprises some 400 pages of transcript. Nineteen witnesses were called, including three mental-health experts. While a few witnesses (*e.g.* a jailer and a prison warden) were called specifically to rebut the State's "continuing threat" aggravator, by and large, the testimony about Appellant's mental disorders (consisting of both lay anecdotes and expert evaluation) advanced the defense case on several fronts simultaneously, illustrating in a more general fashion why Appellant's life should be spared. And the defense experts' own evaluations relied, to some degree, on anecdotal information from the same friends and associates that testified (and others who did not).

¶ 87 Appellant does not complain so much about the number or selection of lay mitigation witnesses that were called, as about whether they were asked the right questions. The prosecutors attacked the defense mitigation case by looking for discrepancies between the information Appellant's friends related in court, and the impressions that the experts received from the same sources. Those who grew up with Appellant, and those who associated with him in later years, gave example after example of his somewhat dysfunctional family environment and his social difficulties.[FN38] While the prosecutors may have quibbled here and there with the testimony, through cross-examination and argument, the State did not present a single witness to rebut these anecdotes, or to impeach the credibility of those relating them. And as we have observed, insofar as these witnesses illustrated Appellant's mental disorders, the State's own mental-health expert generally concurred in the diagnoses that the defense experts had reached after considering the same kind of information. Appellant's attempt to paint a sympathetic picture of his childhood and mental problems was largely successful in the end. Trial counsel thoroughly investigated and prepared a comprehensive case in mitigation. Counsel's decision not to ask different questions, or ask questions in a different way, will not be second-guessed.[FN39] *Strickland,* 466 U.S. at 690–91, 104 S.Ct. at 2066; *Harris,* 2007 OK CR 28, ¶ 39, 164 P.3d at 1118.

> FN38. The one person Appellant claims should have been called to testify, but was not, would have offered information that was either cumulative to other testimony or contradictory to it. Appellant now proffers the affidavit of Randy White, a friend who was not called to testify. Appellant claims

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that many of White's anecdotes "corroborate" those of witnesses who were, in fact, called. White also describes Appellant as appearing slow-witted. This subject was much more thoroughly explored by the defense experts, who testified that Appellant was of above-average intelligence, but had disorders that impaired his social function.

FN39. In punishment-stage closing argument, defense counsel told the jury: "And you've heard from all witnesses that I mentioned in my opening with the exception of two. And frankly, we thought those people were cumulative to what you've already heard."

[60] ¶ 88 Appellant also claims trial counsel should have rebutted the State's insinuation that neuroimaging testing could have been undertaken to confirm certain diagnoses made by the defense experts. In a brief exchange, the prosecutor asked the State's mental-health expert, Dr. Meloy, if such testing could have confirmed "some of those things" in the experts' reports; Meloy said it could have, but apparently it was not done. That was the extent of testimony regarding neuroimaging. It is not clear exactly what aspects of the defense diagnoses might have been at issue. As noted, Dr. ***254** Meloy did not dispute the diagnoses of the defense experts; he merely disagreed with some of their conclusions about whether Appellant constituted a continuing threat to society.FN40 And ultimately, the jury rejected that aggravating circumstance. We find no strong possibility that expert rebuttal to this isolated comment could have affected the outcome of the trial.

FN40. Appellant claims Dr. Meloy "launched a fierce attack" on the specific diagnoses of Schizotypal Personality Disorder and Bipolar II Disorder, opining that neuroimaging testing was "necessary" to confirm these diagnoses, and that the defense experts knew that to be the case. A review of the record does not support this characterization. On cross-examination, defense counsel had implied that Meloy was not qualified to comment on the findings of Dr. McGarrahan, one of the defense experts, because McGarrahan was a neuropsychologist, and Meloy was not. In fact, Meloy admitted he did not have "any disagreement" with McGarrahan's neuropsychological evaluation. At the end of redirect, Dr. Meloy was asked two brief questions about neuroimaging; he did not specify what particular diagnoses such testing might have shed light on.

¶ 89 In summary, the supplementary materials Appellant has presented to this court do not show a strong possibility that trial counsel was ineffective, to the extent that additional fact-finding on the issue would be warranted. Proposition 12 is denied, and Appellant's request for an evidentiary hearing on his claims of ineffective counsel is also denied. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2011); *Simpson v. State,* 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–06.

XIII. CUMULATIVE ERROR

¶ 90 In Proposition 13, Appellant claims that the cumulative effect of all errors identified above denied him a fair trial. Because we have found no error, we likewise find no error by accumulation. *Rojem,* 2009 OK CR 15, ¶ 28, 207 P.3d at 396. This proposition is denied.

MOTION FOR NEW TRIAL

[61][62] ¶ 91 During the pendency of his appeal, Appellant filed a Motion for New Trial in this Court, alleging that newly-discovered evidence warrants reversal of his conviction. Appended to this motion are documents that Appellant has gathered in support of his claim. A defendant may file a motion for new trial when "new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial." 22 O.S.2001, § 952(7).

When such a motion is filed during the pendency of a direct appeal, it shall be filed with this Court, not the district court. Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2011). Such a motion must in any event be filed within one year of the imposition of Judgment and Sentence. 22 O.S.2001, § 953. Appellant's motion was timely filed.[FN41] The State filed a response on October 30, 2009.

FN41. Appellant's Motion for New Trial was filed on the anniversary date of his sentencing—April 3, 2009. The motion was timely filed on the last day before expiration of the one-year period. *See* Rule 1.4, *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2011); *Quick v. City of Tulsa,* 1975 OK CR 220, ¶ 7, 542 P.2d 961, 964.

