APPENDICES

Postelle v. Carpenter

United States Court of Appeals for the Tenth Circuit

August 27, 2018, Filed

No. 16-6290

Reporter
901 F.3d 1202 *; 2018 U.S. App. LEXIS 24195 **

GILBERT RAY ***POSTELLE***, Petitioner - Appellant, v. MIKE CARPENTER[*], Interim Warden, Oklahoma State Penitentiary, Respondent - Appellee.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. (D.C. NO. 5:12-CV-01110-F).

Postelle v. Royal, 2016 U.S. Dist. LEXIS 118755 (W.D. Okla., Sept. 2, 2016)

Core Terms

score, mitigation, sentencing, disability, trial counsel, mitigating evidence, tests, law law law, district court, courts, issues, contradict, Cases, appellate counsel, death penalty, intellectually, intelligence, slip opinion, state court, post-conviction, circumstances, murders, mitigation-based, victim-impact, investigate, cognitive, deference, requires, merits, present evidence

Case Summary

Overview
HOLDINGS: [1]-A habeas petitioner, who was sentenced to death, failed to persuade the court that his trial counsel should have used Flynn Effect evidence to help exempt him from the death penalty under Atkins. The petitioner did not show the plainly incompetent and unprofessional conduct necessary to support a charge of deficient trial-counsel performance under the *Sixth Amendment*. The Oklahoma court of Criminal Appeals reasonably concluded the omission of Flynn Effect evidence did not prejudice the defense. Application of Strickland warranted deference on both the trial-counsel claim and the appellate-counsel ineffective of claim; [2]-The victim-impact evidence erroneously admitted did not affect the petitioner's sentence; [3]-The petitioner was not entitled to a Certificate of Appealability covering additional issues.

Outcome
The court affirmed denial of the writ of habeas corpus and declined to extend the scope of review.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Review > Standards of

[*] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Mike Carpenter is substituted for Terry Royal as the respondent in this case.

Review > Deference

HN1[] Review, Antiterrorism & Effective Death Penalty Act

In appeals from orders denying a writ of habeas corpus, the United States Court of Appeals for the Tenth Circuit reviews the district court's legal analysis de novo and its factual findings for clear error. To qualify for the writ, however, a state prisoner must carry a heavy burden. Indeed, Congress has directed federal courts to give their state counterparts deference in all but the narrowest circumstances. *28 U.S.C.S. § 2254(d)*. Under the *Antiterrorism and Effective Death Penalty Act (AEDPA)*, a state court must contradict or unreasonably apply clearly established federal law, as determined by the Supreme Court of the United States as a prerequisite to federal habeas relief.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN2[] Criminal Process, Assistance of Counsel

The *Sixth Amendment* guarantees every accused the right to have assistance of counsel for his defence. *U.S. Const. amend. VI*. The U.S. Supreme Court has interpreted this right to guarantee every criminal defendant a minimum quality of advocacy from a professional attorney. In Strickland v. Washington, the U.S. Supreme Court held a criminal defendant could establish a violation of his right to counsel upon two related but distinct showings. First, he must show that counsel's performance was deficient. In this context, only commission of errors so serious that counsel was not functioning as the counsel guaranteed by the *Sixth Amendment* constitutes deficient performance. Second, the defendant must show that the deficient performance prejudiced the defense. This inquiry also looks to counsel's errors, this time to determine whether they were so serious as to deprive the defendant of a fair trial with a reliable result.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN3[] Fundamental Rights, Cruel & Unusual Punishment

The U.S. Supreme Court has read the *Eighth Amendment's* prohibition on "cruel and unusual punishments," *U.S. Const. amend. VIII*, to forbid excessive sanctions. The federal courts determine whether a punishment is excessive according to currently prevalent standards. And in Atkins v. Virginia, the U.S. Supreme Court observed a national consensus against putting intellectually disabled persons to death. The Court therefore held states could not execute such persons, as that punishment would be "excessive" in the eyes of the *Eighth Amendment*. The Atkins opinion used the then-accepted nomenclature "mentally retarded." Opinions have since adopted the now-preferred term "intellectually disabled."

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN4[] Fundamental Rights, Cruel & Unusual Punishment

States cannot prevent a court or jury from hearing relevant, mitigating evidence during a capital sentencing determination. In Lockett v. Ohio, a plurality of Justices took the position that—pursuant to the *Eighth Amendment*—states must permit capital juries to consider all proffered mitigating evidence respecting the defendant's character, record, or the circumstance of the offense in all but the rarest kind of capital case. Several years later, in Eddings v. Oklahoma, a majority of the U.S. Supreme Court adopted, expanded, and applied that rule. Eddings clarified that the sentencer in capital cases must be permitted to consider any relevant mitigating factor. "Relevance" here takes the same meaning as in any other evidentiary context—that is, relevant evidence

has some tendency to make any fact of consequence more or less probable than it would be otherwise.

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN5[] Capital Punishment, Intellectual Disabilities

The U.S. Supreme Court has left to the states the task of determining which offenders in fact fall within Atkins v. Virginia's ambit. To implement this directive, the State of Oklahoma has created a process whereby capital defendants may be adjudicated intellectually disabled either by the court prior to trial, Okla. Stat. tit. 21, § 701.10b(E), or by the jury prior to determination of a sentence, Okla. Stat. § 701.10b(E)-(F). But a criminal defendant that scores a 76 or higher on any valid IQ test may not receive an Atkins determination under Oklahoma law. Okla. Stat. § 701.10b(C).

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN6[] Criminal Process, Assistance of Counsel

The United States Court of Appeals for the Tenth Circuit's review of counsel's performance under the first prong of Strickland is a highly deferential one. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Indeed, a showing of deficient performance requires proof that counsel's conduct was not merely wrong, but outside the wide range of professionally competent assistance. With regard to a charge of inadequate investigation in particular, the court asks whether counsel's conduct was reasonable in light of all the circumstances.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN7[] Criminal Process, Assistance of Counsel

Strickland's prejudice prong requires a habeas petitioner to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This means the errors must undermine the court's confidence in the outcome of the petitioner's sentencing. Of course, a single juror's choice to impose a sentence less than death meets that standard. Even still, the likelihood of a different result must be substantial, not just conceivable. In considering whether an inadequate investigation prejudiced a habeas petitioner, the United States Court of Appeals for the Tenth Circuit reweighs the evidence on both sides, this time accounting for the petitioner's proposed additions. This exercise also requires the court to account for how the state would have responded to the omitted evidence.

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

HN8[] Capital Punishment, Bifurcated Trials

In conducting capital sentencing proceedings, state courts must still take care to exclude evidence that goes beyond a victim's subjective suffering and strays into description of the defendant's conduct.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

Criminal Law & Procedure > ... > Review > Standards of Review > Deference

HN9[] Review, Burdens of Proof

When a federal district court denies a state prisoner's petition for habeas corpus, he has no absolute right to appeal. The Court of Appeals may, however, grant the petitioner permission to challenge the district court's resolution of discrete, specified issues through a

Certificate of Appealability. 28 U.S.C.S. § 2253(c). But a petitioner must make a substantial showing of the denial of a constitutional right to justify doing so. 28 U.S.C.S. § 2253(c)(2). This means he must demonstrate that reasonable jurists would find the district court's assessment of the relevant constitutional claim debatable or wrong. In considering whether a petitioner has made such a showing, the United States Court of Appeals for the Tenth Circuit incorporates Congress's mandate of deference to state court decisions.

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

HN10[] Appeals, Certificate of Appealability

To appeal a procedural ruling in a habeas action, a litigant must demonstrate that the ruling is itself debatable among jurists of reason.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Criminal Law & Procedure > Habeas Corpus > Procedure > Court Rules

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN11[] Pleadings, Amendment of Pleadings

A habeas petition may be amended or supplemented as provided in the rules of procedure applicable to civil actions. 28 U.S.C.S. § 2242. Under the Federal Rules of Civil Procedure, a party generally has an absolute right to amend his pleading once within 21 days of its service. Fed. R. Civ. P. 15(a)(1)(A). Once that window has passed, a party needs his opponent's consent or leave of court to file an amendment. Fed. R. Civ. P. 15(a)(2). And even though courts should grant this leave freely, federal habeas law strictly limits the circumstances under which an amendment can relate back to the original petition filing. It may do so if and only if the proposed amendment does not seek to add a new claim or to insert a new theory into the case.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Proof of Innocence

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice

HN12[] Review, Burdens of Proof

To be credible, a claim of actual innocence requires the petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Moreover, to establish the requisite probability that a miscarriage of justice will occur absent equitable tolling, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.

Counsel: Robert A. Nance (John T. Carlson, Assistant Federal Public Defender, Denver Colorado, with him on the briefs), Riggs, Abney, Neal, Turpen, Orbison & Lewis, Oklahoma City, Oklahoma, for the Appellant.

Caroline E.J. Hunt, Assistant Attorney General (Mike Hunter, Attorney General of Oklahoma, with her on the brief), Office of the Oklahoma Attorney General, Oklahoma City, Oklahoma, for the Appellee.

Judges: Before TYMKOVICH, Chief Judge, LUCERO, and MORITZ, Circuit Judges. LUCERO, J., concurring in part and dissenting in part.

Opinion by: TYMKOVICH

Opinion

[*1206] TYMKOVICH, Chief Judge.

An Oklahoma jury convicted and sentenced ***Gilbert*** Ray ***Postelle*** to death in connection with the brutal killings of four people. On Memorial Day 2005, ***Postelle*** and two other assailants attacked Donnie Swindle at his home, murdering him along with three acquaintances. The raid apparently sprang from the ***Postelle*** family's grudge against Mr. Swindle alone; the **[*1207]** three other victims had no connection to the feud.

After an unsuccessful appeal and collateral action in state court, ***Postelle*** now pursues federal habeas corpus relief. He alleges the state **[**2]** prosecution violated several of his constitutional rights, including his *Sixth Amendment* right to counsel and his *Eighth Amendment* right against cruel and unusual punishment. ***Postelle*** raises three issues: (1) whether he received constitutionally adequate trial counsel; (2) whether he received constitutionally adequate appellate counsel; and (3) whether the unconstitutional presentation of victim-impact evidence at trial prejudiced his defense. He also asks to expand the scope of our review to include several new issues for which he has yet to receive a Certificate of Appealability.

For the reasons given below, we affirm denial of the writ and decline to extend the scope of our review.

I. Background

We base our description of ***Postelle***'s crimes on the Oklahoma Court of Criminal Appeals's (OCCA) account in *Postelle v. State (Postelle I), 2011 OK CR 30, 267 P.3d 114 (Okla. Crim. App. 2011)*, as well as the jury's findings and other uncontested facts.

The background for these crimes begins with Earl Bradford "Brad" ***Postelle*** being thrown from his motorcycle in a single-vehicle accident. *See id. at 124* & n.7; Tr. 1030-33. Brad suffered grave injuries, both physical and mental, as a result of the crash. *See Postelle I, 267 P.3d at 124*. Without apparent basis, he and his two sons—David and ***Gilbert Postelle***—would eventually blame the accident on **[**3]** an acquaintance named Donnie Swindle. *See id. at 124-25*; Tr. 2239. And on Memorial Day 2005, that blame erupted into violence.

The day began with the Postelles hosting several friends at their home in Midwest City, Oklahoma. *See Postelle I, 267 P.3d at 123-24*; Tr. 1635, 2087. The house often served as a place to use methamphetamine, and this gathering was no different. *Postelle I, 267 P.3d at 124*. On this day, however, ***Gilbert*** and David ***Postelle*** resolved that "those responsible" for their father's injuries "were 'going to pay.'" *Id.*

That afternoon, the Postelles and three friends left the house, ostensibly to go target shooting. *Id. at 124-25*. After dropping off two of the passengers, however, their van did not follow its usual course to the riverbank. *Id. at 125*; *see* Tr. 2039, 2065. Instead, it rolled on toward the home of Donnie Swindle.

As they drove onto Swindle's property, he and a guest named Terry Smith approached the van. *Postelle I, 267 P.3d at 125*; *see* Tr. 2072. ***Gilbert Postelle*** promptly slid open the van door and shot Smith in the face with a military-style rifle. *Postelle I, 267 P.3d at 124-25* & n.9. ***Gilbert*** and Brad then shot at Swindle, dropping him to the ground. *Id. at 125*. Next, David ***Postelle*** took Brad's gun and shot the bewildered Swindle in the head. *Id. at 126*. ***Gilbert*** then "turned and ran through [Swindle's] trailer, looking for **[**4]** others and firing his gun." *Id. at 126*. He came out through the back door and "chased down" a third victim, James Alderson. *Id.* ***Gilbert*** "shot [Alderson] as [he] tried to seek cover under a boat." *Id.* ***Gilbert*** then gunned down one final victim—Amy Wright—with three shots from behind. *See id. at 123* & n.1, 126. The perpetrators then got back in the van and drove away. *Id. at 126*.

Oklahoma law enforcement eventually identified, arrested, and charged ***Gilbert Postelle*** with four counts of first-degree murder and one count of conspiracy to commit a violent felony. *See id. at 123*. In light of evidence depicting the events above, a jury convicted ***Postelle*** of all five crimes. *See id.* Then, despite mitigating evidence of "organic brain damage and **[*1208]** mental illness," "drug abuse from an early age," and a "chaotic and abusive upbringing," ***Postelle*** *v. State* (***Postelle*** *II*), No. PCD-2009-94, slip op. at 14 (Okla. Crim. App. filed Feb. 14, 2012), the jury sentenced ***Postelle*** to death, *see Postelle I, 267 P.3d at 123*.

Postelle challenged his conviction and sentence in the Oklahoma courts. On direct appeal, he argued—among other claims—that the State's use of victim-impact statements during the trial's sentencing phase violated his *Eighth Amendment* rights. *See* Brief ex rel. ***Gilbert*** Ray ***Postelle***, Appellant **[**5]** at 78-80, *Postelle I, 2011 OK CR 30, 267 P.3d 114* (D-2008-934). The OCCA rejected the challenge on plain error review. *See Postelle I, 267 P.3d at 142-43*. ***Postelle*** then applied for post-conviction collateral relief. This time—again, among other claims—he contended his trial and appellate counsel had rendered constitutionally inadequate assistance. *See* Original Appl. Post Conviction Relief Death Penalty Case at 5-10, 47-49, ***Postelle*** *II*, slip op., (PCD-2009-94) [hereinafter PCR Appl.]. The OCCA rejected these arguments as well, again affirming the trial court. *See* ***Postelle*** *II*, slip op. at 9-17, 18-20.

Finally, ***Postelle*** sought protection from the federal courts. In September 2013, he filed this action in the Western District of Oklahoma for the writ of habeas corpus. *See* R., Vol. I at 10. ***Postelle*** based his petition, in relevant part, on the alleged constitutional violations

just mentioned. *See id.* at 24-51. The district court denied relief. *See id.* at 584-85. ***Postelle*** now appeals that denial.

II. Analysis

Postelle asks us to overturn the district court with respect to three issues. *First*, he claims his trial counsel rendered ineffective assistance by not using the "Flynn Effect" as part of the mitigation strategy to help argue against a death sentence. *See* Aplt. Br. at 2. *Second*, he claims his *appellate* counsel rendered ineffective assistance by not challenging *trial* counsel's failure to use Flynn Effect **[**6]** evidence for death penalty-eligibility and mitigation purposes. *See id. Finally*, ***Postelle*** claims certain victim-impact evidence erroneously introduced in the sentencing phase was not harmless, but in fact prejudiced his defense. *See id.*

HN1[] In appeals from orders denying a writ of habeas corpus, we review the district court's legal analysis de novo and its factual findings for clear error. *Smith v. Duckworth (Smith II), 824 F.3d 1233, 1241-42 (10th Cir. 2016)*. To qualify for the writ, however, a state prisoner must carry a heavy burden. Indeed, Congress has directed federal courts to give their state counterparts deference in all but the narrowest circumstances. *See 28 U.S.C. § 2254(d)*. As relevant here, under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state court must contradict or unreasonably apply "clearly established Federal law, as determined by the Supreme Court of the United States" as a prerequisite to federal habeas relief. *Id.* Mindful of that threshold inquiry, we turn to ***Postelle***'s claims.[1]

A. Ineffective Assistance of Counsel

HN2[] The *Sixth Amendment* guarantees every accused "the right . . . to have Assistance of Counsel for his defence." **[*1209]** *U.S. Const. amend. VI*. The Supreme Court has interpreted this right to guarantee every criminal defendant a minimum quality of advocacy **[**7]** from a professional attorney. In *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, the Court held a criminal defendant could establish a violation of his right to counsel upon two related but distinct showings. First, he "must show that counsel's performance was deficient." *Id. at 687*. In this context, only commission of "errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the *Sixth Amendment*" constitutes "deficient performance." *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* This inquiry also looks to counsel's errors, this time to determine whether they were "so serious as to deprive the defendant of a fair trial" with a "reliable" result. *Id.*

Postelle challenges the adequacy of both his trial counsel and appellate counsel. *See* Aplt. Br. at 2; *see generally Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)* (establishing the right to effective *appellate* counsel). As far as this appeal is concerned, however, *both* claims derive from a single alleged error: trial counsel's failure to incorporate evidence of the Flynn Effect into ***Postelle***'s defense.

1. The Flynn Effect

We start with a short explanation of the Flynn Effect—an aspect of IQ testing upon which ***Postelle***'s petition heavily relies.

The Flynn Effect is an observed **[**8]** phenomenon believed to impact the accuracy of IQ testing. *See generally* John Matthew Fabian et al., *Life, Death, and IQ: It's Much More Than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in* Atkins *Intellectual Disability/Mental Retardation Cases*, *59 Clev. St. L. Rev. 399, 414-16 (2011)*. As the well-known scoring system makes clear, IQ testing does not aim to pinpoint the test subject's absolute intelligence. Instead, it attempts to measure his intelligence *relative to* the rest of the population. *See* Nancy Haydt et al., *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in* Atkins *(Death Penalty) Cases*, *82 UMKC L. Rev. 359, 364 (2014)*. Accordingly, before administering a new IQ test to any one person, the creator must first "norm" it by scoring the performance of a sample group. *Fabian et al., supra, at 414*. Like zeroing a scale, this norming process identifies how someone of average intelligence should perform on the new test. *See id.* The

[1] The parties have also briefed tangential matters of preservation and procedure inherent to the federal habeas process. *See* Aplt. Br. at 35-38; Aple. Br. at 23-37. As the following makes clear, however, we have bypassed these issues and gone straight to the substance of ***Postelle***'s appeal. *See, e.g., Nielander v. Bd. of Cty. Comm'rs, 582 F.3d 1155, 1166 (10th Cir. 2009)*; *Revilla v. Gibson, 283 F.3d 1203, 1214 (10th Cir. 2002)*.

test maker then keys that average performance to an IQ of 100 and constructs a "normal" bell curve of performance around that point. *See id.; see also* Haydt et al., supra, at 364 (explaining points on the IQ scale as corresponding to deviation from the mean on a normal curve). **[**9]** Assuming the sample group accurately represented the general population, the test should now be capable of identifying any single taker's relative intelligence. *See* Fabian et al., supra, at 414.

But in 1984, Dr. James Flynn published a study documenting an increase in average performance on IQ tests over time. *See* James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychol. Pub. Pol'y & L. 170, 172 (2006). Specifically, Flynn's findings indicated an upward creep of average IQ scores by about 0.33 points every year. *See* John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 700 ***[*1210]*** (2009); Fabian et al., supra, at 414 (identifying a rate of 0.31 points per year); Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 838 (2007) (identifying a rate of 0.31 points per year).

Academic literature has since dubbed this phenomenon "the Flynn Effect," and it carries relatively straightforward implications for the accuracy of IQ testing: The performance of the sample group used to norm an IQ test is obviously static—frozen in time. But the average performance of all other test takers gradually improves with each passing **[**10]** year. Thus, just as a photo taken at dawn will not depict the brightness of noon, a sample group used to norm an IQ test in 1995 will not reflect average intelligence in 2005.[2] On the contrary, because of the upward creep in average scores, we should expect a person of average intelligence in 2005 to score a 103 on an IQ test normed ten years earlier, rather than the usual 100. *See* Blume et al., supra, at 701. Conversely, if a person scores a 73 on an IQ test normed ten years before its administration, we may adjust his score downward to 70 to reflect his intelligence relative to today's general population. *See id.*[3]

2. Ramifications for Capital Punishment

Two lines of death penalty jurisprudence connect the Flynn Effect to this case.

HN3[↑] The Supreme Court has read the *Eighth Amendment's* prohibition on "cruel and unusual punishments," *U.S. Const. amend. VIII*, to forbid "'[e]xcessive' sanctions." Atkins v. Virginia, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The federal courts determine whether a "punishment is excessive" according to currently prevalent standards. *Id.* And in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (quoting *U.S. Const. amend. VIII*), the Supreme Court observed "a national consensus . . . against" putting intellectually disabled persons to death. Id. at 316.[4] The Court therefore held states could not execute such persons, as that punishment would be "excessive" in the **[**11]** eyes of the *Eighth Amendment*. *See* id. at 314-17.

In addition, ***HN4***[↑] states cannot prevent a court or jury from hearing relevant, mitigating evidence during a capital sentencing determination. In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 ***[*1211]*** (1978), a plurality of Justices took the position that—pursuant to the *Eighth Amendment*—states must permit capital juries to "consider[]" all proffered mitigating evidence respecting the "defendant's character[,] . . . record[,] . . . [or] the circumstance of the offense" "in all but the rarest kind of capital case." Id. at 604 (Opinion of Burger, C.J.). Several years later, in Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71

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[2] The dissent at times characterizes this phenomenon as producing "bias in the IQ tests" administered to ***Postelle***. Dissent at 1. To clarify, the Flynn Effect does not skew IQ test results based on the identity or personal characteristics of the test taker. Rather, the Flynn Effect tells us that an IQ test indicates the test taker's intelligence relative to the norming group, and that the average intelligence of the norming group will often lag behind the average intelligence of the general population at the time of the test's administration.