¶ 92 Appellant's sole claim in the motion for new trial is that one juror empaneled to try his case withheld relevant information during the jury selection process. He contends that Juror G. was "selective" in disclosing his prior contacts with the legal system. Appellant compares G.'s answers on the juror questionnaire, and his responses during general *voir dire,* with public records showing additional, undisclosed contacts between himself or members of his family, and police or the courts. Appellant contends that G.'s omissions were intentional, and that such deception made him challengeable for cause. Alternatively, he claims G.'s omissions kept him from exercising peremptory challenges in an intelligent manner.

[63] ¶ 93 When a defendant claims that newly-discovered evidence warrants a new trial, we consider the following factors: (1) whether the evidence could have been discovered before trial with reasonable diligence; (2) whether the evidence is material; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable probability that, had it been introduced at ***255** trial, it would have changed the outcome. *Ellis v. State,* 1992 OK CR 45, ¶ 50, 867 P.2d 1289, 1303. We may resolve the issue based on the supplementary materials presented by the parties, or remand for an evidentiary hearing if necessary to adjudicate the claim. Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals* ¶ 22 O.S., Ch. 18, App. (2011).

[64] ¶ 94 The right to a fair trial, guaranteed to every litigant, includes the right to a body of impartial jurors. *Irvin,* 366 U.S. 717, 81 S.Ct. 1639. The law recognizes that prospective jurors may be excused for either implied bias or actual bias. Bias is implied for any of several statutory grounds, generally involving some relation between the prospective juror and the defendant or complaining witness, or the juror's prior involvement with the case itself. 22 O.S.2001, § 660. A juror may also be excused for more subjective reasons which fall under the label of actual bias, *i.e.,* "the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging...." 22 O.S.2001, § 659. While allegations of actual bias usually involve a perceived prejudice against one party or another, a juror may also demonstrate bias "in reference to the case," *i.e.,* some personal interest in influencing the outcome of the trial, irrespective of the parties, that jeopardizes the guarantee to an impartial body of fact-finders. *See e.g. Dyer v. Calderon,* 151 F.3d 970 (9th Cir.1998) (juror's false answers during *voir dire* demonstrated bias which denied defendant a fair trial, even though the juror's motives for lying were unclear).

[65][66][67][68] ¶ 95 Trial judges enjoy considerable discretion in deciding whether to excuse a juror for cause. *Young v. State,* 1998 OK CR 62, ¶ 9, 992 P.2d 332, 337. While a trial court may, in its discretion, excuse a prospective juror for omitting (or even intentionally lying about) certain information during *voir dire,* that does not mean that the same omissions automatically warrant a new trial when they are discovered at a later date.[FN42] The

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constitutional guarantee is to a body of disinterested jurors. Even when a juror's answers in *voir dire* are shown to have been deliberately misleading, a new trial is only required when the record casts sufficient doubt on the juror's ability to be impartial. “The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.” *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984).

> FN42. Evidence of juror bias may arise during *voir dire* or during trial, in which case the defendant may claim on appeal that the trial court should have excused a panelist, removed a sitting juror and replaced him with an alternate, or granted a mistrial, as the case may be. The same statutory rules on bias are relevant in situations like this, where the evidence allegedly showing juror bias is not developed until after a verdict has been rendered.

> It is well settled that, as a general rule, a verdict will not be set aside for reasons that would be sufficient to disqualify on a challenge for cause which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the accused suffered injustice from the fact that the juror served in the case.
> *Stouse v. State,* 6 Okl.Cr. 415, 430, 119 P. 271, 277 (1911).

¶ 96 We have reviewed the trial record, the materials Appellant has attached to his motion for new trial, and an affidavit from Juror G., explaining the omissions, which the State has attached to its response.FN43 Appellant's ***256** argument focuses primarily on G.'s failure to disclose that he was a named defendant in a civil action in the mid–1990's, and on a few domestic incidents apparently related thereto. Appellant claims the nature of these omissions shows that G. was trying to cast himself in a more acceptable light to the court. This may be true. But Appellant does not deny that during jury selection, G. willingly disclosed more than one incident where he was charged with a crime—one of which took place almost fifty years ago. Indeed, Appellant characterizes G. as having “many encounters with the legal system that might have made him appear unfit to serve on a jury,” but concedes that G. freely admitted many of them in open court. *See Dyer,* 151 F.3d at 973 (“For *voir dire* to function, jurors must answer questions truthfully. Nevertheless, we must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment”).

> FN43. Prospective jurors were asked if they had ever “appeared as a witness” in any court proceeding, and if they, an immediate family member, or a close friend had been a defendant in any criminal case, or had been a victim of a crime. Juror G. wrote on his questionnaire that he and his family had been the victims of a burglary in 1989, and that he had testified in a burglary trial. He did not mention that in the mid-1990's, he and his wife were sued by their son over an insurance settlement awarded to the son after injuries sustained in an accident. In his affidavit, Juror G. explained that he didn't list being a “witness” in that case because he was a party to it: “I did not know being part of the case made me a witness.” Such confusion is not uncommon among laypersons. In fact, during general *voir dire,* when asked again about being a *victim* of a crime, G. added that he had been a “party defendant”—he was arrested for assault with a deadly weapon almost 50 years ago, but the case was later dismissed. Juror G. then recalled “one other thing I need to tell you,” which was that he had once shot at some burglars who broke into his home.

Juror G. omitted the fact that in 1992, his daughter had filed a police report against him for a "road rage" incident, and that a few months later, she was charged with making harassing phone calls to her mother (G.'s wife), apparently related to the civil suit involving G.'s son. In his affidavit, G. explained that these incidents "slipped [his] mind" at the time of Appellant's trial, and that "[a] lot of this just seemed like a family problem blown out of proportion." Appellant also presents a police report indicating that G.'s wife was one of two persons allegedly assaulted by a Mr. Williams in 1997. The outcome of this case is not known. Juror G. failed to list this incident when asked if anyone in his family had been the victim of a crime. Appellant also notes that G. had filed several routine burglary reports over the years, but failed to mention them. In his affidavit, G. explained that he ran a boat-repair business, and these were thefts of customers' property, not his own. The police reports Appellant has submitted support this explanation.

During general *voir dire,* Juror G. disclosed that he had been charged with receiving stolen property in the late 1970's, but said that he was cleared of wrongdoing: "And I guess I was arrested, they put me in jail. But they released me.... I don't know if that would be an arrest or not." Appellant submits a copy of an Information showing that G. was *charged* with receiving stolen property in 1979. However, Appellant does not dispute G.'s description of the outcome. All Appellant has shown is that G. was confused on how far the case went before being dismissed.

¶ 97 We must first consider whether the information presented is timely. *Ellis,* 1992 OK CR 45, ¶ 50, 867 P.2d at 1303. All of the "new" information Appellant submits is public record, and he does not explain why it was not collected and presented until now. We conclude that this material does not meet the criteria for being "newly discovered evidence." FN44 *Phillips v. State,* 1954 OK CR 22, ¶ 24, 267 P.2d 167, 174.

FN44. As we have noted, the heart of Appellant's argument is G.'s failure to disclose his involvement in a civil lawsuit in the mid–1990's. That fact was instantaneously accessible from online dockets. Appellant also submits substantial excerpts from transcripts of the civil proceedings, but his primary claim is a willful failure to disclose; the transcripts are offered merely to show that the civil suit was substantial enough that G. could not have simply forgotten about it. The balance of Appellant's materials are police reports, court pleadings, and docket sheets. Juror G. filled out the juror questionnaire on the first day of jury selection. He cleared the initial hurdle of individual death-qualification *voir dire* on the second day. General *voir dire* began about five days later. The presentation of evidence took about two weeks. Had defense counsel presented information about the civil case during general *voir dire* or even during trial, the trial court could have held a hearing on the matter, and if G. had been examined and his explanations were found wanting, the court might have exercised its discretion by replacing G. with an alternate. The fact that none of this happened does not mean that trial counsel performed deficiently. We simply observe that, so far as we can tell, the information Appellant claims is "newly discovered" was readily available when his trial began.

¶ 98 Nevertheless, even if any of this information were truly new, we would find it is not materi-

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al, and cannot reasonably be said to have affected the outcome of Appellant's trial. *Ellis,* 1992 OK CR 45, ¶ 50, 867 P.2d at 1303. Appellant does not contend that Juror G. had any relationship to, connection with, or bias toward or against any party or witness in this case. None of the juror's undisclosed incidents involve anything remotely similar to the charge herein. Rather, ***257** Appellant claims that G.'s omissions show a bias "in reference *to the case* ... [such] that he cannot try the issue impartially." 22 O.S.2001, § 659(2) (emphasis added). Appellant concedes that, even with all the information he has discovered, he cannot discern what motive G. might have had for wanting to be a juror in this case. We cannot find one, either.

[69] ¶ 99 Any doubts about a juror's impartiality should be resolved in favor of the accused. *Grant,* 2009 OK CR 11, ¶ 12, 205 P.3d at 22. Even if we assume, for the sake of argument, that all of G.'s omissions were intentional, we see no hint that he might have harbored any bias toward or against anyone involved in this trial. Nor were G.'s omissions so egregious that one might reasonably detect some personal interest in serving on the jury, and a willingness to commit perjury to do so.[FN45] Appellant has not presented any reason to believe that G. would have been removable for bias of any kind. Hence, Appellant has not shown that G.'s omissions were material to conducting a fair trial. *Ellis,* 1992 OK CR 45, ¶ 50, 52, 867 P.2d at 1303.

FN45. Appellant's reliance on *Dyer v. Calderon* is sound for the general principle that a juror's deception may be so egregious that bias can be inferred. But the facts in *Dyer* are markedly distinguishable from those here. In what it described as a "rare case," *id.* at 984, the Ninth Circuit Court of Appeals in *Dyer* granted *habeas* relief to a state-court capital defendant. One juror had flatly denied *any* contacts between the criminal justice system and herself, or any close relative. When confronted during trial with newly-discovered information that her brother had been killed by another man, the juror dismissed the event as an "accident." *Id.* at 972–73. In truth, the juror herself had been the victim of numerous violent crimes, and practically every close male relative had been arrested for violent crimes. *Id.* at 980–81. As for her brother's "accidental" death, the juror had in fact filed a civil suit against his killer, and the killer had been convicted of a reduced charge of manslaughter after pleading guilty. *Id.* at 974, 975. The defense was tipped off about the juror's deception from the juror's own husband—who just happened to be in the same jail as Dyer, on charges of rape, at the time of Dyer's capital murder trial. *Id.* at 973–74. The Ninth Circuit concluded that the "magnitude of [the juror's] lies, and her remarkable display of insouciance ... fatally undermine our confidence in her ability to fairly decide Dyer's fate." *Id.* at 984.