[3] We neither endorse nor reject the Flynn Effect as a scientific matter. *But cf.* Aplt. Br. at 23, 40, 42 (arguing the Flynn Effect's validity). Our analysis does not depend on its validity. Instead, we assume for the sake of argument that the Flynn Effect is indeed a feature of intelligence testing that counsels in favor of the personalized IQ score revisions ***Postelle*** proposes.

[4] The *Atkins* opinion used the then-accepted nomenclature "mentally retarded." *E.g.* Atkins v. Virginia, 536 U.S. 304, 316, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Our opinions have since adopted the now-preferred term "intellectually disabled." *See* Smith v. Duckworth (Smith II), 824 F.3d 1233, 1242 (10th Cir. 2016).

L. Ed. 2d 1 (1982), a majority of the Court adopted, expanded, and applied that rule. *See* id. at 112-15. *Eddings* clarified "that the sentencer in capital cases must be permitted to consider any *relevant mitigating factor*." Id. at 112 (emphasis added). "Relevance" here takes the same meaning as in any other evidentiary context—that is, relevant evidence has some "tendency to make . . . any fact . . . of consequence . . . more . . . or less probable than it would be" otherwise. Tennard v. Dretke, 542 U.S. 274, 284, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004) (quoting McKoy v. North Carolina, 494 U.S. 433, 440, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990)).

Flynn Effect evidence could potentially play an important role within each of these two jurisprudential veins. First, accounting for the Flynn Effect might impact whom states may execute consistent with the *Eighth Amendment*. This is because IQ **[**12]** is one of the metrics commonly used to identify intellectual disability. *See, e.g.*, Atkins, 536 U.S. at 308 n.3, 309 n.5, 317 & n.22. Second, when the death penalty is, in fact, available as a sentence, evidence of the Flynn Effect may bear on the sentencer's *choice* to issue it in lieu of a lesser punishment.

*3. **Postelle**'s Claims*

Postelle adopts both of these potential uses in his claims of ineffective assistance.

First, ***Postelle*** argues his trial counsel should have used Flynn Effect evidence to help exempt him from the death penalty under *Atkins*. This is because, under Oklahoma law, his entitlement to an intellectual disability determination depended entirely on whether the court adjusted IQ scores to account for the Flynn Effect.

HN5[] The Supreme Court has left to the states the task of "determining which offenders . . . in fact" fall within *Atkins*'s ambit. Id. at 317. To implement this directive, the State of Oklahoma has created a process whereby capital defendants may be adjudicated intellectually disabled either by the court prior to trial, *see* Okla. Stat. tit. 21, § 701.10b(E), or by the jury prior to determination of a sentence, *see id.* at § 701.10b(E)-(F). But a criminal defendant that scores a 76 or higher on any valid IQ test may not receive an *Atkins* determination under Oklahoma **[**13]** law. *See id.* at § 701.10b(C).

Postelle completed two separate IQ tests in 2006 and 2007 in anticipation of trial. ***Postelle*** *II*, slip op. at 12; Tr. 2870. He scored a 79 on the first and a 76 on the second. ***Postelle*** *II*, slip op. at 12. If adjusted for the Flynn Effect, ***Postelle*** contends, his two IQ scores would both have fallen to roughly 73. Aplt. Br. at 27-28.[5] He therefore argues his trial counsel should have used Flynn Effect evidence to get him an eligibility determination, and claims his appellate counsel rendered ineffective assistance by not raising trial counsel's omission on direct appeal. *See* Aplt. Br. at 2, 46.

Second, ***Postelle*** claims his trial counsel was ineffective for not using Flynn Effect **[*1212]** evidence in his sentencing determination, again faulting appellate counsel for not raising this error on appeal. *See id.* at 2. This argument presents a more direct attack on the failure to utilize the Flynn Effect. So the logic goes, a capital defendant may use *any relevant evidence* to convince a jury not to return a death sentence. Thus, ***Postelle*** claims counsel rendered deficient and prejudicial performance by not mentioning the Flynn Effect in support of a lesser sentence. *See* Aplt. Br. at 2, 18-24.

For the reasons stated below, however, neither argument **[**14]** justifies habeas relief.

4. The Eligibility Argument

The OCCA's handling of ***Postelle***'s eligibility-based argument certainly warrants AEDPA deference.

The OCCA clearly rejected ***Postelle***'s eligibility-based argument in his application for post-conviction relief. *See* ***Postelle*** *II*, slip op. at 11-13, 18-20. It explained that any attempt to exempt ***Postelle*** from the death penalty by virtue of intellectual disability would have been fruitless. *See id.* at 13. We take this to mean counsel was wise to strategically omit the evidence, and—by extension—such omission could not have prejudiced ***Postelle***'s defense. *See id.* at 13. ***Postelle*** therefore could not fault *appellate* counsel for failing to raise a meritless claim of trial-counsel ineffectiveness on appeal. *Id.* at 19.

The Oklahoma legislature established its statutory framework for implementing *Atkins* in 2006. *See* Okla. Stat. tit. 21, § 701.10b (effective July 1, 2006). Four years later, in Smith v. State, 2010 OK CR 24, 245 P.3d 1233 (Okla. Crim. App. 2010), the OCCA deemed Flynn Effect evidence—"whatever its validity"—irrelevant to the

[5] One of ***Postelle***'s proposed adjustments also accounts for a supposed norming error specific to the IQ test in question. *See* Aplt. Br. at 22 & n.8, 26-27 & n.10. Again, we assume the validity and accuracy of ***Postelle***'s IQ adjustments for the sake of argument.

statute's IQ cutoff. Id. at 1237 n.6. The defendant in *Smith* then sought federal habeas relief, arguing the Oklahoma court's decision contradicted *Atkins*. *See* Smith II, 824 F.3d at 1242. The district court denied the petition, and we affirmed. *See* id. at 1238. In so doing, we observed "*Atkins* does not mandate an adjustment **[**15]** for the Flynn Effect . . . and 'no decision of the Supreme Court squarely addresses the issue.'" Id. at 1246 (quoting Hooks v. Workman (Victor Hooks II), 689 F.3d 1148, 1170 (10th Cir. 2012) (brackets and ellipses omitted)). Thus, Smith had no right to habeas relief because Oklahoma's treatment of the Flynn Effect did not contradict or unreasonably apply Supreme Court precedent. *Id.*

Though the Supreme Court's more recent decision in Hall v. Florida, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014), did not bear on our analysis in *Smith*, *see* Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), we nevertheless explained that *Hall*, like *Atkins*, "says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability." Smith II, 824 F.3d at 1246. *Hall* deals only with the standard error measurement—a feature of IQ testing already accounted for in Oklahoma's statute. *See* id. at 1245-46.

In light of our decision in Smith, ***Postelle***'s eligibility-based argument cannot further his claim of ineffective appellate counsel. Regardless of whether ***Postelle***'s counsel could have predicted it, Smith's experience clearly shows any attempt to pursue an *Atkins* exemption through Flynn Effect evidence would have failed. Indeed, the exact same argument failed in *Smith*, and ***Postelle*** gives us no reason to believe that his trial and appeal would have turned out any differently. His claim therefore falls **[**16]** far short of the requirements necessary to show prejudice under *Strickland*. *See, e.g.,* Grant v. Royal, 886 F.3d 874, 905 (10th Cir. 2018).

Accordingly, ***Postelle***'s claim of ineffective appellate counsel cannot draw support **[*1213]** from his eligibility-based argument. Far from contradicting or unreasonably applying Supreme Court precedent, the OCCA rendered sound analysis to reach a permissible result.

5. The Mitigation Argument

Postelle's mitigation-based argument presents a more complex analysis. In the end, however, it too fails to persuade us.

a. The State Court Adjudication

To begin, the state-court adjudication of the *mitigation-based* Flynn Effect argument differs markedly from that of the *eligibility-based* argument.

Postelle's only mention of the Flynn Effect as *mitigation* evidence in his state post-conviction briefing appears at the tail end of his eligibility-based argument. There his application states—without elaboration—that "even if counsel had been unsuccessful in obtaining a pre-trial finding that Mr. ***Postelle*** is [intellectually disabled], counsel could have still presented the evidence as mitigation during the second stage of his trial." PCR Appl. at 10.

Under its most reasonable interpretation, the OCCA opinion did not comment on this throw-away **[**17]** assertion. *Cf.* Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 1095, 185 L. Ed. 2d 105 (2013) ("[A] state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim."). Instead, it focused solely on the eligibility argument in rejecting ***Postelle***'s Flynn Effect-based ineffective assistance of counsel theory. *See* ***Postelle*** *II*, slip op. at 11-13 (expressly addressing eligibility without explicitly mentioning mitigation); *id.* at 13-17 (discussing the adequacy of ***Postelle***'s mitigation defense without mentioning the Flynn Effect); *id.* at 18-20 (incorporating the trial-counsel analysis into ***Postelle***'s appellate counsel claim). And even if we look at the decision most broadly, the only colorable partial reference to the mitigation-based argument is the OCCA's sweeping rejection of *any* ineffective assistance of appellate counsel claim premised on the mitigation defense. In relevant part, this followed from the OCCA's conclusion that trial counsel had not, in fact, rendered ineffective assistance in the mitigation phase. *See id.* at 19-20.

We will not, however, read the OCCA opinion to contradict the *Lockett* line of cases as ***Postelle*** argues we should. Under ***Postelle***'s reading, the OCCA held that *Smith v. State* compelled exclusion of Flynn Effect **[**18]** evidence from capital *sentencing* proceedings. Aplt. Br. at 14-15, 18, 25, 30, 35, 39. This would indeed contradict the *Lockett* line of cases, as evidence of the Flynn Effect clearly meets the low bar of relevance to the sentencing determination in light of *Atkins*. But this reading of the OCCA opinion is

untenable.[6] In excluding Flynn Effect evidence from the eligibility calculus, *Smith v. State* in no way addressed its use as mitigating evidence. *See* 245 P.3d at 1237. In addition, and more importantly, we see nothing in the OCCA opinion in this case making that leap. *See* ***Postelle*** *II*, slip op. at 11-13. Moreover, the OCCA ably applied the *Lockett* line of cases on ***Postelle***'s direct appeal, *see* ***Postelle*** *I*, 267 P.3d at 140-41, giving us little if any reason to believe it would ignore those cases on ***Postelle***'s state collateral review.

Accordingly, whether we read the OCCA to reject the mitigation-based argument silently or implicitly to sweep it into a broader analysis, our task would be the same. ***Postelle*** has neither asserted the **[*1214]** OCCA ignored his mitigation-based argument nor shown a contradiction of *Lockett* and its progeny. We thus ask only whether the OCCA reasonably applied *Strickland* in denying a claim to relief under ***Postelle***'s mitigation-based Flynn Effect **[**19]** theory. *See* Williams v. Trammell, 782 F.3d 1184, 1201-02 (10th Cir. 2015).[7] We conclude that it did.

b. Deficient Performance

The OCCA reasonably concluded ***Postelle***'s trial counsel did not perform deficiently by omitting Flynn Effect evidence from the mitigation case.

As we have already mentioned, ***HN6***[⬆] "our review of counsel's performance under the first prong of *Strickland* is a 'highly deferential' one." Byrd v. Workman, 645 F.3d 1159, 1168 (10th Cir. 2011) (quoting Hooks v. Workman (Danny Hooks), 606 F.3d 715, 723 (10th Cir. 2010)). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Grant, 886 F.3d at 903 (alteration in original) (quoting Victor Hooks II, 689 F.3d at 1187). Indeed, a showing of deficient performance requires proof that counsel's conduct was "not merely wrong," but "outside the wide range of professionally competent assistance." *Id.* (quoting Danny Hooks, 606 F.3d at 723). With regard to a charge of inadequate investigation in particular, we ask whether counsel's conduct was reasonable in light of all the circumstances. *See* **[*1215]** Newmiller v. Raemisch, 877 F.3d 1178, 1196 (10th Cir. 2017). And it is particularly relevant to this case that we make "[e]very effort . . . to evaluate the conduct from counsel's perspective at the time." Grant, 886 F.3d at 903 (quoting Littlejohn v. Trammell (Littlejohn I), 704 F.3d 817, 859 (10th Cir.

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[6] The dissent also rejects ***Postelle***'s reading of the OCCA opinion. The dissent proceeds to de novo review on a different theory, which we address more fully below. *See infra* p. 19 n.7.

[7] The dissent proceeds to de novo review because, in its view, "[b]y failing to address ***Postelle***'s [mitigation] argument . . . , the OCCA failed to adjudicate ***Postelle***'s claim on its merits." Dissent at 13. But when a state court "addresses some but not all of a [habeas petitioner's] claims," we presume that the court silently rejected remaining claims on the merits. Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 1094, 185 L. Ed. 2d 105 (2013). Of course, a petitioner can rebut that presumption by giving us "some reason to think some other explanation for the state court's decision is more likely." Harrington v. Richter, 562 U.S. 86, 99-100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). To do so, however, the petitioner must point to some "indication" that the state court ignored the claim or rejected it on grounds of state procedure. *Id.* at 99.

Yet ***Postelle*** has never so much as attempted to argue that the OCCA ignored his mitigation-based claim. *See* Aplt. Br. at 14-18 (applying the OCCA's discussion of the eligibility-based argument to the mitigation-based argument); Reply Br. 8-13 & n.2 (same). And though the OCCA *could have* procedurally barred the claim under Oklahoma rules of post-conviction procedure, *see* ***Postelle*** *II*, slip op. at 11, neither ***Postelle*** nor the dissent gives us any reason to believe the OCCA did so, *cf.* James v. Ryan, 733 F.3d 911, 915 (9th Cir. 2013) (observing that the express application of a state procedural bar can rebut the *Richter* presumption). And we think that explanation quite unlikely given the OCCA considered the merits of ***Postelle***'s other ineffective assistance claims after noting the procedural bar. *See* ***Postelle*** *II*, slip op. at 11-17. Thus, if we did read the OCCA opinion to omit any discussion of the claim, the law would compel us to presume the claim's silent rejection on the merits. ***Postelle*** would then bear the burden to show "there was *no reasonable basis* for the state court to deny relief" under *Strickland*. Richter, 562 U.S. at 98.

Moreover, in concluding the OCCA ignored ***Postelle***'s mitigation-based claim, the dissent's position raises the question of whether ***Postelle*** fairly presented that claim to the OCCA in the first place. *See, e.g.*, Grant v. Royal, 886 F.3d 874, 890-92 (10th Cir. 2018). And if the OCCA did indeed reject the claim on state procedural grounds, the dissent would have to hold those grounds inadequate before it could justify habeas relief. *See* Walker v. Martin, 562 U.S. 307, 315, 131 S. Ct. 1120, 179 L. Ed. 2d 62 (2011); *see also* Aple. Br. at 30-33 (defending Oklahoma's procedural bar for ineffective assistance claims not raised on direct appeal). Though we have bypassed these issues given our interpretation of the OCCA opinion and resolution of the merits, the dissent simply leaves them unresolved. In sum, the OCCA's rejection of this claim warrants deference under AEDPA's standards.

2013))*.

We recognize the Flynn Effect was not wholly foreign to criminal defense advocates **[**20]** at the time of ***Postelle***'s trial. So far as we can tell, the first discussion of the phenomenon by an American court appeared roughly five years earlier in a footnote to a federal district court opinion in Virginia. *See* *Walton v. Johnson, 269 F. Supp. 2d 692, 699 n.5 (W.D. Va. 2003)*, *vacated*, *440 F.3d 160 (4th Cir. 2006)* (en banc). It was thereafter mentioned, though not much explained or discussed, in a dissent to an opinion of the Eleventh Circuit. *See* *In re Hicks, 375 F.3d 1237, 1242-43 (11th Cir. 2004)* (Birch, J., dissenting). In 2004, four years before ***Postelle***'s trial, the California Court of Appeals became the first tribunal to *require* adjustment of an IQ score to account for the Flynn Effect. *See* *People v. Superior Court, 124 Cal. App. 4th 806, 21 Cal. Rptr. 3d 542, 568 (Cal. Ct. App. 2004)*, *vacated*, *26 Cal. Rptr. 3d 568, 109 P.3d 68 (Cal. 2005)*. Several other courts did the same within the next few years. *See* *Walker v. True, 399 F.3d 315, 322-23 (4th Cir. 2005)* (observing a place for Flynn Effect evidence under Virginia law); *Wiley v. Epps, 668 F. Supp. 2d 848, 894 (N.D. Miss. 2009)*. And the legal academy weighed in as well. *See* *Bonnie & Gustafson, supra, at 837-38*; Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make A Right?*, *72 Brook. L. Rev. 1211, 1231-32 n.89 (2007)*.

But hindsight makes this material deceptively easy to find. Indeed, prior to September 2008, only a small proportion of cases and secondary literature citing *Atkins* mentioned the Flynn Effect.[8] In fact, a review of our own opinions, the opinions of the federal district courts in our circuit, as well as the courts of the states that comprise **[**21]** our circuit yields only a single mention of the Flynn Effect before ***Postelle***'s trial. That passing reference occurred in a footnote of *Myers v. State, 2005 OK CR 22, 130 P.3d 262, 268 n.11 (Okla. Crim. App. 2005)*, a decision upholding the jury's finding that the defendant was *not* intellectually disabled despite scoring in the 60s on several separate IQ tests. *See* *id. at 267-68* & n.10. Thus, the notion that ***Postelle***'s counsel *necessarily* rendered substandard advocacy by not using the Flynn Effect as mitigating evidence in ***Postelle***'s 2008 trial cannot be sustained.

More importantly, though, ***Postelle*** gives us no reason to believe counsel ignored or failed to properly solicit expert advice on this subject. The Flynn Effect is not a legal concept. It is a phenomenon that might affect how IQ tests are administered, scored, and evaluated. We should thus expect that if the psychiatric community widely recognized Dr. Flynn's research prior to ***Postelle***'s trial, the defense's mental health expert, Dr. Ruwe, would have alerted counsel to its potential value. This is precisely the reason lawyers seek out expert assistance in the first **[*1216]** place. *See* American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, *31 Hofstra L. Rev. 913, 956 (2003)* [hereinafter **[**22]** ABA Guidelines]; *cf.* *Wilson v. Sirmons, 536 F.3d 1064, 1089 (10th Cir. 2008)* ("[I]n many situations, the expert will know better than counsel what evidence is pertinent to mental health diagnoses and will be more equipped to determine what avenues of investigation are likely to result in fruitful information."), *reinstated sub nom., Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009)* (en banc); *id. at 1133* (Tymkovich, J., concurring in part and dissenting in part) ("When investigating a defendant's mental health, counsel by necessity often relies on expert assistance."). Indeed, just as "[c]ounsel's own observations . . ., while necessary, can hardly be expected . . . to detect . . . conditions" like intellectual disability, *ABA Guidelines, supra, at 956* (footnote omitted), we should likewise not expect the lawyer to know more than the clinical neuropsychologist about the fine details of scoring IQ, *see* *id. at 1002* ("[T]he provision of high quality legal representation in capital cases requires a *team approach* that combines the *different skills, experience, and perspectives of several disciplines*." (emphasis added)). And in this case, despite having been evaluated by two mental health professionals, ***Postelle*** points us to no evidence in this voluminous record indicating either expert alerted counsel to the existence of the Flynn Effect. **[**23]**

Admittedly, the academic literature gives some indication that the Flynn Effect may have been "outside the ken of many mental health clinicians" at the time of ***Postelle***'s trial. *Bonnie & Gustafson, supra, at 856*. But of course, that fact further weakens the case for deficient performance; the less well-known it was in the mental

[8] The dissent has identified many appearances of the Flynn Effect in judicial opinions and academic literature prior to ***Postelle***'s 2008 trial. *See* Dissent at 9 & n.1. But the question is not whether ***Postelle***'s counsel could have found references to the Flynn Effect after knowing to look for them. The question is whether the Flynn Effect featured so prominently in capital cases and literature prior to ***Postelle***'s trial that any failure to discover it would indicate severe professional incompetence. Indeed, the dissent's analysis succumbs to the hindsight bias our court has cautioned against. *See, e.g.,* *Grant, 886 F.3d at 903*.

health community, the less likely a competent attorney would identify it through due diligence. And indeed, given Dr. Ruwe's extensive experience doing mental-health evaluations for the purpose of litigation, *see* Tr. 2846, we think it all the more reasonable for ***Postelle***'s counsel to have thought Dr. Ruwe would offer the most promising mental health—based mitigation arguments.

This is not to say an attorney can abdicate all responsibility for handling scientific or technical evidence. On the contrary, counsel's "managerial role" requires "continue[d] exercise [of] supervisory authority over" expert witnesses and advisors to "ensur[e] that [they] examine[] [necessary] sources of information." *Wilson, 536 F.3d at 1089* (majority opinion). But having provided Dr. Ruwe with the information necessary to test ***Postelle***'s intelligence, we think counsel's reliance on expert advice in the administration and scoring of ***Postelle***'s **[**24]** testing was at least within the bounds of professional competence. *Cf. id. at 1089-90* (stating counsel can reasonably rely on expert opinion "once either the expert or counsel has consulted all readily available sources" of mitigating evidence, *id. at 1089*).[9]

Neither is the defense team's supposed failure to recognize the potential importance of the Flynn Effect altogether surprising. Had either counsel or expert consulted the Diagnostic and Statistical Manual of Mental Disorders (DSM) current at the time of ***Postelle***'s trial, they **[*1217]** would have found no mention of the Flynn Effect at all. *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 41-49 (4th ed., text rev. 2000). Not until 2013—five years *after* ***Postelle***'s trial—did the DSM reference the Flynn Effect, and even then only vaguely as a "[f]actor[] that may affect test scores" on account of "overly high scores due to out-of-date test norms." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013).