[70] ¶ 100 Finally, we turn to Appellant's claim that Juror G.'s omissions prevented him from intelligently exercising his peremptory challenges. In other words, Appellant claims that even if G. was not removable for cause, the information he failed to disclose was such that Appellant would have removed him peremptorily, had Appellant known it before the jury was seated. In *Manuel v. State,* 1975 OK CR 174, 541 P.2d 233, a juror failed to disclose during *voir dire* that he was married to the chief secretary in the prosecutor's office. While defense counsel may not have specifically asked about such relations, his questions were close enough that they should have prompted a positive response from the juror (if not a realization by the prosecutor himself). We held that the defendant was entitled to a new trial, finding that he was, "at the very least," deprived of information relevant to his intelligent use of peremptory challenges, "for we do not doubt that any defense attorney would so challenge a prospective juror with such a kinship to an employee

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of his adversary." *Id.* at ¶ 7, 541 P.2d at 237. But we did not grant relief in *Manuel* simply because the defendant claimed such information, had he possessed it timely, would have altered his use of peremptories. We granted relief only after considering whether the defendant was in fact prejudiced by the nondislosure, observing that the juror's relationship "approached being a basis for a challenge for cause," and that "all doubts regarding juror impartiality must be resolved in favor of the accused." *Id.* at ¶ 8, 541 P.2d at 237.

¶ 101 A similar situation occurred in *Tibbetts v. State,* 1985 OK CR 43, 698 P.2d 942. There, a juror failed to disclose several relevant facts which should have come to mind during *voir dire.* The juror responded negatively when asked if any members of her family had been the victim of a crime similar to the ones on trial: rape, sodomy, kidnapping. As it turned out, the juror's daughter had been the victim of an indecent exposure. The juror in *Tibbetts* also failed to mention that her son-in-law was a deputy sheriff, who had a job application pending with the district attorney's office at the time of trial—***258** and who, in fact, was present in the courtroom at times during the defendant's trial. Citing *Manuel,* we held that even though the new information was not such as to make the juror removable for cause, the "cumulative effect of the circumstances in the case at hand"—coupled with the principle that all doubts regarding juror impartiality must be resolved in favor of the accused—warranted a new trial. *Id.* at ¶¶ 10–11, 698 P.2d at 946.

[71] ¶ 102 New information about a juror's background or opinions can only be grounds for relief if it raises a doubt about the juror's ability to be fair and impartial.[FN46] As *Manuel* and *Tibbetts* illustrate, there may be situations where information about a juror, not obtained until after *voir dire,* might not have required removal of the juror for cause, but it is nevertheless of such importance, given all the circumstances of the case, that lingering doubt about the juror's fitness requires erring on the side of caution, and granting a new trial.[FN47] That is not the case here. As we have observed, Juror G.'s omissions had no relation to any party, witness, or issue in this case. The specter of bias raised in *Manuel* and *Tibbetts* is simply absent here. Juror G.'s omissions did not deny Appellant any substantial right. 20 O.S.2001, § 3001.1.

FN46. By definition, peremptory challenges need no objective justification for their use. *See* 22 O.S.2001, § 654 ("A peremptory challenge ... is an objection to a juror for which no reason need be given, but upon which the court must excuse him"). Hence, an objective *post hoc* analysis of how they might have been used differently is virtually impossible.

FN47. While some language in our prior cases might suggest that impairing a defendant's right to intelligently exercise peremptory challenges results in a *per se* denial of a fair trial, such declarations cannot be taken out of the context in which they were made. The statement is found in *Perez Enriquez v. State,* 1987 OK CR 164, 740 P.2d 1204, where we held that a juror's belated realization that she had several personal reasons to be prejudiced against the defendant's sister, who turned out to be a key alibi witness, warranted a new trial. *Perez Enriquez* cites *Bass v. State,* 1987 OK CR 29, 733 P.2d 1340, for the proposition that "[d]epriving defense counsel of information that could lead to the intelligent use of a peremptory challenge is a denial of an appellant's right to a fair and impartial jury." *Perez Enriquez,* 1987 OK CR 164, ¶ 7, 740 P.2d at 1206. In *Perez Enriquez,* we did not decide whether the juror was removable for cause, but concluded that doubts about her fitness had to be resolved in favor of granting a new trial. In *Bass,* a juror came forward during trial after realizing that his sister was engaged

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to one of the State's witnesses. The juror maintained that he could still decide the case impartially, and the court refused to declare a mistrial. On appeal, we did not find the trial court abused its discretion in accepting the juror's assurances, but did agree with the alternative claim that the juror's relationship to a key eyewitness bore on the defendant's ability to intelligently exercise peremptory challenges, expressly relying on "the principles announced in *Manuel* and *Tibbetts." Bass,* 1987 OK CR 29, ¶ 5, 733 P.2d at 1342. As discussed above in the text, the analysis used in *Manuel* and *Tibbetts* considers all the relevant circumstances, and grants relief only if a doubt exists about the juror's impartiality.

¶ 103 Considering the information available to us, and given our ability to resolve the issue by taking Appellant's factual allegations as true, we see no need for additional fact-finding in this case. Appellant's Motion for New Trial is therefore denied.

MANDATORY SENTENCE REVIEW

[72] ¶ 104 Under Oklahoma law, this Court is required to review any death sentence to determine (1) whether the evidence supports the sentencer's finding of aggravating circumstances, and (2) whether, despite any aggravating circumstances, the sentence of death was improperly imposed under the influence of passion, prejudice, or any other arbitrary factor. 21 O.S.2001, § 701.13.

¶ 105 We have found no error in the evidence, instructions, or argument presented in either stage of the trial. We have concluded that the evidence was sufficient to support the one aggravating circumstance found by the jury. There is no reason to believe that the jury's imposition of the death sentence was the result of any improper factor. The conviction and sentence imposed by the jury are therefore **AFFIRMED.**

DECISION

¶ 106 The Judgment and Sentence of the district court is **AFFIRMED.** Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, 22 O.S., Ch. 18, App. ***259** (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

A. JOHNSON, P.J., LEWIS, V.P.J. and SMITH, J.: concur.
LUMPKIN, J. concur in results.
LUMPKIN, Judge: CONCUR IN RESULT.

¶ 1 I concur in the Court's decision to affirm the judgment and sentence in this case and find the sentence of death supported by the law and evidence.

¶ 2 However, I do have concerns about the syntax used in describing our appellate review. As to Proposition 1, the opinion states "we review the district court's factual findings for clear error ..." when, in fact, on appeal, this Court reviews a trial court's ruling on the facts for an abuse of discretion. "An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Marshall v. State,* 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474 (*citing State v. Love,* 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369). *See also Stouffer v. State,* 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263 (*citing C.L.F. v. State,* 1999 OK CR 12, ¶ 5, 989 P.2d 945, 947); *Slaughter v. State,* 1997 OK CR 78, ¶ 19, 950 P.2d 839, 848–849 (*citing R.J.D. v. State,* 799 P.2d 1122, 1125 (Okl.Cr.1990)) (*quoting Stevens v. State,* 94 Okl.Cr. 216, 225, 232 P.2d 949, 959 (1951)). While the abuse of discretion standard includes an evaluation of whether the judge's decision is clearly erroneous, we have not adopted a separate standard labeled "clear error." We must be careful with the words we use due to the fact our readers evaluate those words for future arguments. Slight changes give rise to arguments that standards of review have changed when in fact they have not. I would just urge the Court to be consistent in the verbiage it uses to explain the methods utilized in analyzing issues on appeal.

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Okla.Crim.App.,2011.
Underwood v. State
252 P.3d 221, 2011 OK CR 12

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN RAY UNDERWOOD, Petitioner,	)	NOT FOR PUBLICATION
v.	)	Case No. PCD-2008-604
THE STATE OF OKLAHOMA, Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 17 2012
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION
DENYING APPLICATION FOR POST-CONVICTION RELIEF
AND RELATED MOTIONS

C. JOHNSON, JUDGE:

Petitioner, Kevin Ray Underwood, was convicted by a jury in Cleveland County District Court, Case No. CF-2007-513, of First Degree Murder (21 O.S.2001, § 701.7(A)). The jury found the existence of one aggravating circumstance alleged by the State, and recommended a sentence of death.[1] On April 3, 2008, the Honorable Candace L. Blalock, District Judge, sentenced Petitioner in accordance with the jury's recommendation.[2] We affirmed Petitioner's conviction and sentence on direct appeal, and denied his request for rehearing. *Underwood v. State*, 2011 OK CR 12, 252 P.3d 221 (rehearing denied, May 19, 2011).

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[1] The State initially alleged three aggravating circumstances in support of the death penalty. Before the capital sentencing phase of the trial began, the State dismissed its allegation that the murder was committed to avoid arrest or prosecution (21 O.S.2001, § 701.12(5)). The jury rejected the State's allegation that Petitioner constituted a continuing threat to society (21 O.S.2001, § 701.12(7)), but did conclude that the murder was especially heinous, atrocious, or cruel (21 O.S.2001, § 701.12(4)).

[2] The prosecution was originally filed in the District Court of McClain County, Case No. CF-2006-102. Judge Blalock granted a change of venue and the case was transferred to Cleveland County.

Petitioner filed the instant Application for Post-Conviction Relief, and related motions, on May 18, 2010. Our review is governed by the Post-Conviction Procedure Act, specifically 22 O.S.Supp.2006, § 1089, which provides applicants with very limited grounds upon which to attack their convictions. First, a post-conviction proceeding is not intended as a substitute for a direct appeal, nor is it intended to be used as a second direct appeal. *Browning v. State*, 2006 OK CR 37, ¶ 2, 144 P.3d 155, 156. Under the doctrine of *res judicata*, claims which were raised and addressed on direct appeal are barred from being relitigated; claims which could have been raised on direct appeal, but were not, are generally considered waived. *Id.* Claims not timely raised on direct appeal may still be considered, if appellate counsel's failure to timely raise them amounts to constitutionally deficient performance. 22 O.S.Supp.2006, § 1089(D)(4)(b). But prior counsel's omissions cannot justify relief unless they undermine confidence in the outcome of the proceedings in which they occurred. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); 22 O.S.Supp.2006, § 1089(C) (claims which are properly raised in a post-conviction application may only afford relief if they "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent"). In short, any claim raised in a post-conviction proceeding – whether or not it involves an allegation of ineffective assistance of prior counsel – requires the petitioner to show, at the very least, a reasonable likelihood that the claim is outcome-determinative, as to either the finding of guilt or the penalty imposed.

Petitioner raises two propositions of error. First, he claims he was denied the effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution and similar provisions of the Oklahoma constitution, by the deficient performance of his trial and appellate counsel. Second, he claims that the cumulative impact of errors committed below denied him a fair capital sentencing proceeding. In his first claim, Petitioner offers a list of claims that appellate counsel could have made, but failed to make, about alleged errors during trial, and about trial counsel's own allegedly deficient performance. 22 O.S.Supp.2006, § 1089(D)(4)(b)(2). We address each sub-claim separately, and then address Petitioner's cumulative-error claim.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

a. Evidence relating to Petitioner's mental health.