And all of this simply *assumes* counsel never discovered the Flynn Effect. *But see* Aplt. Br. at 6 ("Defense counsel was unaware of, *or disinterested in* the Flynn Effect . **[**25]** . . ." (emphasis added)). But in fact, the record does not foreclose the possibility that ***Postelle***'s defense team knew about the Flynn Effect and made a *strategic choice* to omit it from the mitigation case. As the OCCA may have recognized, the difference of a few IQ points was not some magical key to success. And the possible marginal benefit of raising the issue carried with it the additional risk of provoking a "battle of the experts" which could have detracted from the relatively strong evidence of mental impairment ***Postelle*** *did* put on. *Cf.* Aplt. Br. at 40-41 (acknowledging that Flynn Effect evidence might provoke debate even if valid). We discuss this tradeoff more fully below with regard to prejudice. But it suffices to say we disagree that any choice to omit Flynn Effect evidence from the mitigation case would necessarily amount to an egregious practice error.

In sum, ***Postelle***'s petition appears to fall well short of showing the plainly incompetent and unprofessional conduct necessary to support a charge of deficient trial-counsel performance. Thus, the OCCA applied *Strickland* reasonably to determine ***Postelle***'s counsel had not performed deficiently, and we defer to its judgment. **[**26]**

c. Prejudice

Postelle has also failed to make a strong showing that the omission of Flynn Effect evidence prejudiced his mitigation defense.

HN7[⬆] *Strickland*'s prejudice prong requires ***Postelle*** to "demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Grant, 886 F.3d at 905* (quoting *Littlejohn v. Royal (Littlejohn II), 875 F.3d 548, 552 (10th Cir. 2017)*). This means the errors must "undermine [our] confidence in the outcome" of ***Postelle***'s sentencing. *Newmiller, 877 F.3d at 1197* (quoting *Strickland, 466 U.S. at 694*). Of course, in a case such as this, a single juror's choice to impose a sentence less than death meets that standard. *Littlejohn II, 875 F.3d at 553*. Even still, "[t]he likelihood of a different result must be substantial, not just conceivable." *Newmiller, 877 F.3d at 1197* (quoting *Harrington v. Richter, 562 U.S.86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*).

In considering whether an inadequate investigation prejudiced a habeas petitioner, we "reweigh the evidence" on both sides, this time accounting for the petitioner's proposed additions. *Littlejohn II, 875 F.3d at 553* (quoting *Victor Hooks II, 689 F.3d at 1202*). This exercise also requires us to account for how the state

[9] Our analysis does not state or imply that a capital defense attorney may "delegate development of the overall litigation strategy" to an expert witness. Dissent at 1. Clearly that responsibility falls to counsel alone. But where, as here, *counsel* has decided to argue poor mental health and diminished cognitive function as mitigating factors justifying a lesser sentence, counsel may indeed presume that a qualified expert in the field of clinical neuropsychology would *apply that expertise* to the chosen strategy.

would have responded to the omitted evidence. *E.g., id.*

Postelle's mitigation case had several clear focal points.

The first of these was ***Postelle***'s difficult upbringing. The jury heard how ***Postelle***'s mother had abused and starved him as a young child. Court's Ex. **[**27]** 12 at 2654 (introduced at Tr. 2695). It heard how she "made [him] feel rejected and unloved." Video recording: Patsy ***Postelle*** Mitigation **[*1218]** Testimony (Defendant's Ex. 2, introduced at Tr. 2844). It heard how, when she eventually gave him up to his grandparents, he was "malnutrishioned, filthy, and [had] sores on [his] bod[y]." *Id.* The jury heard how thereafter ***Postelle***'s mother "refused to take telephone calls from [him or] have anything further to do with [him]." *Id.* The jury was also told that Brad ***Postelle***'s new girlfriend obstructed the father-son relationship. *See id.*; Tr. 2712-13, 2747. Finally, the jury learned that, despite all of this, ***Postelle*** selflessly cared for his bedridden grandfather, *see* Tr. 2749, 2814, and later, his handicapped father, *see* Tr. 2785-86.

Postelle's mitigation case also focused on the role methamphetamine played in his life from an early age. This included evidence of family members cooking and using meth during ***Postelle***'s childhood. *See* Tr. 2698, 2753, 2767, 2770, 2793-94. The jury also heard about ***Postelle***'s initiation into meth use himself at the age of twelve or thirteen, including openly ingesting the drug in front of his father and other family members. **[**28]** *See* Tr. 2698, 2711, 2728, 2752. In fact, the evidence even indicated that Brad ***Postelle*** *supplied* meth to little Gil. Tr. 2765.

Finally, and most relevant to this appeal, the mitigation case concluded with expert testimony regarding ***Postelle***'s mental function. *See* Tr. 2844-96. Dr. Ruwe had run roughly thirty different tests on ***Postelle***. Tr. 2848. He testified that ***Postelle*** had "pretty significant [neurocognitive] impairments," along with "pretty severe psychological difficulties." Tr. 2849. These included "pretty pronounced problems with remembering information" and "difficulty with reasoning, especially verbal reasoning." Tr. 2850. Dr. Ruwe told the jury that ***Postelle*** gave off "clear[] indications of paranoia[and] disorganized thinking." Tr. 2851. And, according to Dr. Ruwe's assessment, the parts of ***Postelle***'s brain responsible for "impulse control, making good decisions, [and] well reason[ed] judgments" had not developed fully or normally by the time of the murders. Tr. 2856; *see also* Tr. 2857 ("Generally, what that tells us is that the drugs, along with the normal developmental process, makes it more difficult for [***Gilbert Postelle***] to make good decisions."). ***Postelle*** even displayed **[**29]** "symptoms consistent with a post traumatic stress disorder." Tr. 2863.

Moreover, Dr. Ruwe explained, ***Postelle*** had not always been this way. Based on tests administered before ***Postelle*** dropped out of school, Dr. Ruwe concluded the young ***Postelle*** "was performing pretty consistently in the average, unlike current testing." Tr. 2852. "[H]e probably would have had a learning disability or would have qualified for special services," but he had markedly better brain function. Tr. 2852. And though it was somewhat speculative, Dr. Ruwe attributed most of ***Postelle***'s mental difficulties "to the longstanding chronic use of drugs and methamphetamine, which are known to have a pretty pronounced impact on cognitive functions, especially memory." Tr. 2853-54.

This testimony culminated in an apparent attempt to cast ***Postelle*** as a victim of circumstance, rather than a lost cause. He knew right from wrong. *See* Tr. 2865. He was *capable* of choosing between the two. *See* Tr. 2866. He was young and would continue to mature. *See* Tr. 2868. Perhaps the structured environment of prison was the best way to reform him. *See* Tr. 2866.

Though ***Postelle*** makes much of Dr. Ruwe's concession that he *did not* reach the level **[**30]** for "a diagnosis of [intellectual disability]," Tr. 2861; *see* Aplt. Br. at 5, 6, 7, 32, 38, 44, 49, this comment was not overly prejudicial in context or even necessarily wrong in light of Flynn Effect evidence. Indeed, Dr. Ruwe testified ***Postelle*** was not intellectually disabled *but instead* **[*1219]** "in the borderline range" of intellectual functioning. Tr. 2861. His main point was that ***Postelle*** fell "pretty close to" an intellectual disability diagnosis, which would "start somewhere around [an IQ of] 70." Tr. 2861. Of course, that would have also been true of ***Postelle***'s Flynn Effect—adjusted scores. In fact, Dr. Ruwe placed ***Postelle*** "in the 5th percentile range" of relative intelligence, meaning "95 out of 100 . . . [people probably] function[] at a higher level." Tr. 2862. With Flynn Effect—adjusted scores, ***Postelle*** would still have slotted into a relatively similar band. *See* Haydt et al., supra, at 364. Furthermore, Dr. Ruwe clarified that people are "able to function pretty well *until they get down into that borderline range*[]." *Id.* (emphasis added). There, said Dr. Ruwe, people like ***Postelle*** "start developing more pronounced problems with . . . some of the things that we typically take for granted," including "working **[**31]** in the competitive employment force" and "independent living." *Id.*

Postelle also stresses the "uniquely mitigating" nature of

intellectual-disability evidence as support for incorporating the Flynn Effect. *See* Aplt. Br. at 12-13, 45. But this is not a case where counsel simply ignored such evidence or used it *against* the defendant. *Cf.* Smith v. Mullin, 379 F.3d 919, 939-44 (10th Cir. 2004) (finding ineffective assistance where counsel completely failed to incorporate a substantial body of mental health evidence into the mitigation defense). As we have just explained, ***Postelle***'s counsel stressed his poor mental health and severe intellectual difficulties in the final stanza of the mitigation case. Our proper focus is thus the *marginal* benefit of Flynn Effect evidence in light of the other evidence presented, as well as its *marginal* potential cost to the overall mitigation strategy.[10]

We have no reason to believe an attempt to use Flynn Effect evidence would have gone unchallenged by the prosecution either. As we mentioned above, incorporation of this evidence might have caused the mitigation phase to devolve into a confusing and tangential "battle of experts" on the validity and practical significance of the Flynn Effect. **[**32]** Not only would this have risked distracting the jury from more salient issues, it might also have alienated jurors sensitive to a defense that appeared to be focusing on minor side issues. Indeed, even absent a central focus on IQ scores, the state still brought ***Postelle***'s much-higher nonverbal IQ to light. *See* Tr. 2875-77. And though the Flynn Effect could have opened the door to an argument that ***Postelle***'s IQ might actually fall below 70 after accounting for standard error, *see* Aplt. Br. at 25, that point cuts both ways. Indeed, the state itself introduced the margin-of-error concept to *attack* ***Postelle***'s IQ-based argument. *See* Tr. 2871.

In sum, the OCCA reasonably concluded the omission of Flynn Effect evidence did not prejudice ***Postelle***'s defense, and that application of *Strickland* warrants deference on both the trial-counsel claim and the appellate-counsel claim.

[*1220] * * *

In light of the above, the district court did not err in rejecting ***Postelle***'s mitigation-based ineffective assistance claims. The OCCA's rejection of these claims on the merits warrants deference under federal habeas law.

B. Victim Impact Evidence

Postelle also claims the erroneous introduction of victim-impact evidence **[**33]** during the penalty phase of his trial prejudiced his defense. Again, we disagree.

In Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), the Supreme Court interpreted the *Eighth Amendment* to prohibit capital juries from considering evidence of a crime's impact on the victim and his family as part of its sentencing decision. *See* id. at 501-02. Such evidence, the Court explained, "may be wholly unrelated" to the defendant's "blameworthiness" because he "often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family." Id. at 504. Moreover, the Court reasoned that capital defendants "rarely select their victims based on whether the murder will have an effect on anyone" else. *Id.* Victim-impact evidence might thus contribute to death sentences premised upon "factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Id. at 505. In sum, victim-impact evidence had no place in the jury's sentencing task: "determining whether the death penalty is appropriate in light of the background and record *of the accused* and the particular circumstances *of the crime*." Id. at 507 (emphasis added).

But the Court revisited *Booth* a few years later in Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). *Payne* recognized "the assessment of harm" resulting from a **[**34]** crime "has understandably been an important concern of the criminal law" in determining both guilt and punishment. Id. at 819. The Court thus held states *could* present "evidence of the specific harm caused by the defendant" to the jury at sentencing, id. at 825, including "evidence about the victim and about the impact of the murder on the victim's family," id. at 827.

[10] We disagree with the dissent's prejudice analysis on this point. As a scientific and practical matter, there just is not much difference between an IQ slightly below 75 and an IQ slightly above 75—certainly not so much as to fairly indicate ***Postelle*** definitively "lack[ed]," rather than possessed, "the intellectual capacity to bear full culpability for his crimes." Dissent at 16. Indeed, the concept of standard error would itself rebut such an inference. *See* Hall v. Florida, 572 U.S. 701, 134 S. Ct. 1986, 2000, 188 L. Ed. 2d 1007 (2014) ("An IQ score is an *approximation*, not a final and infallible assessment of intellectual functioning." (emphasis added)). And if evidence of possible intellectual disability is so strongly mitigating, then evidence of functioning in the borderline range is at least somewhat mitigating—and plainly not aggravating.

Even still, as the Court has recently pointed out, "*Payne* 'specifically acknowledged its holding did not affect' *Booth*'s prohibition on [characterizations of and] opinions about the crime." *Bosse v. Oklahoma, 137 S. Ct. 1, 2, 196 L. Ed. 2d 1 (2016)* (per curiam) (emphasis added) (quoting Ledbetter v. State, 1997 OK CR 5, 933 P.2d 880, 890 (Okla. Crim. App. 1997)); *see also id.* ("'*Booth* . . . held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the *Eighth Amendment*,' but no such evidence was presented in *Payne*, so the Court had no occasion to reconsider that aspect of the decision." (quoting Payne, 501 U.S. at 830 n.2)). Thus, ***HN8***[ ] in conducting capital sentencing proceedings, state courts must still take care to exclude evidence that goes beyond a victim's subjective suffering and strays into description of the defendant's conduct.

The Oklahoma courts ignored that prohibition in this case. At the prosecution's request, several **[**35]** family members of the victims read prepared statements to the jury. *See* Tr. 2653-55, 2657-60. As relevant to this appeal, James Alderson's brother described Alderson's gruesome injuries. "On advice of the funeral director," he said, "we decided not to allow [our mother] to view Jimmy's body." Tr. 2654. Due to "[t]he disfigurement caused by **[*1221]** head and facial wounds," Alderson's mother therefore "never had a chance for "a final goodbye." *Id.* Amy Wright's mother then testified to "know[ing] that [Amy] was chased from her home and shot in the back . . . without apparent reason." Tr. 2657. As the court below determined, this testimony overstepped the fine line between *Booth* and *Payne*, effecting a constitutional violation. R., Vol. I at 626. And because the OCCA did not enforce *Booth*'s restrictions on appeal, *see id.; see also* ***Postelle*** *I, 267 P.3d at 142-43* (relevant discussion), we do not grant it deference on this issue. *See 28 U.S.C. § 2254(d)*.

But this does not entitle ***Postelle*** to automatic relief. Instead, much like in the ineffective assistance context, he must show the error of admitting impermissible victim-impact evidence prejudiced his defense. *See* Welch v. Workman, 639 F.3d 980, 1002 (10th Cir. 2011); *see also* Brecht v. Abrahamson, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (establishing the standard). This analysis requires us to consider all of the evidence **[**36]** from both stages of the trial. *See* Welch, 639 F.3d at 1004; *see also* Lockett v. Trammel, 711 F.3d 1218, 1239 (10th Cir. 2013) ("In evaluating whether the unconstitutional portions of the . . . 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."). In so doing, we ask whether the jury still would have found the aggravating circumstances outweighed the mitigating factors without the testimony in question. *See* Lockett, 711 F.3d at 1239-40; DeRosa v. Workman, 679 F.3d 1196, 1240 (10th Cir. 2012); Welch, 639 F.3d at 1004.

We have already described the mitigation case ***Postelle*** presented. It included testimony regarding abuse, neglect, mental illness, intellectual difficulties, and the corrosive influence of drugs.

But the jury thought that evidence could not outweigh the aggravating circumstances. In particular, the jury found the same two aggravating circumstances present in all four murders: First, it found ***Postelle*** "knowingly created a great risk of death to more than one person" in each case. Dir. App. R., Vol. VIII at 1550-53. This is, of course, an obvious conclusion to draw in a case involving multiple homicides. Second, the jury found the murders "especially heinous, atrocious, or cruel." *See id.* According to the instructions, this meant the jury found beyond a reasonable doubt that (1) "either torture **[**37]** . . . or serious physical abuse of the victim[s]" preceded the murders, and (2) "the murder[s] [were] . . . extremely wicked or shockingly evil . . . outrageously wicked or vile . . . [or] pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others." *Id.* at 1521. In this context, "'torture' means the infliction of either great physical anguish or extreme mental cruelty." *Id.* Moreover, a finding of "serious physical abuse" or "great physical anguish" must include a finding "that the victim experienced conscious physical suffering prior to . . . death." *Id.*

The victim-impact statements could not have been decisive in a single juror's balancing. The testimony in question centers on two main points: (1) that James Alderson had disfiguring head and facial wounds, Tr. 2654, and (2) that Amy Wright ran for her life only to be randomly killed, Tr. 2657. Both of these statements were substantially redundant and relatively mild when compared to other evidence.

The state had already introduced substantial evidence of Mr. Alderson's wounds. It had presented detailed testimony from a forensic pathologist in the office of the state medical examiner regarding **[**38]** Mr. Alderson's autopsy. *See* Tr. 1450-56. **[*1222]** That witness recounted Mr. Alderson's "compound open fracture" on the top of his head, Tr. 1454, as well as how a bullet had hit his jaw bone, *see* Tr. 1455. Clear diagrams of Mr. Alderson's face and body had aided this description. *See* Ex. 161, 163. A second witness, a forensic consultant,

had also described Mr. Alderson's injuries to the jury. Tr. 1549-52. And all of this testimony had followed the state's introduction of a close-up photo of Mr. Alderson's body from the crime scene, showing the open wound on the top of his head. *See* State's Ex. 54 (introduced at Tr. 1402). Mr. Alderson's brother's statement thus contributed little to the jury's understanding of Mr. Alderson's disfigurement.

So too, the guilt-phase evidence had already painted a more vivid image of Amy Wright's final moments. When police arrived at the scene, they found bullet casings in the trailer, *see* Tr. 1498-1500; *see also* State's Ex. 100, 101, 105, 108, 110, and the back door flung wide open, *see* Tr. 1249. They discovered Ms. Wright's body face down on the grass, obviously shot to death. *See* Tr. 1243-45. She was in close proximity to a solid metal fence that hemmed in the **[**39]** property, *see* Tr. 1388, and she had gravel and grass under her fingernails as though she had been clawing at the ground or other objects, *see* Tr. 1406. Despite being outside in a junk-filled scrapyard, *see* Tr. 1562, Ms. Wright was not wearing her shoes, *see* Tr. 1552. According to the autopsy, she had sustained three gunshot wounds, all from behind. *See* Tr. 1457. Pulling together this evidence, the forensic consultant offered his interpretation of the events: The four victims had been at ease within the trailer home when they experienced some sort of "blitz attack." Tr. 1561. With regard to Ms. Wright in particular, the evidence was consistent with her attempting to flee only to be shot in the midst of escape. *See* Tr. 1569-70. Surely, then, the jury had already concluded Ms. Wright ran for her life before being gunned down for no other reason than that she was in the wrong place at the wrong time.

Our review of the record thus compels the conclusion that the victim-impact evidence erroneously admitted did not affect ***Postelle***'s sentence. In fact, even if we assumed for the sake of argument that the jury should have also heard Flynn Effect evidence as part of the mitigation case, *see* Aplt. **[**40]** Br. at 52-53 (arguing for a cumulative-error analysis), we do not think the impermissible victim-impact statements could have influenced even a single juror. These statements simply told the jurors what they each already knew.

We thus affirm denial of ***Postelle***'s habeas petition on this ground.

C. Expansion of the Certificate of Appealability

As a final matter, we reject ***Postelle***'s request to expand the scope of his appeal.

Postelle has asked us to expand the scope of his appeal to cover three additional issues. *First*, he wishes to challenge the district court's ruling that Oklahoma did not contradict or unreasonably apply *Atkins* in sentencing him to death. *See* Mot. Broaden Certificate of Appealability at 15-17 [hereinafter COA Mot.]. *Second*, he seeks permission to appeal the district court's determination that Oklahoma did not contradict or unreasonably apply the *Lockett* line of cases in refusing to admit David ***Postelle***'s lesser sentence as mitigating evidence. *Id.* at 3-8. *Finally*, he requests an appeal of the district court's procedural ruling denying him a stay and abatement or leave to amend his habeas petition. *See id.* at 8-15.

HN9[↑] When a federal district court denies a state prisoner's petition for habeas **[**41]** corpus, he has no absolute right to appeal. *See* *Slack v. McDaniel, 529 U.S. 473, 480-81, **[*1223]** 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. We may, however, grant the petitioner permission to challenge the district court's resolution of discrete, specified issues through a Certificate of Appealability. *See* *28 U.S.C. § 2253(c)*. But a petitioner must make "a substantial showing of the denial of a constitutional right" to justify our doing so. *Id.* at *§ 2253(c)(2)*. This means he "must demonstrate that reasonable jurists would find the district court's assessment of the [relevant] constitutional claim[] debatable or wrong." *Slack, 529 U.S. at 484*; *see* *Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. In considering whether a petitioner has made such a showing, we incorporate Congress's mandate of deference to state court decisions. *Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004)*.

Reasonable jurists could not debate the correctness of the additional district court rulings ***Postelle*** seeks to appeal.

1. The Atkins *Claim*

We need not hear appeal on ***Postelle***'s *Atkins* claim because our precedent forecloses relief.

We have already twice held that Oklahoma's rejection of the Flynn Effect as irrelevant to the *Atkins* analysis does not contradict or unreasonably apply *Atkins*. *See* *Smith, 824 F.3d at 1244-46*. ***Postelle*** recognizes these holdings, but argues that other Supreme Court precedents, specifically *Lockett* and its progeny, compel states to consider the mitigating **[**42]** value of Flynn Effect evidence in applying *Atkins*. COA Mot. at 17. But the *Lockett* line of cases only applies to *relevant*

evidence, and only as it relates to the *choice* to impose the death penalty. Thus, because we have already determined that a state—consistent with *Atkins*—may deem Flynn Effect evidence *irrelevant* to death penalty *eligibility*, our precedents still preclude ***Postelle***'s argument. Reasonable jurists therefore could not debate this issue. *See, e.g.,* United States v. Tafoya, 557 F.3d 1121, 1129 (10th Cir. 2009). Accordingly, we must deny ***Postelle*** permission to raise it on appeal.

2. David Postelle's Sentence as Mitigating Evidence

Neither can we permit ***Postelle*** to appeal the district court's ruling on the exclusion of David ***Postelle***'s sentence as mitigating evidence.