While Petitioner concedes that trial counsel presented "much" evidence, in the mitigation phase of the trial, regarding his mental-health history, he now claims that "much more" was available. However, Petitioner does not offer specific fact witnesses or records that were overlooked by trial counsel. Rather, the gist of his claim is that the mental-health information and expert evaluations used by trial counsel supported a particular diagnosis not identified at trial. Petitioner offers a new psychological evaluation to support his claim. Although this evaluation was based in part on new interviews with Petitioner and his parents, the great majority of data informing the evaluator's conclusions comes from the trial record, and from the evaluations and diagnoses made by mental-health professionals who testified at trial. The new

evaluation accepts most of the previous observations and diagnoses, but concludes that, rather than suffering from Schizotypal Disorder (as previous diagnoses had suggested), Petitioner may actually suffer from Asperger Syndrome (also known as "Asperger's Syndrome" or "Asperger Disorder").

The new evaluation is thorough in explaining the reasons for the alternative diagnosis. However, Petitioner fails to explain how it is reasonably possible that affixing this new label to his condition would have changed the outcome of the trial. Petitioner observes that the three mental-health professionals involved in his trial each had their own specialized field of expertise. Naturally, each expert viewed Petitioner's condition through their own particular lens of education and experience. Despite their different perspectives, these experts largely agreed with one another's basic conclusions. In fact, the State's own expert did not dispute most of the diagnoses suggested by the defense experts, but simply drew different conclusions from them.[3] *See Underwood*, 2011 OK CR 12 at ¶¶ 58, 87-88, 252 P.3d at 245, 253-54. And as we observed in the opinion on direct appeal, the jury presumably was influenced to Petitioner's advantage by the mental-health evidence presented in mitigation, as it found that he was not a continuing threat to society. *Id.* at ¶¶ 11, 87, 252 P.3d at 232, 253. Petitioner does not explain how reclassifying his condition as Asperger Syndrome would have affected the one aggravating

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[3] According to one recent study, an overwhelming number of reported violent criminals believed to suffer from Asperger Syndrome also had coexisting psychiatric disorders, such as schizoaffective disorder. Newman & Ghaziuddin, "Violent Crime in Asperger Syndrome: the Role of Psychiatric Comorbidity," *Journal of Autism and Developmental Disorders* 38 (10): 1848-52 (2008).

circumstance found by the jury (that the murder was especially heinous, atrocious, or cruel), or how it would otherwise have altered the tenor and force of the mitigation evidence as a whole. Absent a showing that the outcome of the punishment stage might reasonably have been different, trial counsel was not ineffective for not investigating this alternative diagnosis.[4] *Grissom v. State*, 2011 OK CR 3, ¶ 82, 253 P.3d 969, 995-96.

b. Various claims not raised by counsel on direct appeal.

Petitioner claims that three legal issues advanced by trial counsel were not sufficiently pursued by counsel on direct appeal. The first complaint involves the alleged violation of a gag order issued by the trial court. The sensational nature of this case prompted the trial court to restrict the release of information about the proceedings. Petitioner states that a pretrial order, dealing with the admissibility of his statements to police, was made available to the public in violation of the gag order. Trial defense counsel requested an investigation into how the ruling was leaked, and asked the court to strike the Bill of Particulars – presumably as a punishment, and based on the assumption that the leak was the fault of the prosecutor's office. Apparently, no investigation was undertaken.

No complaint about the gag order and its alleged violation was raised in Petitioner's direct appeal. We cannot say that appellate counsel was deficient

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[4] Petitioner briefly points to another comment in the new psychological evaluation, relating to his prescribed use of Lexapro. According to the new evaluation, there is anecdotal evidence that Lexapro "increases the risk of disinhibition in certain individuals." Petitioner concedes that his use of the drug, and its perceived effects on his behavior, were brought out at his trial. Petitioner does not present anything new in this regard.

in this regard. First, Petitioner offers no information on how the leak occurred, or who might have been responsible for it. More importantly, however, regardless of whether the gag order was intentionally violated, and if so, by whom, Petitioner offers no explanation as to how the release of the trial court's ruling after the suppression hearing affected his ability to get a fair trial.[5] *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Petitioner's second attack on appellate counsel's performance involves the arguments made for suppressing his custodial statements to police. Conceding that many arguments were made (both at trial and on appeal) as to why the statements should have been suppressed, Petitioner now offers a new angle on the subject, and faults direct-appeal counsel for not presenting it. On direct appeal, this Court agreed with the trial court's conclusion that, while in custody, Petitioner invoked his right to counsel, but waived it a few hours later by affirmatively asking to speak with certain detectives, despite reminders of his previous invocation of counsel. *See Underwood*, 2011 OK CR 12 at ¶¶ 5-6, 30-35, 252 P.3d at 231, 238-39.[6]

Petitioner now appears to claim that his statements to police, after

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[5] Conceivably at least, if a trial court suppresses highly incriminating statements by the accused or other inflammatory evidence, but that information is nevertheless spread throughout the media, it might be difficult for jurors to exclude the suppressed information from their minds. But that was not the situation here. The trial court ruled that practically all of Petitioner's statements to police, and the evidentiary fruits thereof, were lawfully obtained, and thus would be admissible at his trial. *See Underwood*, 2011 OK CR 12 at ¶¶ 12-13, 252 P.3d at 232-33.

[6] The trial court suppressed certain statements made by Petitioner between his invocation of counsel, and his decision to speak without counsel made later that day. *Underwood*, 2011 OK CR 12 at ¶ 5, 13, 252 P.3d at 231, 233.

invoking his right to counsel, were 'coerced' by the officers' failure to obtain a lawyer for him quickly enough, *i.e.*, before he had a chance to change his mind. Petitioner recites the standard case law on custodial interrogation and invocation of the right to silence, but he cites no authority on how quickly police must provide counsel to a suspect who asks for same. Petitioner concedes that the police are not required to have an attorney 'on call' for such situations, but argues that the officers "should have at least taken him to jail or done something other than what they did," which was to keep him in a detective's office for a few hours.[7] Again, Petitioner offers no authority suggesting the officers' conduct rendered his subsequent change of mind 'coerced' in a legal sense. We find no deficient performance on appellate counsel's part.

Finally, Petitioner faults appellate counsel for not advancing one of trial counsel's attacks on the validity of the search warrant used to gather evidence from Petitioner's apartment. Petitioner claims the search of his personal computer and other electronic storage devices was improper, because the warrant affidavit did not provide facts which would justify searching those areas in particular. Petitioner must demonstrate that appellate counsel's failure to maintain this claim on appeal could have no reasonable strategic value, and a reasonable probability that the omission of this claim affected the

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[7] *Compare Edwards v. Arizona*, 451 U.S. 477, 478-79, 101 S.Ct. 1880, 1881-82, 68 L.Ed.2d 378 (1981), where Edwards, when re-approached by police, changed his mind and decided to speak to them without counsel, after having requested a lawyer the day before. No lawyer had been provided in the interim. The Supreme Court's analysis of the voluntariness of Edwards's confession looked at who reinitiated the discussion after his request for counsel – not at whether, or how quickly, police were working to provide counsel for him.

outcome of the trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Despite a lengthy and detailed argument about why the seizure and subsequent inspection of his electronic files was improper, in the end, Petitioner identifies only five State's Exhibits (out of a total exceeding 200) as the fruit of this unreasonable search. Petitioner does not specify what they depicted, how their introduction might have unfairly prejudiced him at trial, or why appellate counsel could have had no strategic reason for not complaining about them. The State presented a considerable amount of evidence about Petitioner's bizarre, violent, and gruesome sexual obsessions, and the few images complained of here were a relatively small part of that corpus of evidence. On direct appeal, we found the admission of other evidence along these lines (physical evidence from Petitioner's apartment, and Petitioner's own statements to police) was proper. *Underwood*, 2011 OK CR 12 at ¶¶ 30-35, 49-51, 252 P.3d at 238-39, 243-44. We find no reasonable probability that the few exhibits complained of here, by themselves, affected the outcome of Petitioner's trial.[8] Thus, appellate counsel was not ineffective for failing to specifically challenge their admission, and this claim is denied. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

c. Unchallenged instances of alleged prosecutor misconduct.

Petitioner claims counsel on direct appeal was deficient for not including

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[8] On direct appeal, Petitioner claimed that admission of physical evidence illustrating his unusual interests was unfairly cumulative, because it was "obvious" from his confession and the testimony of his own experts that he is a "sexually and mentally disturbed individual." *Underwood*, 2011 OK CR 12 at ¶ 51, 252 P.3d at 243.

certain arguments relating to alleged prosecutor misconduct. Petitioner concedes that appellate counsel raised several claims of prosecutor misconduct on direct appeal, *see Underwood*, 2011 OK CR 12 at ¶¶ 71-76, 252 P.3d at 248-50, but contends the omission of these additional points constituted ineffective assistance of appellate counsel.

Petitioner's first claim of prosecutor misconduct involves a laundry list of photographs and physical evidence admitted at trial. We considered many of the same items on direct appeal, and found they were properly admitted. *See Underwood*, 2011 OK CR 12 at ¶¶ 49-51, 252 P.3d at 243-44. In a sense, Petitioner is attempting to recast a claim of trial court error in admitting certain evidence, made on direct appeal, into a claim of prosecutor misconduct in presenting much of the same evidence. Post-conviction is not a forum to reformulate issues that have previously been considered in a slightly different manner. *Williamson v. State*, 1993 OK CR 24, ¶ 4, 852 P.2d 167, 168. To the extent we addressed some of these items on direct appeal, reconsideration is barred by *res judicata*. *Coddington v. State*, 2011 OK CR 21, ¶ 15, 259 P.3d 833, 838. As for the remaining items, not complained about at trial and/or on direct appeal, Petitioner fails to show how they were unfairly prejudicial to him.[9] Absent a reasonable likelihood of prejudice, appellate counsel's performance cannot be called deficient. *Id.*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835; *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

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[9] Besides certain items already considered on direct appeal, Petitioner complains about multiple photographs of essentially the same item, and completely innocuous photographs such as those of furniture, an automobile, and various personal effects.

Petitioner's second claim of misconduct is that the prosecutor violated the trial court's gag order by not filing the State's notice of victim-impact evidence under seal. Again, Petitioner fails to state how this action might have affected his ability to receive a fair trial, and thus how appellate counsel could have been ineffective for failing to mention it on direct appeal. *Strickland, id.*

In his third claim of misconduct, Petitioner alleges that the prosecutor made improper comments during trial, refused to allow defense counsel to interview police witnesses, and elicited improper sentence recommendations from the victim's family. Once again, Petitioner fails to show how the comments he complains of could reasonably have affected the outcome of the trial. Petitioner concedes that most of the comments he refers to were curtailed by sustained objections and/or admonitions from the trial court. He fails to specify how the inability to interview certain witnesses – if true – impaired his defense. As for the victim's parents' testimony about the appropriateness of the death penalty, we considered those statements in a slightly different context on direct appeal. *Underwood*, 2011 OK CR 12 at ¶ 70, 252 P.3d at 248. We reject Petitioner's attempt to recast this complaint as prosecutor misconduct. *Williamson*, 1993 OK CR 24, ¶ 4, 852 P.2d at 168.