When ***Postelle*** raised this issue in state court, the OCCA correctly noted the constitutional requirement that "the proffered evidence . . . relate to the defendant's personal circumstances, [that is], his character, record or circumstances of the offense." ***Postelle I***, 267 P.3d at 141. To be sure, some courts have determined that evidence of a codefendant's sentence is relevant to capital sentencing. *See* id. at 140-41 (collecting cases). But the question we must answer is whether the OCCA unreasonably applied or **[**43]** contradicted *Lockett* and its progeny in rejecting ***Postelle***'s argument and taking the opposite stance. And the presence of a legitimate controversy regarding the relevance of a codefendant's sentence, *see* COA Mot. at 7, indicates the *Lockett* line of cases does not answer the question. Thus, even if the OCCA was ultimately wrong, reasonable jurists could not debate that its decision deserves deference under federal habeas law. And despite ***Postelle***'s argument to the contrary, *see id.* at 6, the severity of the sentence at issue cannot alter this analysis.

We therefore deny ***Postelle*** permission to appeal this issue as well.

3. The Actual Innocence Claim

Finally, ***Postelle*** wishes to appeal the district court's procedural ruling denying **[*1224]** him a stay and abatement or else leave to amend his habeas petition. This challenge to a matter of procedure requires a somewhat different analysis, but ultimately does not warrant further review.

We begin with some additional factual background. ***Postelle*** submitted his original habeas petition to the district court on September 3, 2013. *See* R., Vol. I at 10. Over a year and a half later, he moved for the district court to stay and abate habeas proceedings or otherwise permit him to amend **[**44]** his petition with an actual-innocence claim. *See* id. at 488. This was because David ***Postelle*** had contacted ***Postelle***'s attorneys and confessed to the murders. *See* id. at 491. David claimed he had directed ***Postelle*** not to discuss the events of the crime with anyone—even his own counsel—and that ***Postelle*** did not actually shoot anyone. *See id.* at 518-21 (David ***Postelle*** letter). On account of this new evidence, ***Postelle*** moved for the court to stay federal proceedings to allow him to exhaust claims of actual innocence (and possibly interference with counsel) in the Oklahoma courts. *See* id. at 491. In the alternative, he asked for leave to amend his petition "to add facts, argument, and authorities based upon the confession of his older brother." *Id.* He further asked for leave to newly assert "a constitutional claim of actual innocence." *Id.*[11]

The district court denied these requests. *See* Dkt. 71 at 2. First, it thought a stay and abatement "inappropriate in this situation" because ***Postelle*** sought "to exhaust claims to add to his existing petition" rather than "exhaust claims that are included in his petition." *Id.* at 3. Next, the district court rejected ***Postelle***'s request to amend his petition, reasoning that the new claims did not derive from the same operative **[**45]** facts as the old claims, and therefore the amendment could not relate back to the original habeas petition. *See id.* at 3-5. Accordingly, the amendment would fall outside the statute of limitations. *Id.* at 4. Equitable tolling was also unavailable because David's confession was not reliable, nor did it present "new" evidence in the relevant sense. *Id.* at 6-8.

The district court thus construed ***Postelle***'s motion not as a request for a stay or leave to amend, but as a second habeas petition. *See id.* at 9. Accordingly, it transferred the petition to this court for us to decide whether to authorize it as such. *Id.*; *see* 28 U.S.C. § 2244(b)(3)(A). We reserved judgment on that question pending resolution of this appeal. *See* In re ***Postelle***, No. 16-6237, [slip op.]at 3, 2016 U.S. App. LEXIS 24321 (10th

[11] For the sake of argument, we accept ***Postelle***'s contention that "a truly persuasive demonstration of actual innocence . . . would render [his] execution . . . unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." COA Mot. at 15 (quoting Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)). *But cf.* Doe v. Jones, 762 F.3d 1174, 1176 n.5 (10th Cir. 2014) (acknowledging the Supreme Court has never resolved whether such a claim exists).

Cir. Oct. 18, 2016).

Postelle now moves for permission to appeal the district court's rejection of his requests for a stay or leave to amend his petition. *See* Mot. at 8-15. HN10[↑] To appeal a procedural ruling in a habeas action, "a litigant . . . must demonstrate that" the "ruling . . . is itself debatable among jurists of reason" Buck v. Davis, 137 S. Ct. 759, 777, 197 L. Ed. 2d 1 (2017). We deny this motion because reasonable jurists could not debate the district court's procedural ruling.

To begin, **Postelle** gives the court no reason to **[**46]** doubt the district court's holding that it could not stay and abate habeas proceedings for exhaustion of a claim not yet before the court. *See* Mot. at 11-15. **[*1225]** And indeed, the Supreme Court's decision in Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005), approving of the stay-and-abatement process for raised but unexhausted claims does not appear to apply to claims not yet raised at all. *See* id. at 275-79 (discussing the procedure only with regard to "mixed" petitions containing both exhausted and unexhausted claims). We thus deem the district court's resolution of that issue undisputably within its discretion.

Neither does **Postelle** directly address the district court's treatment of the amendment issue. And rightfully so, as reasonable jurists could not debate it either.

HN11[↑] A habeas petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. Under the Federal Rules of Civil Procedure, a party generally has an absolute right to amend his pleading once within 21 days of its service. *See* Fed. R. Civ. P. 15(a)(1)(A). Once that window has passed—and in this case it certainly has—a party needs his opponent's consent or leave of court to file an amendment. *See id.* at 15(a)(2). And even though courts should grant this leave freely, *see id.*, federal **[**47]** habeas law strictly limits the circumstances under which an amendment can relate back to the original petition filing. As relevant here, it may do so "*if and only if* . . . the proposed amendment does not seek to add a new claim or to insert a new theory into the case." United States v. Espinoza-Saenz, 235 F.3d 501, 505 (emphasis added) (quoting United States v. Thomas, 221 F.3d 430, 431 (3d Cir. 2000); *see also* Woodward v. Williams, 263 F.3d 1135, 1142 (10th Cir. 2001) ("Although this petition was brought under *§ 2254* rather than *§ 2255*, we see no reason to treat the issue differently."). **Postelle**'s amendment exclusively seeks to add new claims to the case under new theories of the facts. Accordingly, his actual innocence claim could not possibly relate back to the original filing absent equitable tolling. **Postelle** thus attacks only the district court's treatment of the equitable tolling issue.

He cannot prevail on this theory. To be sure, a valid claim of actual innocence might render **Postelle**'s amendment timely and bypass the relation-back problem altogether. *See* Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000). But HN12[↑] "[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Moreover, "[t]o **[**48]** establish the requisite probability" that a miscarriage of justice will occur absent equitable tolling, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 327.

Postelle faults the district court for conducting a "deep dive into the merits" of his actual-innocence claim to carry out this analysis. *Id.* at 11. According to **Postelle**, the district court "should have [only] asked . . . whether [David's] affidavit raised a debatable question of . . . **Postelle**'s ineligibility for the death penalty." *Id.* But that simply is not the law. Even assuming it constituted "new reliable evidence," *but cf.* Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004) ("A defendant's own late-proffered testimony is not 'new' because it was available at trial."), the question before the district court was whether any reasonable juror could have found **Postelle** guilty beyond a reasonable doubt in light of David's statement. On appeal, we would review its **[*1226]** decision for abuse of discretion. *See* Espinoza-Saenz, 235 F.3d at 503; *cf.* Carter v. Bigelow, 787 F.3d 1269, 1278 & n.6 (10th Cir. 2015) (observing the abuse-of-discretion standard applies to denials of motions to supplement as well as motions to amend).

Accordingly, the question before us now is whether reasonable jurists could **[**49]** debate the district court's exercise of discretion concluding reasonable jurists could still convict **Postelle** in the face of David's statements. For obvious reasons, this is not a close call. David **Postelle**'s letter cannot wash away the mountain of other evidence presented at trial, including a directly contradictory account from another eyewitness. Reasonable jurors could easily disregard David's account. Accordingly, the court below clearly and

undisputably rendered a decision within the bounds of its discretion on this issue.

* * *

For these reasons, we deny ***Postelle*** a Certificate of Appealability covering additional issues.

III. Conclusion

For the forgoing reasons, we **AFFIRM** the district court's denial of habeas relief and **DENY** ***Postelle***'s motion to expand the Certificate of Appealability.

Concur by: LUCERO, J. (In Part)

Dissent by: LUCERO, J. (In Part)

Dissent

LUCERO, J., concurring in part and dissenting in part.

I join all but Part II.A of the majority opinion. Two issues prevent my full agreement with my respected colleagues that would lead to my full joinder. (1) It was well-known that bias in the IQ tests used at the time of ***Postelle***'s sentencing skewed the scores introduced at trial and presented to the jury to **[**50]** a degree significantly lower than ***Postelle***'s true score. Given that ***Postelle*** scored in the bottom one tenth of one percentile of children his age on an adaptive behavioral test administered when he was a child, evidence of the IQ score bias—known as the Flynn Effect—should have been fully developed by trial counsel. Failure to do so resulted in manifest prejudice to the defendant, amplified by counsel's presentation of scores evincing a higher degree of mental capacity than justified, compounding the error to a reversible degree. (2) My majority colleagues' suggestion that defense counsel can delegate development of the overall litigation strategy and investigation of the law to a testifying psychologist is clearly erroneous. Although the bar to relief is high under *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, adequate representation by counsel, particularly in a capital case, mandates a complete investigation and presentation of mitigating evidence. The failure to fulfill that duty by counsel in the case before us compels me to respectfully dissent.

I

The majority opinion capably lays out the facts of the crime for which ***Gilbert Postelle*** was convicted. It omits, however, a considerable amount of evidence presented in mitigation **[**51]** and on appeal, which provides necessary background. In context, counsel's failure to raise the Flynn Effect violated ***Postelle***'s right to effective assistance of counsel under Strickland.

Assuredly, trial counsel did present evidence that ***Postelle***'s childhood was highly dysfunctional and that he had been seriously mentally impaired since childhood. ***Postelle***'s maternal aunt and his sister testified that mental illness ran in his family. His mother, Dawn, was so mentally ill that, at the time of trial, she was committed to an inpatient mental institution in Arizona. The defense's expert witness, Dr. Ruwe, testified that ***Postelle*** suffered from significant neurocognitive problems and severe psychological problems. Later, upon **[*1227]** being provided with a complete family history by post-conviction counsel, Dr. Ruwe diagnosed ***Postelle*** with major depressive disorder with psychotic features, and found that he exhibited symptoms of post-traumatic stress disorder and possible schizophrenia.

Dr. Ruwe's testimony at the sentencing phase of the trial merely touched upon his analysis of ***Postelle***'s mental state, despite the fact that "courts have repeatedly found [evidence of mental illness] to be powerful **[**52]** mitigation." *Wilson v. Sirmons, 536 F.3d 1064, 1093 (10th Cir. 2008)*. Counsel on direct appeal failed to conduct any further investigation, despite the indications present in the trial transcript that mental illness may have been a viable mitigation claim, and that ***Postelle***'s "borderline" IQ scores might not accurately capture his mental capacity. Only collateral counsel completed the basic investigation that unearthed the depth of ***Postelle***'s cognitive and psychological issues. This failure may have to do with the fact that ***Postelle*** was, according to his counsel on direct appeal, incapable of meaningfully assisting her. He failed to disclose any information regarding the facts of the crime to his lawyers or their investigators, and appeared to be ignorant of the seriousness of the proceedings and the nature of his sentence. Post-conviction counsel confirmed the impressions of direct appeal counsel, reporting that when they attempted to discuss ***Postelle***'s case with him he spent "most of the time giggling, laughing inappropriately, and staring up at the ceiling."

Multiple individuals who had known ***Postelle*** throughout his life testified that he had significant mental impairments from a very young age: he was "different from the rest of the **[**53]** kids," "accident prone," and

"slow at processing things." He "believed everything he was told," "couldn't understand when people were joking," and took frequent and unnecessary risks. Many of ***Postelle***'s friends and family members reported that they had not been contacted by any of ***Postelle***'s lawyers, save his post-conviction counsel, and that if they had been, they would have testified to their observation of ***Postelle***'s mental disability. Others indicated that, although they had spoken to ***Postelle***'s trial attorneys, they were not asked about his mental health, cognitive function, or family history of mental illness.

School records presented at trial indicated that ***Postelle*** was removed from mainstream schooling and placed in special education early in elementary school, where he remained until he dropped out of school at the age of twelve. In 1999, shortly before leaving school, ***Postelle*** was given an Adaptive Behavior Inventory, a type of adaptive functioning test, and scored in the bottom 0.1 percentile—that is, about 99.9 percent of children his age outperformed him. According to this assessment, at the age of twelve, when most children would be finishing sixth grade, ***Postelle*** was **[**54]** "beginning" to use spoken language to convey information to others, read a few simple sight words, and become aware of the perceptions of others. He was unable to answer questions about a story he had just read, convey knowledge in writing, do work independently without disturbing others, or make appropriate comments in group situations. He had not mastered any skills, including telling time or knowing the names and values of coins and bills.

In November 2006, ***Postelle*** took the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III") and scored a 79. In March 2007, ***Postelle*** took the Wechsler Abbreviated Scale of Intelligence ("WASI") and received a score of 76. Without adjustment for either the standard of error or the Flynn effect, these scores fell within the range considered to indicate "borderline mental disability." See T.P. Alloway, **[*1228]** Working Memory and Executive Function Profiles of Individuals with Borderline Intellectual Functioning, 54 J. Intell. Disability Res. 448, 449 (2010). People with borderline mental disability generally have limited skills related to planning, decision making, and spoken language. Marsha Mailick Seltzer et al., Life Course Impacts of Mild Intellectual **[**55]** Deficits, 110 Am. J. Mental Retardation 451, 451 (2005).

II

In *Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*, the Supreme Court struck down a state statute that provided that the death penalty was mandatory for certain crimes, unless one of three potentially mitigating factors applied. *Id. at 593-94*. The Court noted that "the concept of individualized sentencing" had long been a central principle of American law and that sentencing judges had traditionally been able to consider a wide variety of facts about the offender and the crime itself. *Id. at 602-03*. In capital cases particularly, "the fundamental respect for humanity underlying the *Eighth Amendment*" requires individualized consideration of the particular offender and offense "as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id. at 603* (quotation omitted).

Therefore, the *Eighth* and *Fourteenth Amendments* require that the sentencer "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." *Id. at 604*. Because Ohio's statute did not permit such consideration, it was held unconstitutional. *Id. at 608*. This requirement that individual mitigating factors be considered in **[**56]** imposing death reflects "the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)*.

The Eddings Court expanded on Lockett's directive. Monty Eddings, who was sixteen when he killed a police officer, had experienced an extremely difficult upbringing and suffered from severe emotional and psychological disorders. *Id. at 105-06*. In sentencing him to death, the trial judge noted that he had considered Eddings' youth but could not, under the law, consider the abuse Eddings experienced as a child or his various mental afflictions. *Id. at 108-09, 112-13*. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed, holding that Eddings' "family history" and mental illness were "useful in explaining why he behaved the way he did" but could not be used in mitigation because it "did not excuse his behavior." *Id. at 109-10*. The Supreme Court reversed, concluding that "[e]vidence of a difficult family history and of emotional disturbance" is relevant mitigating evidence. *Id. at 114*. It might have been permissible for the sentencing authority to conclude that, as a matter of fact, there was insufficient evidence of mental illness or child abuse, but it was **[**57]** not permissible to determine that such evidence could not properly be considered. Id.

Evidence of emotional disturbance and violent family history, including an alcoholic mother and a physically abusive father, was determined particularly relevant because Eddings was young at the time of the crime. *Id. at 116*. The Court reasoned that, at sixteen, an average adolescent might be expected to lack the maturity of an adult and, given Eddings' severe emotional problems, violent family background, and belowaverage intelligence, he was perhaps even less mature **[*1229]** than his chronological age would suggest. Id. Mitigating facts of his mental illness and his difficult background did not excuse his crime, but "the background and mental and emotional development of a youthful defendant [must] be duly considered in sentencing." Id.

Under Lockett and Eddings, ***Postelle*** clearly had a broad right to bring in a wide variety of mitigating evidence, provided that it related to his own personal characteristics or to the circumstances of the crime. Further, under Strickland, he had the right to counsel to adequately represent him. Adequate representation in the capital context has long been understood to mean a reasonable, **[**58]** complete investigation and presentation of mitigating evidence. *Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*.

In Williams, the Supreme Court reversed a death sentence because the defendant's counsel had failed to adequately investigate and present evidence of his intellectual disability and abusive childhood. Id. Williams' trial counsel failed to obtain records that would have revealed that Williams had been severely beaten by both of his parents as a child. *Id. at 395*. Counsel also failed to introduce evidence available at the time of trial indicating that Williams was "borderline [intellectually disabled]" and did not advance beyond sixth grade. *Id. at 396*. Not all of the evidence regarding Williams' background was favorable to him, but the Court concluded that a tactical decision to focus on another aspect could not have justified the omission of the "voluminous" amount of evidence in Williams' favor, and that their omission could only indicate a failure to investigate the client's background. Id.

In *Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*, the Court again reversed a death sentence due to trial counsel's inadequate investigation into mitigation evidence. There, trial counsel hired a psychologist and researched both social service records and the defendant's presentence investigation **[**59]** report. *Id. at 524*. Yet these efforts were determined to be inadequate because counsel had failed to hire a forensic social worker to prepare a social history report. Id. The Court held this failure, despite counsel's other investigative efforts, fell short of the American Bar Association's requirement that counsel make "efforts to discover all reasonably available mitigating evidence." Id. (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), 93 (1989)). The Court concluded that competent counsel, knowing the extent of the abuse that Wiggins suffered, would have investigated further and then introduced mitigating evidence related to that abuse at trial. *Id. at 535*. Due to counsel's failure to investigate, the jury did not hear evidence that the defendant had been frequently abused and neglected by his alcoholic mother. Id. The jury also did not hear that Wiggins had significantly diminished mental capacities. Id. The omission of this "considerable mitigating evidence" meant that Wiggins was deprived of constitutionally adequate counsel. *Id. at 536*.

In *Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)*, trial counsel interviewed five of the defendant's family members and employed three mental health experts. *Id. at 381-82*. **[**60]** Despite knowing that Rompilla had a criminal record and had left school in the ninth grade, trial counsel did not examine the records of his schooling or his prior incarcerations. *Id. at 382*. The Supreme Court once again overturned the sentence, holding that, if his counsel had located and read these records—especially his easily available criminal records—they would have found a range of **[*1230]** mitigation leads, including a suggestion that he was cognitively impaired and suffered from schizophrenia. This would have built a stronger mitigation case. *Id. at 390-91*.

In summary, investigation and presentation of mitigation evidence is a vital function of counsel in a capital punishment penalty phase trial. *Wiggins, 539 U.S. at 522*; *Eddings, 455 U.S. at 112*. "[A] consistency produced by ignoring individual differences is a false consistency." *Eddings, 455 U.S. at 112*. Evidence of a defendant's abusive family background, lack of education, and reduced cognitive capacity is particularly strong mitigating evidence. *Wiggins, 539 U.S. at 535*.

III

By the time of ***Postelle***'s trial in 2008, the Flynn Effect was sufficiently well observed and documented that a reasonable capital defense attorney, preparing for a

presentation of mitigating evidence, should have discovered and presented it. Particularly, given that the materials **[**61]** available to and used by trial counsel indicated that ***Postelle*** left school at twelve after experiencing learning difficulties, suffered significant childhood trauma, and had reduced mental capabilities, counsel had a duty to competently research diminished mental capacity. Had counsel done so, they would have discovered the Flynn Effect, adding significant weight to the contention that ***Postelle***'s crime was mitigated by his level of mental impairment.

As the majority opinion ably explains, the Flynn Effect is an observed phenomenon in which IQ scores increase by approximately 0.3 points for every year that has elapsed since the test was normed. (Majority Op. 8-10.) James R. Flynn first observed the phenomenon in 1984 (24 years before ***Postelle***'s trial) when he noted that, between 1932 and 1978, the IQ score of a representative sample of Americans rose an average of 13.8 points. James R. Flynn, The Mean IQ of Americans: Massive Gains 1932 to 1978, 95 Psych. Bull. 29, 29 (1984). By the time of ***Postelle***'s trial in 2008, the Flynn Effect had not only gained acceptance within the scientific community but was commonly mentioned in capital punishment cases. See, e.g., *People v. Superior Court (Vidal), 40 Cal. 4th 999, 1006 n.4, 56 Cal. Rptr. 3d 851, 155 P.3d 259 (2007)*, and the voluminous collection **[**62]** of cases in footnote 1.[1]

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[1] Other pre-2008 cases in which courts have discussed the Flynn Effect include *Cole v. Branker, No. 5:05-HC-461-D, 2007 U.S. Dist. LEXIS 69904, 2007 WL 2782327, at *22 (E.D.N.C. Sept. 20, 2007)* (unpublished) (rejecting a Flynn Effect argument on the basis that the defendant did not explain how the Flynn Effect would show evidence of intellectual disability before age 18); *Moore v. Quarterman, 491 F.3d 213, 231 (5th Cir. 2007)*, overruled on other grounds by *Moore v. Quarterman, 533 F.3d 338 (5th Cir. 2008)* (en banc) (acknowledging that a defendant's IQ score was reduced to account for the Flynn Effect); *People v. Superior Court (Vidal), 40 Cal. 4th 999, 1007, 56 Cal. Rptr. 3d 851, 155 P.3d 259 (2007)* (noting the lower court's acceptance of the Flynn Effect's validity); *Williams v. Campbell, No. 04-0681-WS-C, 2007 U.S. Dist. LEXIS 27050, 2007 WL 1098516, at *47 (S.D. Ala. Apr. 11, 2007)* (unpublished) (acknowledging the potential impact of the Flynn Effect); *In re Mathis, 483 F.3d 395, 398 n.1 (5th Cir. 2007)* (noting a Flynn Effect argument articulated below without addressing it); *Green v. Johnson, No. 2:05cv340, 2007 U.S. Dist. LEXIS 21711, 2007 WL 951686, at *12 (E.D. Va. Mar. 26, 2007)* (unpublished) (indicating that the Flynn Effect was properly considered in analyzing a defendant's IQ score); *Winston v. Warden of the Sussex I State Prison, No. 052501, 2007 Va. LEXIS 43, 2007 WL 678266, at *15 (Va. Mar 7, 2007)* (unpublished) (rejecting a Flynn Effect argument on the basis that the Flynn Effect would not show evidence of intellectual disability before age 18); *Ex parte Blue, 230 S.W.3d 151, 166 (Tex. Crim. App. 2007)* (declining to consider a Flynn Effect argument); *United States v. Parker, 65 M.J. 626, 629* (N-M. Ct. Crim. App. 2007) (indicating that the Flynn Effect is properly considered in analyzing a defendant's IQ score); *Wiley v. Epps, No. 2:00CV130-P-A, 2007 U.S. Dist. LEXIS 8197, 2007 WL 405041, at *37 (N.D. Miss. Feb. 2, 2007)* (unpublished) (noting defendant's argument that the Flynn Effect had been widely known since it was first discovered in 1984); *Green v. Johnson, No. CIVA 2:05CV340, 2006 U.S. Dist. LEXIS 90644, 2006 WL 3746138, at *46 (E.D. Va. Dec. 15, 2006)* (unpublished) (concluding that it is necessary in capital cases to adjust IQ scores to reflect the Flynn Effect); *Van Tran v. State, No W2005-01334-CCA-R3-PD, 2006 Tenn. Crim. App. LEXIS 899, 2006 WL 3327828, at *12 (Tenn. Crim. App. Nov. 9, 2006)* (unpublished) (describing post-conviction testimony regarding the Flynn Effect); *Berry v. Epps, No. 1:04CV328-D-D, 2006 U.S. Dist. LEXIS 72879, 2006 WL 2865064, at *35 (N.D. Miss. Oct. 5,2006)* (unpublished) (mentioning post-conviction counsel's attempts to admit Flynn Effect evidence); *Murphy v. Ohio, No. 3:96 CV 7244, 2006 U.S. Dist. LEXIS 81332, 2006 WL 3057964, at *5 (N.D. Ohio Sept. 29, 2006)* (unpublished) (concluding that a state court's refusal to incorporate the Flynn Effect was not reviewable given the procedural posture of the instant case); *Conaway v. Polk, 453 F.3d 567, 592 n.27 (4th Cir. 2006)* (mentioning the Flynn Effect's potential impact on IQ scores); *Moore v. Quarterman, 454 F.3d 484, 499 (5th Cir. 2006)*, overruled on other grounds by *Moore v. Quarterman, 533 F.3d 338 (5th Cir. 2008)* (en banc) (noting that the defendant's IQ scores were adjusted to reflect the Flynn Effect); *Green v. Johnson, 431 F. Supp. 2d 601, 612-617 (E.D. Va. 2006)* (granting the defendant's request for an evidentiary hearing to determine whether he was intellectually disabled, based in part on Flynn Effect evidence); *Hedrick v. True, 443 F.3d 342, 368 (4th Cir. 2006)* (discussing the defendant's failure to raise the Flynn Effect); *In re Salazar, 443 F.3d 430, 433 (5th Cir. 2006)* (indicating that, even assuming the validity of the Flynn Effect, the defendant's scores were still too high to meet the intellectual disability cutoff); *Melican v. Morrisey, No. 041368B, 2006 Mass. Super. LEXIS 186, 2006 WL 1075465, at *6 (Mass. Mar. 13, 2006)* (unpublished) (assuming the validity of the Flynn Effect); *Walton v. Johnson, 440 F.3d 160, 177-78 (4th Cir. 2006)* (rejecting a Flynn Effect argument on the basis that the defendant did not explain how the Flynn Effect would render his IQ lower than the cutoff); *Ex parte Salazar, No. WR-49,210-02, 2006 Tex. Crim. App. Unpub. LEXIS 507, 2006 WL 8430173, at *1 (Tex. Crim. App. Mar. 9, 2006)* (unpublished) (rejecting a Flynn Effect argument on the grounds that the Flynn Effect would not render the defendant's IQ lower than the cutoff); *Cummings v. Polk, No. 5:01-HC-910-BO, 2006 U.S. Dist. LEXIS 95151, 2006 WL 4007531, at *31 (E.D.N.C. Jan. 31, 2006)* (unpublished) (acknowledging Flynn Effect testimony presented at trial); *State v. Burke, No. 04AP-1234, 2005-Ohio-*

[*1232] ***Postelle***'s IQ has been tested twice. First, in November 2006, he scored a 79. When adjusted for the Flynn Effect, this score falls to 74. See James R. Flynn, The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False over the Approximately True, 16 Applied Neuropsychol. 98, 103 (2009).[2] In March 2007, he scored a 76. Deducting the standard 0.3 points for each year between when the WASI was normed and when ***Postelle*** took it, this score also becomes a 74. Additionally, the statistical analysis built into these tests themselves is not perfect. **[**63]** Because the score produced is not entirely certain, each test produces a 95 percent confidence interval—a range of values such that there is a 95 percent probability that the true IQ score lies within it. ***Postelle***'s original, unadjusted WAIS-III test indicated that there was a 95 percent probability that his true IQ score was between 75 and 83. When corrected for the Flynn Effect, this range drops by five points, so that ***Postelle***'s IQ score in fact likely falls between 70 and 78. His second test, the WASI, produced a 95 percent confidence interval of 72 to 81. The Flynn Effect when applied to that second test shows that, in fact, there is a 95 percent probability that his true score lies between 70 and 79.

Instead of presenting evidence that ***Postelle***'s correct IQ score was 74 and could in fact be as low as 70, however, his counsel presented evidence that it was either a 76 or a 79. No party made any mention of the Flynn Effect during his trial or his direct appeal. It was first mentioned by the defense at the post-conviction relief stage. After ***Postelle*** argued that his trial and appellate counsel should have introduced evidence that would have more accurately captured his IQ score, **[**64]** both for the purpose of challenging whether he could constitutionally be executed under *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*, and for the purpose of mitigation, the OCCA addressed only the first argument, without mention of the second potential purpose of this evidence.

By failing to address ***Postelle***'s argument that the Flynn Effect evidence could be used for the purpose of mitigation rather than merely for the purpose of determining whether Atkins applied, the OCCA failed to adjudicate ***Postelle***'s claim on its merits.[3] Thus, the

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*7020, 2005 WL 3557641, at *12 (Ohio Ct. App. Dec. 30, 2005)* (unpublished) (concluding that a trial court considering an Atkins claim must consider Flynn Effect evidence); *White v. Commonwealth, 178 S.W.3d 470, 485, n.5 (Ky. 2005)* (defining the Flynn Effect); *Myers v. State, 2005 OK CR 22, 130 P.3d 262, 268 n.11 (Okla. Crim. App. 2005)* (defining the Flynn Effect); *Black v. State, No. M2004-01345-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1129, 2005 WL 2662577, at *16, 39-40 (Tenn. Crim. App Oct. 19, 2005)* (unpublished) (rejecting a Flynn Effect argument on state law grounds); *People v. Superior Court (Vidal), 129 Cal. App. 4th 434, 450, 559, 28 Cal. Rptr. 3d 529 (Cal. Ct. App. 2005)* (indicating that the Flynn Effect was generally accepted in the clinical field in 2005); *Walton v. Johnson, 407 F.3d 285, 296 (4th Cir. 2005)* (rejecting a Flynn Effect argument on the basis that the defendant did not explain how the Flynn Effect would show manifestation of intellectual disability before age 18); *Bowling v. Commonwealth, 163 S.W.3d 361, 374-75 (Ky. 2005)* (rejecting a Flynn Effect argument); *Walker v. True, 399 F.3d 315, 322-23 (5th Cir. 2005)* (remanding for the district court to consider the Flynn Effect); *State v. Murphy, No. 9-04-36, 2005-Ohio-423, 2005 WL 280446, at *2 (Ohio App. Feb. 7, 2005)* (noting Flynn Effect evidence presented in post-conviction proceedings); *In re Hicks, 375 F.3d 1237, 1242-43 (11th Cir. 2004)* (Birch, J., dissenting) (arguing the importance of Flynn Effect evidence in calculating a capital defendant's IQ); *Walton v. Johnson, 269 F. Supp. 2d 692, 699 n.5 (W.D. Va. 2003)*, judgment vacated by *Walton v. Johnson, 407 F.3d 285 (4th Cir. 2005)* (rejecting a Flynn Effect argument on the basis that the defendant did not explain how the Flynn Effect would show manifestation of intellectual disability before age 18).

During the same time frame, a number of articles in legal journals and law reviews also noted the Flynn Effect's importance. See, e.g., Dora W. Klein, Categorical Exclusions from Capital Punishment, *72 Brook. L. Rev. 1211, 1231 n.89 (2007)*; Richard J. Bonnie & Katherine Gustafson, The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases, *41 U. Rich. L. Rev. 811, 837-38, 841, 844 (2007)*; Ana Romero-Bosch, Lessons in Legal History—Eugenics & Genetics, 11 Mich. St. U. J. Med. & L. 89, 105 n.96 (2007); James R. Flynn, Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, *12 Psychol. Pub. Pol'y & L. 170 (2006)*; J. Philippe Rushton & Arthur R. Jensen, Wanted: More Race Realism, Less Moralistic Fallacy, *11 Psychol. Pub. Pol'y & L. 328, 330* (2005); Justin B. Shane, Case Note, *17 Cap. Def. J. 481 (2005)*; Linda Knauss and Joshua Kutinsky, Into the Briar Patch: Ethical Dilemmas Facing Psychologists following Atkins v. Virginia, *11 Widener L. Rev 121, 127-28 (2004)*; LaJuana Davis, Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyers, *5 J. App. Prac. & Process 297, 309 (2003)*.

[2] Flynn has continually updated and refined his conclusions, particularly about the WAIS-III. Although the data used above were published in 2009, Flynn's earlier hypotheses would have led to an even larger downward adjustment and would have indicated that ***Postelle***'s corrected test result was instead a 73. Id.

[3] The majority correctly notes that, under *Johnson v. Williams,*

deferential standard of review usually required by the Antiterrorism and Effective Death Penalty Act does **[*1233]** not apply in this case. *28 U.S.C. § 2254(d)*; see also *Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002)*; *Grant v. Royal, 886 F.3d 874, 889 (10th Cir. 2018)*; *Grant, 886 F.3d at 961, 967-70* (Moritz, J., dissenting). Instead, "we exercise our independent judgment and review the federal district court's conclusions of law de novo, and its factual findings for clear error." *Grant, 886 F.3d at 889* (quotations omitted). See also *Hooks v. Workman, 689 F.3d 1148, 1163-64 (10th Cir. 2012)*.

The majority opinion holds that the OCCA's failure to address the mitigation-related argument was excusable because ***Postelle***'s counsel's failure to identify and present Flynn Effect evidence did not rise to the level of constitutional inadequacy under Strickland. The majority argues first that the defense counsel relied legitimately **[**65]** on its expert witnesses given that the expert witness defense counsel consulted, Dr. Ruwe, did not raise the Flynn Effect. (Majority Op. 21-23.) This argument misapprehends the role of experts. An expert witness provides testimony that bolsters the litigation strategy created by counsel. This is why counsel often retains multiple consulting experts, some of whom never testify at trial. See Loren Kieve, Retaining an Expert, in Litigators on Experts, 18, 18 (Wendy Gerwick Couture & Allyson W. Haynes eds., 2011). The concept of an independent expert—one who might contradict, undermine, or revise counsel's litigation strategy—is virtually unheard of in American law. Ellen Deason, Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference, *77 Or. L. Rev. 59, 65 (1998)*.

The legal duty to fully investigate and develop a particular aspect of a client's case, particularly in the capital context, is not delegated to an expert merely because one is hired. Investigation of the facts and legal parameters of a case and the expert's field should guide the retention and use of an expert. It was counsel's duty to hire experts who would testify to conclusions that the attorneys felt would advance their client's **[**66]** cause. In ***Postelle***'s case, his counsel hired an expert who testified that he was not intellectually disabled. Given the defendant's background and available mitigation evidence, that is not a reasonable litigation strategy. Counsel cannot now fall back on that expert for their failure to introduce additional evidence that would contradict those conclusions and develop a potentially successful result. An expert's role is not to assume the role of counsel but to assist in the presentation of a case in its best light. Thus, the experts hired in ***Postelle***'s trial cannot serve to inoculate his counsel against claims of constitutional inadequacy.

The Supreme Court's opinion in Rompilla further demonstrates that the retention of an expert witness does not necessarily demonstrate that trial counsel adequately represented the defendant. In that case, trial counsel retained three mental health experts but failed to review records of the defendant's prior convictions, which would have shown that he had exhibited symptoms of serious mental health issues. The Court noted that, although the mental health experts' reports had indicated a "benign conception of Rompilla's upbringing and mental capacity," **[**67]** further research would have led trial counsel to question those reports and build a stronger mitigation case. *Rompilla, 545 U.S. at 391*. Although the majority opinion argues that an expert witness may be presumed to apply their expertise to the case (Majority Op. 25 n.9), Rompilla makes clear that counsel may not assume that an expert will cover the scientific field.

Similarly, in ***Postelle***'s case, expert testimony and the affidavits of family members, which trial counsel gathered, should have prompted his counsel to investigate **[*1234]** cognitive limitations as a mitigating factor. Not unlike the situation that prompted the Supreme Court to overrule the defendant's death sentence in Wiggins, ***Postelle***'s trial counsel had materials that indicated he had serious mental capacity issues. His IQ scores were borderline, his family members reported concerns about his cognitive capacities, and he dropped out of school when he was very young. Dr. Ruwe testified that while he was competent for Atkins purposes, he experienced significant cognitive issues. This range of mitigation leads should have prompted competent counsel to further investigate ***Postelle***'s cognitive capacity. Had counsel exercised due diligence in their research, **[**68]** they would have discovered that the Flynn Effect could explain ***Postelle***'s IQ scores. I stress, the Flynn Effect was well-known in 2008 in the legal field and in the scientific

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568 U.S. 289, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013), when a state court adjudicates some but not all of a petitioner's claims, we presume that the court adjudicated all of the claims and rejected them on the merits. (Majority Op. 19 n.7.) However, the state court's opinion—which emphasized the potential use of the Flynn Effect to show that ***Postelle*** was ineligible for capital punishment under Atkins, without mentioning the evidence's potential second use as mitigation evidence—suggests that the court may have instead misconstrued the mitigation argument as the Atkins argument, rather than merely rejecting it on the merits.

community: a simple search would have discovered it.

The majority opinion further argues that Flynn Effect evidence might not have made much difference if it had been introduced for mitigation purposes. (Majority Op. 25-30.) The majority notes that "this is not a case where counsel simply ignored [ ] evidence or used it against the defendant." (Majority Op. 30.) However, counsel did in fact use artificially high IQ scores in a manner that cut against ***Postelle***. This line of reasoning misapprehends the nature of an IQ score. A score of 75 or lower is low enough to call into serious question an individual's capacity. As a constitutional matter, a score of 75 or below entitles a defendant to an inquiry into whether he is intellectually disabled. *Hall v. Florida, 572 U.S. 701, 134 S. Ct. 1986, 2000, 188 L. Ed. 2d 1007 (2014)*. As a practical matter, such a score can reasonably be expected to suggest to a jury that a defendant lacks the intellectual capacity to bear full culpability for his crimes. On the other hand, a score above 75 suggests the opposite—it suggests, as a legal and practical matter, **[**69]** that the test-taker has below-average but not deficient intellectual function. Thus, an IQ score, by its very nature, either indicates intellectual disability or its absence. In this case, ***Postelle***'s counsel did not merely fail to bring evidence that he had a score below 75; instead, they brought evidence that he had a score above 75.

I repeat: ***Postelle***'s counsel did not merely fail to introduce evidence of ***Postelle***'s lower adjusted scores; they instead introduced scores that were erroneously high. Counsel's failure to introduce the Flynn Effect amounted not to the mere omission of mitigation evidence but rather to the introduction of evidence that went against mitigation. These artificially high IQ scores are in tension with family testimony that ***Postelle*** had been intellectually challenged since he was a small child. They indicated that ***Postelle*** was more intellectually capable than he was, and hence bore more responsibility for his actions than he did.

The majority opinion suggests that trial counsel could have made a strategic choice to omit evidence of the Flynn Effect. (Majority Op. 24-25.) To the contrary, such evidence would have served an important role within the existing mitigation **[**70]** strategy, not detracted from it. Trial counsel emphasized ***Postelle***'s youth, and the extent to which methamphetamine use had impacted his brain development and educational trajectory. A diagnosis of intellectual disability would have fit well into the defense's narrative—and significantly strengthened ***Postelle***'s mitigation case—without contradicting or undermining any of the evidence counsel did present.

The correct IQ scores would have provided valuable context to the jury for the facts of the crimes themselves. ***Postelle*** was only eighteen at the time of the murders. He was urged to participate by his **[*1235]** father and older brother. As the Supreme Court has acknowledged, there is "abundant evidence that [people with intellectual disabilities] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Atkins, 536 U.S. at 318*. In context, such a diagnosis would have been particularly powerful mitigation evidence.

By failing to identify and present a well-documented scientific phenomenon that had well made its way into the legal landscape of capital defense, and by neglecting to locate and present that vital evidence, ***Postelle***'s trial counsel **[**71]** presented a mitigation case that erroneously depicted him as more capable, more cunning, and more culpable than he was. Ignorant of the Flynn Effect and presented with artificially high IQ scores, the jury sentenced ***Postelle*** to death. This profound failure by ***Postelle***'s counsel erroneously deprived ***Postelle*** of his constitutional right to counsel in violation of Strickland.

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FILED
United States Court of Appeals
Tenth Circuit

October 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GILBERT RAY POSTELLE,

Petitioner - Appellant,

v.

MIKE CARPENTER, Interim Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 16-6290

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MORITZ**, 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

ELISABETH A. SHUMAKER, Clerk

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

GILBERT POSTELLE, Petitioner, Vs. TERRY ROYAL, Warden, Oklahoma State Penitentiary Respondent.	)	Case No. CIV-12-1110-F

MEMORANDUM OPINION

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 convictions entered against him in Oklahoma County District Court Case No. CF-05-4759. Tried by a jury in 2008, Petitioner was found guilty of four counts of first degree murder and one count of conspiracy to commit murder in the first degree. Petitioner was sentenced to death on two of the first degree murder convictions, life without parole on the other two, and 10 years in prison for the conspiracy conviction. In support of his death sentences, the jury found two aggravating circumstances, namely, (1) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person, and (2) the murder was especially heinous, atrocious, or cruel. Criminal Appeal Original Record (hereinafter "O.R.") VIII, at 1550-53.

Petitioner has presented five grounds for relief. Respondent has responded to the petition and Petitioner has replied. Docs. 19, 39, and 48. In addition to his petition, Petitioner has filed motions for discovery and an evidentiary hearing. Docs. 20 and 30. 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 convictions and sentences to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). The OCCA affirmed in a published opinion. *Postelle v. Oklahoma*, 267 P.3d 114, 147 (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 October 1, 2012. *Postelle v. Oklahoma*, 133 S. Ct. 282 (2012). Petitioner also filed a post-conviction application, which the OCCA denied in an unpublished opinion. *Postelle v. Oklahoma*, No. PCD-2009-94 (Okla. Crim. App. Feb. 14, 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:

> On Memorial Day, 2005, James Donnie Swindle, Terry Smith, Amy Wright and James Alderson were shot to death outside Swindle's trailer located next to a salvage yard and alignment shop in an industrial area of Del City, Oklahoma. [FN2] Several witnesses in the area heard multiple gunshots and saw a maroon Dodge Caravan leaving the salvage yard shortly after the shots were fired. The owner of a flower shop nearby saw four men in the minivan; she testified that the men had dark hair and that she believed they were either Caucasian or Hispanic. A security camera across the street from the salvage yard captured on videotape the minivan entering and leaving the salvage yard driveway. Neither the license tag nor the occupants

could be seen on the videotape. Sandra Frame, a bartender working at a bar next to the alignment shop, heard gunshots around 6:15 p.m. She heard the minivan accelerating and saw it leaving the crime scene. She could see there were at least two men in the minivan and she observed them laughing. She glimpsed the man in the passenger seat for a few seconds; he was young with dark hair and facial hair, possibly Hispanic. She was later shown a photographic lineup and was "eighty-five percent sure" that David Postelle was the man she saw in the passenger seat of the minivan that day.

> [FN2] James Donnie Swindle was known as and referred to throughout the record as Donnie Swindle.

Oklahoma City Police Officer Rocky Gregory was on traffic duty down the street from the salvage yard when two people approached him and reported hearing gunfire from the vicinity of the salvage yard. Gregory and his partner investigated and found Smith and Swindle, each dead from multiple gunshot wounds. The bodies of the two other victims, Alderson and Wright, were discovered further north after other officers arrived.

Several people who were at the Postelle home on Memorial Day testified at Gilbert Postelle's trial, including Crystal Baumann, [FN3] Arthur Wilder, [FN4] Alvis "Jay" Sanders [FN5] and Randall Byus. [FN6] The Postelle home was routinely used by these four and others as a place to smoke methamphetamine in the "smoke room." Memorial Day 2005 was no different. Crystal Baumann and Arthur Wilder, admitted methamphetamine addicts, testified they had gone to the Postelle home on Memorial Day to get high. On that day, they both said, Gilbert and David Postelle talked about their belief that Donnie Swindle was responsible for the motorcycle accident that left their father, Brad, both physically and mentally impaired. [FN7] Wilder recalled Gilbert and David Postelle naming Swindle as one of those responsible for the accident and saying that those responsible were "going to pay" for the damage done to their father. [FN8] Their conversation subsequently turned to target shooting. Wilder had come equipped with his newly acquired MAK–90 rifle to go target shooting with the Postelle brothers. [FN9] David Postelle had an SKS rifle he used for target practice. Because they needed ammunition, Gilbert Postelle, Baumann and Wilder went to a house in Del City where a

friend gave Gilbert Postelle a speed loader for the MAK–90 rifle and a bag of bullets that could be used in both the MAK–90 and SKS rifles.