Finally, Petitioner lists several instances where the prosecutor allegedly misstated various facts. As for those which occurred during trial, Petitioner concedes that the trial court sustained objections to all of them. He fails to explain why this did not cure any possible error. Petitioner also claims the prosecutor was disingenuous in leading the defense to believe that one

particular expert witness would testify in rebuttal, when in fact a different expert witness was ultimately called. Petitioner does not show that trial defense counsel was unaware of, or unprepared for, this personnel change. Without any showing of a reasonable likelihood that Petitioner's defense was compromised by any of these instances, we decline to consider further whether appellate counsel was deficient in raising them on direct appeal. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Coddington*, 2011 OK CR 21, ¶ 15, 259 P.3d at 838.

d. Allegation of structural error permeating the proceedings.

Petitioner claims his entire prosecution has been permeated by structural error, and that appellate counsel was deficient for not making this same claim on direct appeal. By definition, a structural error in the proceedings can never be harmless. *Robinson v. State*, 2011 OK CR 15, ¶¶ 3-4, 255 P.3d 425, 428. The only 'structural' error Petitioner identifies is the cumulative effect of "misconduct on the part of the District Attorney's office and its representatives." Petitioner concedes that numerous claims of prosecutor misconduct were made on direct appeal. *See Underwood*, 2011 OK CR 12 at ¶¶ 71-76, 252 P.3d at 248-250. He cites no authority holding that the cumulative effect of prosecutor misconduct is among the "limited class of cases," *see Johnson v. United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 1549-50, 137 L.Ed.2d 718 (1997), where structural-error analysis is appropriate. Petitioner's attempt to recast an issue previously raised in a different form is rejected.

e. The death penalty as "cruel and unusual" punishment.

On direct appeal, Petitioner argued that he was mentally ill, and that imposition of the death penalty in his case offends the Eighth Amendment's ban on cruel and unusual punishment. We rejected the claim, "accept[ing] the jury's conclusion that he was morally culpable for his actions and deserving of the death penalty." *Underwood*, 2011 OK CR 12 at ¶ 69, 252 P.3d at 248. Petitioner now claims that appellate counsel was deficient for not casting his condition as more in the nature of mental retardation, instead of mental illness. *See Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (execution of the mentally retarded violates the Eighth Amendment's ban on cruel and unusual punishment). He characterizes his recent diagnosis of Asperger Syndrome (see Part I(a) above) as a developmental disability, and argues that such disorders, with onset during childhood, should be treated like mental retardation for purposes of the Eighth Amendment. Petitioner cites no authority for extending *Atkins* in this manner,[10] and we thus refuse to find appellate counsel deficient for failing to make the argument on direct appeal. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Harris v. State*, 1989 OK CR 15, ¶ 5, 773 P.2d 1273, 1274. This claim is denied.

II. CUMULATIVE ERROR

In his second and final proposition of error, Petitioner argues that the

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[10] *See Schoenwetter v. State*, 46 So.3d 535 (Fla. 2010) (while conditions such as Asperger Syndrome, ADHD, and frontal lobe damage may be considered as mitigating circumstances in a capital sentencing proceeding, mere mental illness does not serve as a bar to execution under *Atkins v. Virginia*).

cumulative effect of all claims raised herein, and on direct appeal, deprived him of a fair trial. We have concluded that trial and appellate counsel were not ineffective. There is no error to accumulate. *Harris*, 2007 OK CR 32 at ¶ 20, 167 P.3d 438, 445.

DECISION

Petitioner's Application for Post-Conviction Relief, and his requests for discovery and an evidentiary hearing, are hereby **DENIED**. His motion reserving the right to supplement his application pending disposition of his direct appeal is **DISMISSED AS MOOT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE CANDACE L. BLALOCK, DISTRICT JUDGE

APPEARANCES ON POST-CONVICTION

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NO RESPONSE REQUESTED FROM THE STATE

OPINION BY C. JOHNSON, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
SMITH, J.: CONCUR

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LUMPKIN, JUDGE: CONCUR IN RESULTS

I concur in the results reached in this case but write separately to address the following.

The opinion does not correctly apply *res judicata* and waiver to Petitioner's allegations concerning trial counsel. "[C]laims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata.*" *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. An allegation of ineffective assistance of counsel was raised on direct appeal; therefore any claim raised on post-conviction, as it relates to trial counsel, is barred from further consideration by *res judicata.*

To the extent Petitioner's post-conviction claim challenging the effectiveness of trial counsel is different from that raised on direct appeal, further consideration of the issue on its merits is waived as it could have been raised on direct appeal but was not. 22 O.S.2001, § 1089(C)(1).

Despite the procedural bars of *res judicata* and waiver, a claim of ineffective assistance of trial counsel can be brought for the first time on post-conviction, but only if it requires fact-finding outside of the direct appeal record. 22 O.S.2001, § 1089(D)(4)(b)(1). This Court may not review post-conviction claims of ineffective assistance of trial counsel if the facts generating those claims were available to the direct appeal attorney and thus either were or could have been used in the direct appeal. 22 O.S.Supp. 2009, § 1089(D)(4); *See also Turrentine v. State*, 1998 OK CR 44, ¶ 4, 965 P.2d 985, 987. Post

conviction review is not intended to serve as a second appeal and "[w]e will not allow a defendant to subdivide claims in order to relitigate an issue in an application for post-conviction." *Coddington v. State,* 2011 OK CR 21, ¶ 15, 259 P.3d 833, 838. As Petitioner's claim does not depend on facts unavailable at the time of his direct appeal, he has failed to meet the conditions for review of this claim on the merits and further review is barred. *Murphy,* 2002 OK CR 32, ¶ 25, 54 P.3d at 565.