> [FN3] Baumann faced charges for several crimes related to this case. She entered into an immunity agreement in August 2005 providing for her full cooperation with the State to prosecute these murders in exchange for immunity from prosecution for any crimes she could be held liable for stemming from this incident, provided there would be no immunity from prosecution for any crime that would make Baumann a principal to the crime of homicide in any degree. (Defendant's Exhibit 35).
>
> [FN4] Wilder was charged with Accessory After the Fact, Unlawful Possession of a Firearm, Concealing Stolen Property and Possession of a Sawed-off Shotgun. Wilder entered a blind plea and was sentenced to 180 years imprisonment subject to one-year judicial review. On judicial review, Wilder agreed to testify and his sentence was vacated by the sentencing judge, who agreed to entertain a new recommendation following the trials related to this matter. Wilder signed an Agreement to Cooperate and Testify Truthfully that provided he would be allowed to withdraw his original plea and re-enter a new plea of nolo contendere to the previous charges, plus some drug charges, and receive five years on each count to be served concurrently and with credit for time served. Wilder testified that the acceptance by the court of this plea bargain would result in his release from prison because of his credit for time served. (Defendant's Exhibit 41).
>
> [FN5] Sanders entered a guilty plea to Accessory After the Fact to the offense of First Degree Murder for his disposal of evidence after the murders. In exchange for his truthful testimony, the State recommended, and Sanders was given, a 12–year split sentence per his plea agreement of six years imprisonment with the remaining six years suspended. According to Sanders, he had discharged his sentence by the time of Postelle's trial. (Defendant's Exhibit 38).

[FN6] Byus was originally charged in the same Information with Postelle with four counts of First Degree Murder and one count of Conspiracy to Commit Murder. He pled guilty to Accessory to a Felony (First Degree Murder). In exchange for his truthful testimony, the State agreed to recommend a split sentence of six years imprisonment with the remaining fourteen years suspended. (Defendant's Exhibit 39).

[FN7] Gilbert Postelle's father, Earl Bradford Postelle, was referred to as "Brad" throughout the record.

[FN8] There was also testimony that David and Gilbert Postelle were angry with Swindle because Swindle allowed someone to steal parts off of one of their cars that was stored on Swindle's property.

[FN9] Wilder's rifle was referred to by several witnesses as an AK–47, but the State's firearm and toolmark examiner identified it as a MAK–90.

Later that day, Gilbert, David and Brad Postelle, along with Wilder, Baumann and Randall Byus left in the Postelles' maroon Dodge Caravan. Baumann denied knowing about a plan to shoot Swindle at the time they left. She and Wilder were dropped off at the home of Wilder's brother. Wilder, however, testified that he had heard the Postelles talking about a plan to go to Swindle's house and shoot him. He was unsure they would go through with it, but their conversation worried Wilder enough to insist the Postelles take him and Baumann home. Hours later David Postelle returned Wilder's MAK–90 to him. Wilder and Baumann took the gun to their storage unit and hid it. Wilder heard about the murders from a friend, put "two-and-two together" and worried that the rifle he had left in the Postelles' minivan had been used in the murders. Wilder's fear that the Postelles had used his rifle to commit murder was confirmed when he saw the Postelles' minivan leaving Swindle's property on a surveillance camera video on the local news. A few days after the murders, Gilbert Postelle told Wilder how he had chased everyone outside after breaching the door of Swindle's trailer and how he then shot them outside. Gilbert Postelle then noticed Baumann standing nearby and ordered her to keep quiet about what she had overheard.

Jay Sanders testified that he had been living at the Postelle home the month before the murders. [FN10] Sanders said that the patriarch, Brad Postelle, talked about having bad dreams about his motorcycle accident and his conviction that Swindle was responsible for that accident. According to Sanders, Gilbert and David Postelle were devastated by the accident and its effect on their father.

> [FN10] Sanders's real name is Alvis Earl Sanders, Jr. but he was known as and referred to as "Jay."

On Memorial Day, Sanders said he was in and out of the smoke room throughout the day, getting high and working on his broken-down van. Sanders was in the smoke room when he learned that the Postelles were going to go target shooting. Sanders said someone put the SKS rifle in the Postelles' minivan, and he helped Brad Postelle into the van. David, Gilbert and Brad Postelle left with Wilder and Byus, but only the Postelles returned. [FN11] Later that night or the next morning, Sanders learned of the murders from the news; all the television sets in the Postelle home were tuned to news stations showing the security videotape of the minivan entering and leaving the murder scene. The Postelles also received several telephone calls from friends telling them about the murders. Sanders recalled that the Postelle home had "a different kind of atmosphere" and that there was a lot of whispering among the Postelle family.

> [FN11] Sanders recalled that Baumann left in another vehicle with a friend.

Sanders testified that a couple of days after the murders, the Postelles were discussing different ideas about what to do with the minivan "since it might be the van on the news." It was decided that Sanders and Daniel Ashcraft would take the minivan to Indiana, set it on fire and ultimately put it in a lake. [FN12] Sanders wiped the van down and drove it to Indiana to the home of a Postelle relative. Sanders also purged the Postelle home of drugs and drug paraphernalia. He buried gun parts and the minivan license plate in the backyard. After Sanders returned from Indiana, he was privy to a conversation in which Gilbert Postelle said, "I shut that bitch up in the corner" and mimed shooting a rifle at someone. Sanders testified that

he, Gilbert, David and some other Postelle family members discussed fabricating a story for the police to shield the Postelles from being implicated in the murders.

> [FN12] Sanders and Ashcraft did not follow through with burning the van and submerging it in a lake. The police later found the van.

The State's firearm and toolmark examiner examined the many casings collected at the murder scene and determined that they were fired from two guns: Wilder's MAK–90 rifle and another rifle, possibly an SKS rifle. David Postelle's SKS rifle was never found. Law enforcement located the Postelles' van in Indiana and searched it. The alterations to the van observed by the investigators were consistent with Sanders's testimony about efforts to disguise it.

Randall Byus was with the Postelles when they shot the victims. According to Byus, he accompanied the Postelles, Wilder and Baumann, believing the Postelles were taking Baumann and Wilder home and then going target shooting. He saw Wilder's MAK–90 and David Postelle's SKS rifle in the Postelles' minivan. Nothing appeared unusual as they dropped off Baumann and Wilder. When David Postelle turned the van around and headed away from their normal place for target shooting, Byus asked where they were going, and was told that they were going to Swindle's house first, for some "shit," which Byus understood meant drugs. Byus first understood the Postelles' murderous plan when Gilbert Postelle asked his father a block from Swindle's trailer what to do if Donnie Swindle's father was there and Brad Postelle said to kill everybody there. Byus voiced disbelief and Brad Postelle responded that Donnie Swindle had tried to kill him. At the trailer, Byus witnessed Gilbert Postelle open the van door and shoot Terry Smith, who was near the minivan, in the face. Gilbert Postelle and his father then shot Donnie Swindle, causing him to fall to the ground. Swindle looked up and asked what was going on and David Postelle took the gun from his father and shot Swindle in the head. Gilbert Postelle turned and ran through the trailer, looking for others and firing his gun. He emerged and chased down James Alderson and shot him as Alderson tried to seek cover under a boat. After David Postelle told his cadre to get in the van, Byus heard two more shots. When Gilbert Postelle got in the van, he

> said, "that bitch almost got away." As they drove away, Brad Postelle hugged his sons and said, "That's my boys." On the way back to the Postelle home, the Postelles warned Byus against telling anyone what they had done.

Postelle, 267 P.3d at 123-26.

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 claim presented. "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—
>
> > (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 claims that his trial and appellate counsel were ineffective. Specifically, Petitioner claims that trial counsel was ineffective for (1) not fully cross-examining and impeaching Randall Byus; (2) failing to raise mental retardation as a defense to the death penalty and as mitigating evidence; (3) failing to present complete and persuasive mitigating evidence; and (4) failing to develop and present evidence about Petitioner's mental illnesses. Petitioner faults appellate counsel for not raising these claims on direct appeal. Petitioner first raised these claims in his post-conviction application. *Postelle*, No. PCD-2009-94, slip op. at 9-21. The OCCA observed that the trial counsel claims were waived, yet still addressed and denied the claims on their merits as well. *Id.* at 9-17. The OCCA denied the appellate counsel claims on the merits. *Id.* at 18-21.

1. *Unexhausted claims.*

Before bringing a habeas action, petitioners 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.*

Petitioner claims that his trial counsel was ineffective for not impeaching Randall Byus with a past burglary charge. But nowhere in his state court proceedings did he raise that challenge. Original Appl. for Post-Conviction Relief at 6-9. Petitioner also never raised an ineffective assistance of appellate counsel claim based on the burglary charge. Because Petitioner did not fairly present either the trial counsel or appellate counsel ineffectiveness claims based on Byus' burglary charge to the state court, those claims are unexhausted.

2. *Procedural bar.*

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.* (quoting *Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir. 1992)). Oklahoma defendants cannot apply for post-conviction relief on issues that could have been raised "previously in a timely original application or in a previously considered application . . . ." OKLA. STAT. tit. 22, § 1089(D)(8). Randall Byus' conviction was part of the public record since before Petitioner's trial. Petitioner could have raised the trial counsel claims either on direct appeal or in his application for post-conviction relief, but failed to do so. Petitioner could have raised the appellate counsel claims in his post-conviction proceeding, but did not. Therefore, Oklahoma law would now bar those claims.

The Petitioner does not mount any serious challenge to the independence or inadequacy of Oklahoma's procedural bar, as he only mentions in passing that he "disputes" that issue. Petition at 13. Petitioner's conclusory assertion fails to convince this Court that Oklahoma's oft-approved procedural bar is inadequate or dependent on federal law as applied to this claim. *See Fairchild v. Trammell*, 784 F.3d 702, 719 (10th Cir. 2015); *Banks v. Workman*, 692 F.3d 1133, 1145-46 (10th Cir. 2012); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012).

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 the burglary charge 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 arisen when it was apparent that appellate counsel did not raise the claim, which would be when counsel filed the appellate brief. Since Petitioner cannot establish cause to excuse the default of the unexhausted ineffective assistance of trial counsel claim, the claim is denied as procedurally barred. As for the appellate ineffectiveness claim, Petitioner does not offer any cause to excuse that default. That claim is also procedurally barred.

Respondent argues that Petitioner's other ineffectiveness claims are barred as well, because the OCCA noted in its order that those claims were waived. The Court agrees with Respondent that it must acknowledge and apply the Oklahoma procedural bar even though the OCCA also reached the merits of Petitioner's claims. *See Thacker*, 678 F.3d at 834 n.5. But the Court may "bypass the procedural issues and reject a habeas claim on the merits" when the "questions of

procedural bar are problematic." *Cannon v. Mullin*, 383 F.3d 1152, 1159 (10th Cir. 2004). The Court faces such a situation here, as the parties' briefs present an adequacy problem related to the Oklahoma procedural bar.

The Tenth Circuit has recognized that a lack of separate trial and appellate counsel undermines the adequacy of a state procedural bar. *See English v. Cody*, 146 F.3d 1257, 1263 (10th Cir. 1998). And there are situations where two different attorneys working in the same office can be considered non-separate. *Cannon*, 383 F.3d at 1173-74. Respondents have asserted that the OCCA's procedural bar applied on post-conviction was adequate, because the Petitioner had different trial and appellate attorneys. Here, however, Petitioner argues that the attorneys were not separate, because they worked in the same office. Rather than untangling the various factors and determining whether counsel was, or was not, separate, the Court exercises its discretion to bypass the procedural morass and dispose of the ineffectiveness claims on their merits.

3. *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.*

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.

4. *Analysis.*

The OCCA found that neither trial counsel nor appellate counsel rendered deficient performance. This decision was not contrary to clearly established federal law, nor is it an unreasonable application thereof.

a. *Failure to properly impeach Randall Byus.*

Petitioner complains first about trial counsel's handling of Randall Byus, who provided the only eyewitness account of the murders. Petitioner argues that

counsel did not properly impeach Byus and did not use expert testimony to emphasize the contradictions between Byus' testimony and the physical evidence. Petitioner specifically notes inconsistencies regarding DNA evidence, the number of shots fired from the SKS rifle, and the size of the magazine in the SKS rifle.

"Counsel's decisions regarding how best to cross-examine witnesses presumptively arise from sound trial strategy." *Richie v. Mullin*, 417 F.3d 1117, 1124 (10th Cir. 2005). Courts must analyze the attorney's performance without the distorting effects of hindsight. *Strickland*, 466 U.S. at 689.

Petitioner points out that while Byus only admitted to loading ammunition into the SKS rifle, the state's DNA expert could not exclude Byus as a possible match to DNA discovered on a shell casing ejected from the MAK-90 rifle. Petition at 15. Petitioner argues that trial counsel should have showcased the contradiction between Byus' testimony and the physical evidence by admitting ballistics and forensics reports or calling an expert witness. *Id.* at 17-18.

The OCCA rejected this claim, finding that trial counsel attacked Byus' credibility on cross examination, and highlighted the inconsistencies between Byus' testimony and the physical evidence. *Postelle*, No. PCD-2009-94 slip op. at 10. The OCCA also noted that counsel "spent much of closing argument" exposing the contradictions. *Id.* The OCCA's resolution of that claim is not unreasonable.

The State's forensics investigator testified about her DNA testing, and told the jury that she was able to develop a partial DNA profile from a shell casing labeled 24A. Trial Tr. vol. VII, 1871-72. The investigator testified that Byus could not be excluded as a match for that DNA profile. *Id.* The investigator also gave the jury the statistical probability that the DNA came from a random individual as opposed to Byus, a probability that was quite low. *Id.* at 1872. Petitioner's counsel confirmed that testimony on cross-examination and

emphasized that while Byus was a possible match to the DNA profile, Petitioner was not. *Id.* at 1880. The State's firearm expert, using various charts and diagrams, testified that casing 24A was ejected from the MAK-90.[1] In closing, trial counsel pointed out the discrepancy, reminding the jury that although Byus said he did not know who loaded the MAK-90 magazines, the DNA on a shell casing ejected from the MAK-90 very likely came from Byus. Trial Tr. vol. X, 2530, 2541.

Trial counsel did not need further expert testimony or reports to punctuate the inconsistency between Byus' testimony and the DNA evidence. Injecting cumulative information on that issue would have only wasted time and perhaps confused the jury. Based on the record, trial counsel's decision appears to have been sound trial strategy, and this Court cannot say that counsel's performance was deficient. And even if it were deficient, Petitioner did not suffer any prejudice. The jury heard the evidence and the argument that Byus' testimony clashed with the physical evidence. There is no reasonable probability that a juror would have deemed Petitioner innocent if the argument had been presented in a different way.

Petitioner also argues that trial counsel failed to explore Byus' statement that he saw David and Brad Postelle shoot five to six rounds total from the SKS. This testimony contradicted evidence at the crime scene that revealed at least ten casings that were ejected from a different rifle than the MAK-90, presumably the SKS.[2] Petition at 16-17. Trial counsel was not unreasonable for not cross-examining Byus on that issue. Byus admitted on direct examination that he could not say how many shots were fired at a given time, because the event happed so

[1] The record does not contain explicit testimony that casing 24A was ejected from the MAK-90, but the exhibits and testimony make clear, and the parties agree, that the testimony supports the fact that casing 24A was ejected from the MAK-90.

[2] Ballistics experts were not able to compare the casings to the SKS used in the murders, as that weapon was never recovered.

quickly. Trial Tr. vol. IX, 2178. Any cross-examination on the number of shots would likely only elicit another admission that he could not remember the number. Trial counsel could rightly assume that impeaching a witness on exactly how many shots originated from one of two weapons would be an exercise in futility, especially when Byus' count erred by only four or five shots.

In the context of semi-automatic weapons being fired in rapid succession, the jury could have reasonably credited Byus' testimony as surprisingly accurate, even considering the discrepancy. The Court cannot fault trial counsel for not pursuing that line of questioning. Foregoing that line of questioning also did not cause prejudice. There is no reasonable probability that exposing the slight inconsistency in front of the jury would persuade a juror reach a different verdict.

Petitioner finally claims that trial counsel should have impeached Byus based on his statement that the SKS rifle contained a five-round magazine.[3] Petitioner argues that at least ten casings related to the SKS were recovered at the scene, and that a post-conviction firearms expert was unaware of any SKS magazine that held less than ten rounds. Petition at 17. Counsel's decision to not impeach Byus on that point was not unreasonable. A police investigator already testified that the standard SKS magazine held ten rounds. Trial Tr. vol. V, 1280. Any expert testimony would have simply parroted the investigator's testimony, meaning that the testimony would yield little or no net benefit in comparison with the multiple other avenues to impeach Byus. And trial counsel did impeach Byus based on other inconsistencies between his testimony and other witness testimony, as well as on the fact that Byus testified in order to avoid the death penalty.

[3] Petitioner refers to a "clip" in his briefing. This is likely due to confusion in the record. An investigator for the State testified that a "stripper clip" is used to quickly load rounds into the SKS magazine. Trial Tr. vol. V, 1280. During his testimony, Byus used the term "clip" at times when he likely meant "magazine." Trial Tr. vol. VIII, 2037, vol. IX, 2152. The difference in terminology is not dispositive on this issue, and the Court will refer to a "magazine" instead of a "clip" for accuracy's sake.

Counsel's decision not to press Byus about the size of the magazine was not unreasonable, nor did it amount to deficient performance.

Also, there is no reasonable possibility that extensive impeachment on the magazine size would have altered the verdict. The jury heard from investigators that ten casings attributed to the SKS were found at the crime scene. Trial Tr. vol. VII, 1827-29. Yet Byus did not testify to seeing or hearing anyone reload the SKS. The jury also heard from an investigator that an SKS magazine would hold ten rounds. Trial Tr. vol. V, 1280. The jury heard the information it needed to conclude that Byus' testimony again did not mesh with the physical evidence; therefore there is no reasonable probability that a juror would be swayed by another expert testifying to the standard SKS magazine size.

Having examined the record, Petitioner's complaints regarding counsel's handling of Byus amount to hindsight-based criticisms against which *Strickland* warns. The OCCA's decision on this issue was reasonable, therefore this Court will not disturb that ruling.

b. *Mental retardation.*

Petitioner raises two distinct challenges to how trial counsel handled evidence of mental retardation. First, Petitioner claims that counsel should have argued mental retardation as a complete defense to the death sentence under *Atkins v. Virginia*. Second, Petitioner says that counsel should have used evidence of mental retardation as mitigating evidence. The OCCA denied this claim, stating that counsel was not ineffective because Oklahoma law excluded Petitioner from being considered mentally retarded. *Postelle*, No. PCD-2009-94, slip op. at 12-13. The OCCA addressed the Flynn Effect, and reiterated that it was irrelevant in the mental retardation determination in Oklahoma. *Id.* at 12. That decision was not unreasonable in light of clearly established federal law.

At trial, Petitioner's expert Dr. Ruwe testified regarding Petitioner's IQ tests. Petitioner scored a 76 and a 79 on the two separate tests. Trial Tr. vol. XI, 2860-61, 2876. In Oklahoma, a score of 70 or below is necessary to support a mental retardation defense. OKLA. STAT. tit. 21, § 701.10b(C). That score takes into account the standard error measurement. *Id.* However, no defendant that receives a score of 76 or above can be considered mentally retarded, and is not entitled to proceedings to determine whether he is mentally retarded. *Id.* Although Petitioner's scores are outside the range for mental retardation under Oklahoma law, he nevertheless claims that his score should be adjusted downward based on the Flynn Effect.

The Flynn Effect is "a phenomenon named for James R. Flynn, who discovered that the population's mean IQ score rises over time . . . ." *Hooks v. Workman*, 689 F.3d 1148, 1169 (10th Cir. 2012). The premise is that current IQ scores are inflated, and therefore must be renormed to take the rising IQ levels into account. *Id.* Petitioner claims that trial counsel should have used the Flynn Effect to establish that Petitioner is mentally retarded, then presented that information as both an absolute defense to his death sentence and as mitigating evidence.

Counsel was not ineffective for not advancing that argument. There is no basis for an argument that Petitioner is ineligible for the death penalty because he is mentally retarded. Petitioner's expert witness specifically testified that he was not mentally retarded. Trial Tr. vol. XI, 2862-63. Petitioner did not present a solitary piece of evidence in his post-conviction proceeding or in this proceeding that contradicts that expert opinion. Petitioner only offers his own calculations based on the Flynn Effect. While Petitioner criticizes trial counsel for not investigating further or getting a second opinion, Petitioner fails to show that any expert would actually agree with his argument. Also, the OCCA has rejected the

Flynn Effect as not relevant to the mental retardation determination. *Smith v. Oklahoma*, 245 P.3d 1233, 1237 n.6 (Okla. Crim. App. 2010). According to the Tenth Circuit, that decision is "not contrary to or an unreasonable application of clearly established federal law." *Smith v. Duckworth*, ___ F.3d ___, 2016 WL 3163056 at *8 (10th Cir. June 6, 2016). The established state and federal precedents show that Petitioner's Flynn Effect argument is not meritorious under Oklahoma law, nor is it meritorious in habeas proceedings. Counsel's performance was not deficient for not advancing an argument that was sure to fail.

The issue of whether counsel should have raised mental retardation in mitigation is more complicated. Evidence of mental retardation can be mitigating. *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). And a failure to present mitigating evidence can rise to ineffectiveness of counsel. *See Porter v. McCollum*, 558 U.S. 30, 39-41 (2009). But counsel faced special circumstances here.

First, as noted above, Petitioner's own expert witness testified that he was not mentally retarded. Counsel would have had to impeach their own expert, Dr. Ruwe, in order to argue that Petitioner was mentally retarded. With the amount of helpful mitigating testimony which Dr. Ruwe gave, counsel would likely want to avoid damaging his credibility or expertise.

Second, it is doubtful that the trial court would have even allowed counsel to tell the jury that Petitioner was mentally retarded, even under his novel scientific theory, when Oklahoma law specifically states Petitioner *cannot* be considered mentally retarded because he scored 76 and 79 on his IQ tests. *See* OKLA. STAT.

tit. § 701.10b(C).[4] Oklahoma's evidence rules apply in full force at the penalty stage, and it is unlikely that the trial court would admit evidence that the OCCA has deemed "not a relevant consideration in the mental retardation determination for capital defendants." *Smith*, 245 P.3d at 1237 n.6. Further, the Flynn Effect itself is not a widely accepted theory, at least not in the capital murder context. *See Hooks*, 689 F.3d at 1170 (recognizing lack of scientific consensus on the Flynn Effect's validity). *See also Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 637-38 (11th Cir. 2016) (materials do not show a general consensus in the medical community about the Flynn Effect, and do not give any guidance as to how to apply it); *Pruitt v. Neal*, 788 F.3d 248, 267 n.2 (7th Cir. 2015) ("application of the Flynn Effect was contentious in the professional community"); *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015) ("it is not common practice to adjust IQ scores by a specific amount to account for" the Flynn Effect); *Maldonado v. Thaler*, 625 F.3d 229, 238 (5th Cir. 2010) (the Fifth Circuit has not recognized the Flynn Effect as scientifically valid). Some jurisdictions do consider and apply the Flynn Effect, but considering Oklahoma's past treatment of the theory and the federal circuit courts' critical opinion of the

[4] The Court is also unsure whether Petitioner could have presented the evidence as a procedural matter. When a capital defendant seeks to raise a mental retardation defense in Oklahoma, the question can either be resolved by the trial court in a pretrial evidentiary hearing, or by the jury, during the sentencing stage of the defendant's trial. OKLA. STAT. tit. 21, § 701.10b(E)-(F). If the defendant opts for the jury to decide the issue, the trial court submits a special issue to the jury as to whether the defendant is mentally retarded. *Id.* § 701.10b(F) If the jury either finds that the defendant is not mentally retarded, or is unable to reach a unanimous decision on that issue, the jury can still consider the evidence presented on the mental retardation issue as a mitigating factor. OKLA. STAT. tit. 21, § 701.10b(G). But those procedures only apply to defendants who score below a 76 on their IQ test. *Id.* § 701.10b(C). If a defendant scores 76 or above, he is not entitled to an evidentiary hearing or a decision by the jury. *Id.* It is unclear whether the defendant can even claim mental retardation in trial if his score is above 76. That is not to say that this statute precludes that type of mitigating evidence, but rather to show that trial counsel was not unreasonable for not presenting evidence that would likely have been disallowed.

Flynn Effect, there is little reason to think that Flynn Effect evidence would have even been admissible at Petitioner's trial.

Third, a discussion of the Flynn Effect could have confused the jury. Counsel had a significant amount of family history, mental issues, and other mitigating evidence to present. Explaining to the jury that the Petitioner was mentally retarded, even though the law and his own expert said he was not, could have created a risk of significant confusion and might have obfuscated the other mitigating evidence. Finally, the Supreme Court acknowledged in *Atkins v. Virginia* that mental retardation can carry both positive and negative elements. 536 U.S. 304, 321 (2002). Mental retardation can "be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id*. It would certainly be reasonable for counsel to avoid the pitfalls and obstacles that awaited any attempt to use mental retardation as a mitigating factor.

Even if counsel did not perform reasonably, there is no reasonable probability that a juror would be swayed from the death sentence by the evidence of the Flynn Effect, and therefore no prejudice. The jury heard testimony that Petitioner's IQ level sat in the borderline range for mental retardation. Dr. Ruwe explained that Petitioner functioned on a level lower that 95% of the population. Trial Tr. vol. XI, 2862. The mitigation case included evidence of Petitioner's adolescent methamphetamine abuse and the negative effects flowing from that abuse. It is unlikely that additional testimony that Petitioner's actual IQ was a few points lower--based on a sharply contested scientific theory--would persuade a juror to vote against the death penalty. The OCCA's decision is not unreasonable in light of clearly established federal law, therefore relief is denied on that issue.

c. *Failure to present additional testimony from friends and family.*

Petitioner also claims that trial counsel failed to investigate and present other mitigating evidence. Petitioner faults the manner in which counsel presented mitigating evidence about his background, arguing that the information was incomplete and "presented in a disjointed manner." Petition at 27. Petitioner alleges that counsel also should have presented more testimony, like the affidavits attached to his state post-conviction application. *Id.* at 28-29.

Petitioner first takes issue with trial counsel's decision to present Destainy Postelle's testimony through a transcript of her testimony from David Postelle's trial. Destainy is Petitioner's sister, and was incarcerated in a juvenile facility during Petitioner's trial. Trial Tr. vol. XI, 2806. Trial counsel did obtain video testimony from Destainy, but the quality was so poor that counsel could not hear what she was saying. *Id.* at 2807. Petitioner argues that while Destainy gave emotional and persuasive testimony during David Postelle's trial, his attorneys simply presented the same testimony through a transcript at Petitioner's trial, devoid of the same emotional impact. The OCCA denied relief on this issue, finding that the record showed that presenting live testimony from those witnesses was not an option, and "beyond the control of trial counsel." *Postelle*, No. PCD-2009-94 at 14.

The OCCA's ruling was not unreasonable. Both parties stipulated that Destainy could not testify because she was incarcerated at a juvenile facility in Arizona. Petitioner has not argued that trial counsel could or should have attempted to bring her to Oklahoma. And while counsel did obtain a video of her testimony, they could not use it due to the poor quality. Faced with this difficult situation, trial counsel presented the transcript. To be sure, that option is not ideal,

but it was the best available to counsel. Counsel is not ineffective or unreasonable when they must present weak evidence through no fault of their own. Attorneys are required to act reasonably, not miraculously.

The same is true with the testimony of Gilbert Eugene Postelle Jr., Petitioner's uncle. Counsel also presented Gilbert Postelle's testimony through transcript, because he was unavailable due to medical reasons. *Id.* at 2694-95. And although counsel did not seek to obtain video testimony from Gilbert Postelle, the Court observes an obvious strategic reason: Gilbert Postelle's mental capabilities threatened his usefulness as a witness. Gilbert Postelle details how he had visions of spirit guides that drove him to attempt suicide in 2008, the year of Petitioner's trial. Original Appl. for Post-Conviction Relief, Ex. 14. Counsel investigated the possibility of Gilbert Postelle testifying, and learned that his medical status precluded his travel. Counsel likely learned the extent of those medical issues, and decided to use the transcripts of Gilbert Postelle's testimony in David Postelle's trial. That decision was reasonable given the circumstances, and thus the OCCA's resolution of that issue was also reasonable.

Petitioner refers to several affidavits containing various sorts of information, and argues that counsel should have called those witnesses and presented that testimony.[5] The affidavits generally show that Petitioner struggled in school, was a slow learner, became easily frustrated, was accident prone, and had once

[5] Petitioner presented these affidavits in his state post-conviction proceeding, but did not actually explain how their contents would affect his mitigation case. Original Appl. for Post-Conviction Relief at 13. The OCCA interpreted the affidavits as evidence of Petitioner's mental illnesses. *Postelle*, No. PCD-2009-94, slip op. at 14-15. In this habeas proceeding, Petitioner seems to raise the claim separate and apart from his mental health claims. Although it is unclear whether the OCCA addressed this specific claim on the merits, the Court finds that it would fail regardless of whether the standard of review were *de novo* or the deferential AEDPA standard.

encouraged a suicidal friend. Many of the affidavits discussed his family's history of mental illness, focusing especially on his mother's severe issues.

Aside from the history of mental illness, this information has relatively slight potential for beneficial impact.[6] While mitigating, the information pales in comparison to the evidence that was presented. Counsel introduced compelling evidence of a young boy who was abused by his mother and raised by his grandparents. Trial Tr. vol. XI, 2742, 2744-47. Witnesses testified that Petitioner abused methamphetamine beginning at age 12 or 13, and even helped his father cook methamphetamine in the backyard. *Id.* at 2716, 2698, 2751-54. Witnesses discussed the tragic circumstances of Petitioner's grandfather's stroke and his father's debilitating motorcycle accident. *Id.* at 2700-01, 2736-37, 2748-50, 2785-86.

Counsel painted a vivid picture of the complete and utter dysfunction surrounding Petitioner. Counsel was not unreasonable for not calling other witnesses that would have provided only marginal benefit to the mitigation case. The mental illness history of the Postelle family would be relevant, but both

[6] Although this point is not determinative, it is worth noting that there is good reason for caution when a habeas petitioner seeks relief on the basis of trial counsel's failure to call one or more witnesses to give testimony that the petitioner asserts would have been favorable. When a petitioner makes that kind of an argument, he can tout the beneficial import of the testimony of the witnesses who were not called while disregarding that fact that *every* decision by trial counsel as to whether to call, or not call, a given witness is, of necessity, a cost/benefit analysis (as to those aspects of the prospective witness's testimony that are knowable) and a risk analysis (as to those aspects that are not known or knowable). In this case, Petitioner complains of his trial counsel's failure to call several "family members and lifelong friends." Petition, at 28. Family members and associates of capital murder defendants are, almost by definition, risky witnesses. The marginal benefit to be derived from testimony elicited by defense counsel might be obliterated, and then some, in the blink of an eye on cross examination by a skilled and well-prepared prosecutor who knows "the rest of the story." Especially in the emotion-laden setting of the penalty phase of a capital murder trial, defense counsel must be as wary of calling one too many witnesses as he is of asking one too many questions. In the habeas context, caution is especially appropriate because the petitioner's affidavits from uncalled witnesses will quite understandably show the upside but not the downside.

Petitioner's aunt and sister already testified that Petitioner's mother suffered from mental illness to such an extent that she was committed to a mental institution. Ct.'s Ex. 13 at 2762; Trial Tr. vol. XI, 2833. While the affidavits may give more detail about Petitioner's mother's issues, the Court cannot say that counsel was unreasonable for not presenting that information, especially since Petitioner left his mother's care at a very young age. Additional lay testimony about the family's history was unnecessary. Counsel's performance was not deficient.

Even if counsel's performance was deficient regarding the additional mitigating evidence, the Court can find no prejudice. As noted above, counsel presented a complete and persuasive mitigation case, detailing Petitioner's troubled upbringing in a shameful environment. It is unlikely that a little more testimony about his struggles with school, or one more account of his mother's mental illness would tip the scale in his favor.[7] The OCCA found that counsel's performance was not deficient, and that Petitioner did not suffer any prejudice from the alleged deficient performance. Applying the high deference under both *Strickland* and AEDPA, this Court concludes that the OCCA's decision was reasonable.

d. *Failure to present mental health evidence.*

Petitioner's final trial counsel claim involves counsel's decision to focus on Petitioner's brain damage, rather than on potential mental illnesses. Dr. Ruwe testified that Petitioner suffered from neurocognitive and psychological problems. Trial Tr. vol. XI, 2849. Petitioner claims that trial counsel focused primarily on the neurocognitive issues, particularly the organic brain damage related to

[7] Petitioner argues that he can show prejudice because David Postelle only received a life sentence, not the death penalty. This argument ignores the fact that Randall Byus did not testify during David's trial, therefore his jury had no eyewitness testimony to identify the most culpable party. In Petitioner's case, the jury not only heard Byus' testimony, but heard that Petitioner was the main shooter, solely responsible for killing three of the four victims.

methamphetamine use. Petition at 31. Petitioner argues that Dr. Ruwe also diagnosed him with Major Depressive Disorder, Recurrent, Severe, with Psychotic Features, and found that Petitioner exhibited symptoms of Posttraumatic Stress Disorder and possibly Schizoaffective Disorder or Schizophrenia, but that counsel did not focus on those issues at trial. *Id.*

Doubtless, evidence of mental illnesses is mitigating. *Hooks*, 689 F.3d at 1204-05. But the Tenth Circuit has specifically identified "organic brain damage" as having a "powerful mitigating effect." *Id.* at 1205. To be sure, there is some overlap of the two, as organic brain damage is often the root cause of mental illnesses. *See Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008).

Counsel had evidence from Dr. Ruwe that Petitioner suffered from both organic brain damage and mental illnesses. The decision to focus Dr. Ruwe on the organic brain damage as opposed to the mental illnesses was an informed choice, based on Dr. Ruwe's findings. At trial, Dr. Ruwe went into great detail regarding the effects of methamphetamine on Petitioner, and emphasized the problems the abuse would cause since Petitioner was very young. Trial Tr. vol. XI, 2854-59. Dr. Ruwe's testimony gave the jury substantial information on Petitioner's cognitive short-comings and how those might affect his behavior. Dr. Ruwe testified that his testing did not reveal any thought disorders, hallucinations, or delusions. *Id.* at 2884.

The OCCA found that counsel's decision to focus on organic brain damage as opposed to mental illness was reasonable.[8] This Court cannot say that the OCCA's ruling is itself unreasonable. The fact that different trial lawyers might

[8] There is little doubt, given recent trends in capital habeas litigation (at least in the Tenth Circuit), that any failure to defend on the basis of organic brain damage would result in a vigorous complaint in post-conviction proceedings. *See, generally,* the discussion in *Hooks*, 689 F.3d at 1205.

have pursued differing strategies does not make the decisions made by Petitioner's trial counsel constitutionally deficient.

Moreover, even if the performance were deficient, the OCCA reasonably concluded that the Petitioner successfully made the point that his judgment was impaired, therefore he suffered no prejudice. Dr. Ruwe's testimony explained in great detail the neurocognitive effects of drug abuse on Petitioner's brain, and discussed the depression, borderline IQ, and other psychological problems. This Court cannot say that the OCCA's determination of no prejudice is unreasonable. Relief is denied on this issue.

e. *Ineffectiveness of appellate counsel.*

Petitioner finally claims that his appellate counsel was ineffective for not raising his trial counsel claims or his mental retardation claim on direct appeal. Petition at 33-36. As discussed above, Petitioner's trial counsel claims lack merit. Therefore, appellate counsel's failure to raise those meritless claims cannot amount to deficient performance. Also, Petitioner does not show any prejudice. Appellate counsel can only be ineffective if, 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). The OCCA rejected Petitioner's trial counsel and mental retardation claims as meritless. It is unlikely that Petitioner would have prevailed if appellate counsel had raised those exact claims on direct appeal. In any event, the OCCA's rejection of Petitioner's appellate counsel claims was reasonable in the light of clearly existing state law. Therefore, relief is denied as to that issue.

5. *Conclusion.*

The OCCA's decisions on Petitioner's ineffectiveness claims are reasonable in the light of clearly established federal law. As for Petitioner's unexhausted claim, it would be procedurally barred should Petitioner raise it in state court at this time. Therefore, Petitioner's Ground One is denied in all respects.

B. Ground Two: Right to an Impartial Jury.

Petitioner claims that his *voir dire* process violated his right to an impartial jury. Petitioner notes that the trial court did not allow juror questionnaires or individual *voir dire*, and dismissed eight prospective jurors on its own initiative without allowing the defense to question them. Petition at 38-39. The OCCA denied these claims on direct appeal.[9] *Postelle*, 267 P.3d at 133-36.

1. *Clearly established law.*

Criminal defendants have "the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment . . . ." *Uttecht v. Brown*, 551 U.S. 1, 9 (2007). That right "prohibits the exclusion of venire members 'simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" *Wilson*, 536 F.3d at 1097 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)). Instead, a juror is only removable for cause when his views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

[9] Petitioner claims that the OCCA did not rely on federal law to decide these claims, and argues that the Court's review should be *de novo*. The OCCA very clearly referred to the standard in *Wainwright v. Witt*, 469 U.S. 412 (1985), in determining this issue, therefore the OCCA's decision is entitled to AEDPA deference. *Postelle*, 267 P.3d at 135.

The guarantee of an impartial jury requires "an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). There is no catechism for *voir dire*, and the method is generally left to the trial court's sound discretion. *Id.* This gives the trial court "great flexibility in conducting *voir dire*." *Wilson*, 536 F.3d at 1097. But that discretion is still subject to the essential demand of fairness. *Morgan*, 504 U.S. at 730. Therefore, the Court does not ask whether further questioning or different methods would have been helpful, but whether the trial court's handling of *voir dire* "render[ed] the [Petitioner's] trial fundamentally unfair." *Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991).

2. *Analysis.*

It is unclear whether Petitioner raises claims based on the trial court's decision not to conduct individual *voir dire* or use juror questionnaires. The structure of the petition seems to only use those issues as background context. The Court addresses those issues nonetheless.

a. *Individual voir dire.*

"There is no absolute right to individual *voir dire* in capital cases…." *Wilson*, 536 F.3d at 1098. Conducting *voir dire* with the entire venire present can quite easily comport with the requirements of due process. *Id.* Still, it is possible that such a method could be so egregious in certain circumstances that it would deprive a defendant of a fair trial. *Id.* These egregious situations could arise where jurors gave their opinions about guilt or innocence based on pre-trial publicity, or where jurors expressed knowledge that the defendant was arrested for some other heinous crime. *Id.* Those types of statements, made in the presence of other jurors, could taint the entire venire and render the trial fundamentally unfair. *Id.*

Petitioner does not present that type of egregious situation here. Some prospective jurors indicated that they or someone they knew had made up their minds as to guilt or innocence, but none of them gave any indication as to which verdict they favored. And while other jurors discussed their exposure to media coverage of the murders, the comments were non-specific and general. Nothing in the record indicates the kind of egregious situation where general *voir dire* tainted the entire venire or that jurors failed to answer questions fully or honestly due to *voir dire* method. The OCCA's rejection of that claim was not unreasonable.

b. *Jury questionnaires*.

The decision to use – or not use – jury questionnaires is another issue committed to the trial court's discretion. Petitioner does not make any attempt show that the *voir dire* method violated due process. As the OCCA noted, Petitioner does not identify any question that he would have asked in a questionnaire that was not or could not have been asked during *voir dire*. Petitioner does not present any argument to this Court that would indicate that the lack of a questionnaire violated his right to an impartial jury. The OCCA's decision on that point was therefore reasonable.

c. *Removal of jurors*.

Petitioner focuses primarily on the trial court's dismissal of eight prospective jurors. After asking these eight prospective jurors questions regarding their view of the death penalty and their ability to consider the possible penalties, the trial court dismissed them without allowing questioning by either party. Petitioner claims *voir dire* was inadequate because his attorneys were not permitted to question the prospective jurors prior to their dismissal. Petition at 39.

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 also evaluates prospective jurors' demeanor and credibility, which are important considerations apart from the cold record of questions and answers. *See Uttecht*, 551 U.S. at 7-8. When faced with ambiguity in a prospective juror's statements, the trial court is free to resolve that 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).

The pertinent question is whether the *voir dire* was adequate to determine whether a prospective juror was qualified to serve on the panel. *Moore v. Gibson*, 195 F.3d 1152, 1170 (10th Cir. 1999). Questioning by the parties is not constitutionally required, and there is no constitutional right to rehabilitate a prospective juror who appears unqualified. *Id.*; *Brown v. Sirmons*, 515 F.3d 1072, 1081 (10th Cir. 2008). While such questioning can sometimes be helpful and in some cases even vital, that is not the situation here.

In this case, the trial court questioned each prospective juror about his or her views on the death penalty and his or her ability to consider the punishments available. The first dismissed prospective juror, Mr. Goldsmith, responded "No" when the trial court asked if he could consider all three of the legal punishments. Trial Tr. vol. I, 37. When the trial court asked if his reservations about the death penalty were so strong that he would not consider it, regardless of the law, facts,

and circumstances of the case, Mr. Goldsmith said, "I would have to say yes." *Id.* 38. The trial court then dismissed Mr. Goldsmith.[10]

Later, the trial court questioned Mr. Murray, who initially admitted that he "could not guarantee [the court] that [he] could impose the death penalty." *Id.* at 45. The trial court then asked

> . . . if you find the defendant guilty of murder in the first degree, can you consider all three of the legal punishments, death, imprisonment for life without parole, or imprisonment for life and weigh the aggravating circumstances against the mitigating circumstances to impose the punishment that you feel is warranted by the law and evidence?

Id. at 45-46. Mr. Murray responded "No." The court then asked

> . . . if you find beyond a reasonable doubt that the defendant was guilty of murder in the first degree and, if under the evidence, facts and circumstances of the case would permit to [sic] you consider an imposition of death, are your reservations about the penalty of death so strong that regardless of the law, the facts and the circumstances of the case, you would not consider the imposition of the penalty of death?

Id. at 46. Mr. Murray said, "I could not consider the imposition of death." *Id.* Upon further questioning from the trial court, Mr. Murray indicated that he could impose death if he were an eyewitness, but not in any other situation. *Id.* The trial court explained that the law would never require a death penalty, and told Mr. Murray that he would have to be able to consider all three punishments, even after he found the Petitioner guilty. *Id.* at 47-49. Mr. Murray finally said that he could not consider all three punishments, and the trial court dismissed him. *Id.*

[10] Petitioner complained on direct appeal, as he complains here, that the trial court did not use the Oklahoma Uniform Jury Instruction questions when questioning Mr. Goldsmith. This issue has no constitutional import. The questions the trial court asked Mr. Goldsmith were not confusing or misleading, and were adequately designed to elicit a reliable response. Also, the trial court noted that Mr. Goldsmith was "emphatic" about his view. Trial Tr. vol. I, 39.

The next six dismissed prospective jurors simply answered "no" when asked if they could consider all three punishments, and "yes" when asked if their views on the death penalty would preclude them from even considering that punishment. *Id.* at 55, 64, 70, 90-91, 105-06, 121. The record does not reveal any equivocation on the part of those eight prospective jurors that might have warranted further inquiry. The questions went to the heart of the *Witt* standard by asking whether the prospective jurors' views would prevent or substantially impair their performance as jurors. The clear statements that the eight prospective jurors would not consider one of the punishments certainly established cause for dismissal. The trial court also observed and presumably weighed the demeanor of the prospective jurors. Petitioner does not present any evidence or argument to overcome the deference due the trial court's factual determinations regarding prospective jurors.[11] The OCCA's decision to reject this claim was not contrary to or an unreasonable application of clearly established law. Therefore, relief is denied on Ground Two.

[11] The undersigned, having (as presiding judge) empaneled a jury in a capital murder case, cannot but point out one of the awkward anomalies of jury selection in capital cases. In follow up questioning after a prospective juror expresses a disinclination even to consider the death penalty, defense counsel will almost plead with the prospective juror to consider voting for death (or at least to profess willingness to do so). In turn, the prosecutor will ask questions designed to shore up the candidate's unalterable moral opposition to the ultimate penalty. (And these roles are reversed when the candidate says, as some do, that he will not consider any penalty other than death if murder is proven.) Petitioner has cited no constitutional authority, and the Court has found none, for the proposition that a trial judge, having heard a definitive statement of unwillingness to consider one of the permissible penalties, must subject the prospective juror to a tug of war between the prosecution and the defense. Unless the trial judge, with the benefit of first-hand observation of the prospective juror, has reason to believe that a definitive statement of position can be softened up by partisan voir dire (with the result that one party or the other has to expend a peremptory challenge that could otherwise be profitably used to get rid of some other candidate), exposing the prospective juror to verbal pushing and shoving by counsel will, in almost every instance, amount to a waste of time and an unseemly imposition on the prospective juror.

C. Ground Three: Exclusion of David Postelle's Sentence.

David Postelle was tried prior to Petitioner for the same murders, and received four consecutive life sentences without possibility of parole. Petition at 47. Petitioner complains that the trial court violated his right to present mitigating evidence by excluding evidence of David Postelle's life sentence. *Id.* at 47-48. On direct appeal, the OCCA denied this claim, holding that while the trial court was not precluded from admitting the evidence, the trial court did not err by excluding it. *Postelle*, 267 P.3d at 140-41.

1. *Clearly established law.*

Courts must allow sentencers to consider "*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 (1978) (emphasis in original). The Supreme Court has observed that the "low threshold for relevance" asks whether the evidence "tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). Yet the Supreme Court has also noted that state courts still retain their traditional authority to "exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12.

2. *Analysis.*

Petitioner argues that David Postelle's sentence is relevant mitigating evidence under clearly established federal law. Petitioner relies heavily on *Parker v. Dugger*, 498 U.S. 308 (1991). In *Parker*, the Supreme Court found that although the Florida trial court found and weighed a co-defendant's more lenient

sentence as mitigating evidence, the state supreme court did not. *Id.* at 315-16, 318. The Supreme Court observed that the sentence was proper nonstatutory mitigating evidence under Florida law. *Id.* at 315-16. Petitioner claims that this observation clearly establishes David Postelle's sentence as relevant mitigating evidence in Petitioner's case.

This argument misconstrues *Parker*. The Supreme Court reversed the Florida Supreme Court's decision because the Florida Supreme Court stated, as a factual finding, that the trial court did not find any mitigating circumstances. *Id.* at 321-23. After a lengthy discussion, the Supreme Court concluded that the trial court had found and weighed several mitigating circumstances, including the co-defendant's sentence. *Id.* at 315-18. Based on the obvious factual disagreement between the trial court and the Florida Supreme Court, the Supreme Court determined that the Florida Supreme Court's decision rested on an unreasonable determination of facts. *Id.* at 322-23. The Supreme Court stated that "had the Florida Supreme Court conducted its own examination of the trial and sentencing hearing records and concluded that there were no mitigating circumstances, a different question would be presented." *Id.* at 322. The facts and circumstances in *Parker* show that the Supreme Court was not addressing the issue of whether a co-defendant's sentence is relevant mitigating evidence under *Lockett*. The issue merely arose because the trial court properly considered that type of evidence under Florida law.

This Court faces the "different question" referred to in *Parker*: does clearly established federal law require that a trial court admit the sentence of a co-defendant as mitigating evidence? Having discussed why *Parker* fails to address that question, the Court now considers other existing precedent on the subject.

The OCCA cited a split of authority on this issue. Notably, the only cases the OCCA found on Petitioner's side were state court cases. *Postelle*, 267 P.3d at 140-41. Three circuits, the Fourth, Fifth, and Ninth, have found that *Lockett* and its progeny do not require admission of a co-defendant's sentence. *Id.* (citing *Meyer v. Branker*, 506 F.3d 358, 375-76 (4th Cir. 2007); *Beardslee v. Woodford*, 358 F.3d 560, 579 (9th Cir. 2004); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986)). Research discloses no published Tenth Circuit decisions on this issue. However, the weight of federal authority appears to indicate that a trial court does not violate *Lockett* or any other clearly established federal law by excluding evidence of a co-defendant's sentence.

This conclusion is consistent with *Lockett's* direction to allow mitigating evidence about a defendant's character, record, or the circumstances of the crime. A co-defendant's sentence does not fall into any of those categories. Instead, it is an extrinsic consideration. Petitioner argues that since the evidence gives some reason to impose a sentence less than death, *Lockett* demands its inclusion. But this broad proposition ignores *Lockett's* limiting principle that the evidence must relate to the defendant or the circumstances of his crime. The Court can conceive of an abundance of facts that could give *some* reason not to impose the death penalty. But many of those facts would be completely irrelevant to the actual case that the jury must resolve. The OCCA concluded that the trial court did not err under *Lockett* by excluding evidence of David Postelle's sentence during the mitigation presentation. That decision was not contrary to or an unreasonable application of clearly established federal law. Relief is denied on Ground Three.

D. Ground Four: Victim Impact Testimony.

Petitioner claims that the victim impact statements read by John Alderson, brother of victim James Alderson, and Janet Wright, mother of victim Amy Wright, violated his constitutional rights. Petitioner argues that the statements were overly emotional and contained characterizations of the crimes. Petition at 57-59. Petitioner also claims that victim impact testimony acted as an unconstitutional super-aggravator. *Id.* at 55-56. On direct appeal, the OCCA reviewed for plain error and found that the victim impact testimony was proper, did not unfairly prejudice Petitioner, and did not prevent the jury from reaching a reasoned, moral decision. *Postelle*, 267 P.3d at 143. The OCCA also rejected his "super-aggravator" argument, relying on state precedent. *Id.* at 146.

1. *Exhaustion.*

Petitioner's current argument on this claim is more expansive than the argument he presented on direct appeal. There, Petitioner only complained that the victim impact testimony was overly emotional. Br. of Appellant at 78-80. Petitioner did not challenge the portions of the victim impact testimony that discussed the circumstances of the crime. *Id.* However, the OCCA's order stated that the testimony mentioned "the physical effects of the crime" and "the manner in which it was carried out…." *Postelle*, 267 P.3d at 143. The OCCA then ruled that the victim impact testimony was permissible. *Id.* As noted in Section III.A, *supra* p. 8, the purpose of exhaustion is to give state courts the first opportunity to correct alleged violations of state prisoner's federal rights. While Petitioner did not challenge the characterizations of the crimes, the OCCA apparently ruled on that issue. The Court therefore finds this claim is exhausted.

2. *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 overruled *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). *Payne* did not require states to allow victim impact evidence, but rather held that

> . . . if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty may be imposed.

Id. at 827. Under *Payne*, prosecutors may give a "quick glimpse of the life petitioner chose to extinguish." *Id.* at 830 (O'Connor, J., concurring) (quotation omitted). Evidence of the victim and the impact on the victim's family is therefore treated as any other relevant evidence. *Id.* at 827. Any challenge to such evidence must show that it "is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825.

But while *Payne* allows evidence about the victim and the victim's family, it does not permit 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 characterizes the crime itself or recommends a specific sentence is still barred under *Booth*. *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998) (disapproved on other grounds).

3. *Analysis.*

During the sentencing stage of Petitioner's trial, John Alderson read a victim impact statement. That statement discussed the emotional trauma, stress, and physical illness that James Alderson's death brought to his family. Trial Tr. vol. XI, 2654. He described James' care for their elderly mother, who was not able to view James' body because his head and face were so disfigured from the gunshot wounds. *Id.* Mr. Alderson also explained his decision to attend all of the hearings, even to the point of neglecting the family business. *Id.* at 2655.

Janet Wright also read an impact statement. She expressed the difficulty of losing a child. *Id.* at 2657. Mrs. Wright said that knowing her daughter "was chased from her home and shot in the back is an unthinkable nightmare from which my family and I will never awake." *Id.* She described her memories of Amy as a little girl, and mentioned Amy's love of animals. *Id.* at 2657-58. Mrs. Wright spoke of Amy's interests, talents, and personality. *Id.* at 2658. Mrs. Wright told how Amy's death affected her family. Mrs. Wright detailed her own struggle to work and be ambitious in her career, her increased fear for her safety, and her need for counselling, anti-anxiety medications, and sleeping pills. *Id.* at 2658-59. She testified that Amy's sister lost her job, moved back in with her parents, gave up on a singing competition, and changed her major in college. *Id.* at 2658-59. Mrs. Wright concluded by noting that while one of the people who took her daughter's life was allowed to go home to family, she could only go to a cemetery. *Id.* at 2659-60.[12] Petitioner claims that these statements were unduly emotional and improperly characterized the crimes at issue.

[12] While the transcript is unclear, this comment likely refers to Petitioner's father, Brad Postelle, who was deemed incompetent and released to his home.

a. *Emotional content.*

The OCCA considered the emotional content of these two victim impact statements, and determined that the evidence was "concise, and narrowly focused on the permissible subjects and was within the bounds of admissible victim impact testimony." *Postelle*, 267 P.3d at 143. On that issue, the OCCA's decision was not unreasonable.[13]

Not only is testimony about the victim and the victim's family permissible, but the Tenth Circuit has frequently held that even highly emotional victim evidence did not render trials unfair. Two cases in particular illustrate this trend. In *United States v. Chanthadara*, a defendant claimed error when the trial court allowed the murdered woman's husband and two children to present victim impact testimony. 230 F.3d 1237, 1274 (10th Cir. 2000). The husband showed the jury numerous color photographs of his wife. *Id.* The children were ages seven and ten, and both "ended their testimony in tears." *Id.* The jury even took letters from the children to their dead mother into the jury room, as well as a "daily journal which described one child's loss." *Id.* Despite the heart-wrenching emotional content of that evidence, the Tenth Circuit determined that it was not "so prejudicial as to render the proceeding fundamentally unfair." *Id.*

The Tenth Circuit reached the same conclusion in *United States v. McVeigh*, where the trial court allowed extensive victim impact evidence regarding the Murrah Building bombing. 153 F.3d at 1218-19. That evidence included witness

[13] To the extent that Petitioner argues that the OCCA's decision is not entitled to deference, the Court notes that the case cited by the OCCA in its disposition of this claim, *Murphy v. Oklahoma*, discusses *Payne* and *Booth* at length. 47 P.3d 876, 885 (Okla. Crim. App. 2011). The Court is required to give state-court decisions the benefit of the doubt, and presume that state courts know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). The Court is satisfied that the state court applied the federal standard, therefore its ruling on this point is entitled to AEDPA deference.

accounts of their last contact with the victims, "agonizing efforts to find out what happened to their loved ones," their emotional reactions to learning of their loved ones' deaths, the professional and personal histories of the victims, including their admirable qualities, the innocence and unconditional love of the murdered children, and the tragic on-going impact on the victims' families. *Id.* at 1219-21. Yet the Tenth Circuit found that this substantial broadside of emotionally-charged evidence did not render the defendant's trial fundamentally unfair. *Id.* at 1222.

The victim impact evidence in Petitioner's trial pales in comparison to the evidence in *Chanthadara* and *McVeigh*. Mr. Alderson's testimony was emotional, but not so much that it rendered Petitioner's trial unfair. Instead, the testimony focused on the impact that James Alderson's death had on the family, and offered a short glimpse at his life. Janet Wright's testimony was also emotional, and poignantly described her struggle with her daughter's murder. The Supreme Court has allowed this type of evidence to give the victims a voice, and portray them as "a unique loss to society and in particular to [their] famil[ies]," not a "faceless stranger at the penalty phase of a capital trial." *Payne*, 501 U.S. at 825 (quotations omitted). The evidence in this case accomplished that permissible purpose. The Court is confident that the evidence at issue in this case was not so emotional as to violate Petitioner's due process right to a fair trial. Therefore, the OCCA reasonably denied Petitioner's claim that the victim impact testimony was unconstitutional because of its emotionally-charged nature.

b. *Characterization of the crime.*

Petitioner also argues that certain portions of the victim impact statements included characterizations of the murders. John Alderson described James Alderson's disfigured head and face in the context of explaining why his mother

could not say a final goodbye. Trial Tr. vol. XI, 2654. Janet Wright discussed the "nightmare" of knowing that her child was chased from her home and shot in the back, and said that the crime was "without apparent reason." *Id.* at 2657.

These statements are not purely evidence about the victims and the impact on the victims' families. They instead stray into the realm of characterizing the crimes at issue, which *Booth* precludes. The OCCA recognized that the evidence was "clearly related to the physical effects of the crime" and "the manner in which it was carried out . . . ." *Postelle*, 267 P.3d at 143. But the OCCA held that under Oklahoma law, such evidence was permissible. That decision was in error, as it is contrary to the clearly established law set out in *Booth*. Having found error, the Court must now consider whether the error was harmless.

c. *Harmless Error.*

When state courts do not address an error, federal habeas courts 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." *Id.* at 637. And an "error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht*, 507 U.S. 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).

Courts determine whether an error had a substantial or injurious effect by considering the improper evidence in the context of the entire trial and the record

as a whole. *Brecht*, 507 U.S. at 638. Using the Tenth Circuit's approach, the Court will first examine the nature of the problematic statements, and then "address the broader context of mitigating and aggravating evidence presented at trial." *Lockett v. Trammel*, 711 F.3d 1218, 1238 (10th Cir. 2013).

The problematic comments are mild. Two are closely tied to appropriate victim impact testimony, specifically the impact of the deaths on the families. John Alderson discussed James' injuries only to explain why the funeral home director suggested that his mother not look at the body. Trial Tr. vol. XI, 2654. And Janet Wright spoke of her daughter being chased and shot – explaining how, as a mother, she was affected more deeply by that than she would have been if Amy had died of a natural cause. *Id.* at 2657. The Court acknowledges that these statements did cross the line into the impermissible characterization of the crime, but not by much. Also, the statements were not couched in inflammatory language but were instead matter-of-fact descriptions consistent with evidence already presented throughout the trial. Finally, as discussed above, the other portions of the statements were proper, and did not pile overly-emotional testimony atop the impermissible comments.

Not only were the statements mild, but the evidence supporting the aggravating circumstances regarding victims Alderson and Wright was significant. The prosecution presented evidence that Petitioner shot all four victims and was solely responsible for killing three of them. That evidence firmly supports the aggravating circumstance that Petitioner created a great risk of death to more than one person. Also, the evidence showed that Petitioner chased Alderson and Wright from the trailer, through the property, and shot them as they tried to escape impending death. *Postelle*, 267 P.3d at 144. The mental terror of running for their lives established that the murders were especially heinous, atrocious, and cruel.

And finally, the prosecution provided ample evidence that Petitioner posed a continuing threat to society.[14] One witness recounted Petitioner's remorseless boast that he "shut that bitch up in the corner," and the accompanying pantomime of a rifle shot. Trial Tr. vol. IX, 2280-81. Another described Petitioner saying "bitch you better not say nothing" to an individual that overheard Petitioner's description of the murders. Trial Tr. vol. VII, 1702. Finally, the prosecution presented evidence that Petitioner crafted a 10-12 inch shank while awaiting trial in the county jail. Trial Tr. vol. XI, 2690-91. The callousness, threats, and contraband weapons certainly support the assertion that Petitioner would be a continuing threat. All told, the case in aggravation against Petitioner was strong.

The mitigating evidence was also substantial, and addressed Petitioner's troubled upbringing, drug abuse, and mental health issues. However, the prosecution presented sufficient aggravating evidence to outweigh the mitigating evidence. And at the close of the evidence, the trial court specifically instructed the jurors on the weight they could give to the victim impact evidence and admonished the jury not to impose the death penalty as an emotional response. O.R. VIII at 1535-36. Considering the statements and the entire context of the trial, the Court is not in grave doubt that the three mild sentences from the victim impact statements had a substantial or injurious effect on the jury's decision. Therefore, while the characterizations of the murders should not have been admitted into evidence, the error was harmless.

[14] 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. *See Selsor*, 644 F.3d at 1027.

d. *Victim impact evidence as a super-aggravator.*

Petitioner also argues that victim impact testimony is a "super-aggravator." Petitioner claims that while Oklahoma law allows juries to consider victim impact testimony when deciding whether to impose the death sentence, the law does not give clear guidance as to how juries must weigh that evidence. Petition at 55-56, 63-67. The OCCA rejected the argument, as it has many times before.[15] That decision was not unreasonable.

As discussed above, the Eighth Amendment does not erect a *per se* bar to victim impact testimony. If a state wishes to include victim impact testimony in its death penalty scheme, there is no *per se* constitutional obstacle. *Payne*, 501 U.S. at 827. The State of Oklahoma has decided that victim impact testimony will be permitted. OKLA. STAT. tit. 21, §§ 701.10(C), 142A-8(A). To aid the jury in properly considering victim impact testimony, the trial court instructed the jury that victim impact testimony was not an aggravating circumstance or proof of an aggravating circumstance. O.R. VIII at 1535. The instructions further told the jury that it could only consider the victim impact testimony if it first found the presence of an aggravating circumstance. *Id.* at 1535-36.

Petitioner argues that the instructions do not guide the jury on how to use or weigh the victim impact testimony. But trial courts do not instruct the jury on how to weigh any evidence. As Petitioner points out, the jury must reach a moral reasoned judgment after considering all the evidence. Exactly how to weigh each piece of evidence is not the province of the courts or statutes, rather is the duty of the jury. Doubtless some jurors value victim impact evidence more than others,

[15] Petitioner again argues that the OCCA did not consider federal law in reaching its decision. The cited materials in the OCCA's decision trace back to the OCCA's discussion of *Payne* and *Booth* in *Murphy*, 47 P.3d at 886. *See* Footnote 8, *supra* p. 32.

but that does not render the scheme unconstitutional. Notably, Petitioner's jury could also, under Jury Instruction 62, consider sympathy when deciding whether to impose the death penalty. *Id.* at 1537. Sympathy is certainly not a mitigator in the ordinary sense of the word, yet the jury could still consider it. The jury's ability to consider sympathy does not render it a "super-mitigator," but merely allows the jury to consider sympathy when reaching the reasoned moral decision as to whether to impose the death penalty. Victim impact testimony is treated the same way. The Tenth Circuit has specifically acknowledged that Oklahoma's decision to allow victim impact testimony, when accompanied by a proper instruction, does not create a "super-aggravator." *See Brown*, 515 at 1096-97; *Le v. Mullin*, 311 F.3d 1002, 1016 (10th Cir. 2002). The OCCA's rejection of this claim was not unreasonable.

e. *Victim impact testimony consideration under* Ring v. Arizona.

Petitioner finally claims that victim impact testimony violates the Sixth Amendment because the jury is not required to find "whatever it must find" beyond a reasonable doubt. Petition at 67.[16]

Petitioner's argument is precluded by Tenth Circuit precedent. In *Matthews v. Workman*, the Tenth Circuit characterized the weighing analysis for aggravating and mitigating circumstances not as a factual finding, but rather as a "highly subjective, largely moral judgment regarding the punishment that a particular person deserves." 577 F.3d 1175, 1195 (10th Cir. 2009) (quoting *United States v. Barrett*, 496 F.3d 1079, 1107 (10th Cir. 2007)). This Court and other district courts have emphasized that point in numerous cases. *See Lay v. Trammell*, No.

[16] There is some debate between the parties as to whether this claim is exhausted. Rather than untangle the complicated exhausted question, the Court deems it simpler to dispose of the claim on its merits.

08-CV-617-TCK-PJC, 2015 WL 5838853, at *54-56 (N.D. Okla. Oct. 7, 2015); *Rojem v. Trammell*, No. CIV-10-172-M, 2014 WL 4925512, at *18 (W.D. Okla. Sept. 30, 2014); *Smith v. Trammell*, No. CIV-09-293-D, 2014 WL 4627225, at *50 (W.D. Okla. Sept. 16, 2014); *Ryder ex rel. Ryder v. Trammell*, No. CIV-05-0024-JHP-KEW, 2013 WL 5603851, at *35 (E.D. Okla. Oct. 11, 2013); *Fitzgerald v. Trammell*, No. 03-CV-531-GKF-TLW, 2013 WL 5537387, at *59 (N.D. Okla. Oct. 7, 2013); *Jackson v. Workman*, No. 08-CV-204-JHP-FHM, 2013 WL 4521143, at *27 (N.D. Okla. Aug. 26, 2013); *Cole v. Workman*, No. 08-CV-328-CVE-PJC, 2011 WL 3862143, at *51-52 (N.D. Okla. Sept. 1, 2011); *DeRosa v. Workman*, No. CIV-05-213-JHP, 2010 WL 3894065, at *32-33 (E.D. Okla. Sept. 27, 2010); *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1277-78 (E.D. Okla. 2007). That same logic applies here. The jury's consideration of victim impact testimony is part of that highly subjective moral judgment, and is therefore not a factual finding subject to the reasonable doubt standard. Relief is denied on this issue.

4. *Conclusion.*

Petitioner's claims that the victim impact evidence was overly emotional, that victim impact evidence is a super-aggravator, and that victim impact testimony is subject to the reasonable doubt standard are all without merit. The OCCA reasonably rejected those claims. However, the OCCA's decision that victim impact testimony characterizing the crimes at issue was admissible is contrary to clearly established law. Still, the Court finds this error harmless. Relief is denied as to Ground Four.

E. Ground Five: Mental Retardation.

Petitioner claims that his death sentence should be reversed because he is mentally retarded. Petition at 69. Petitioner bases this claim on his understanding that Flynn Effect would reduce his IQ score to the range in which Oklahoma considers persons mentally retarded. *Id.* Petitioner failed to raise this issue on direct appeal, but did raise it in his post-conviction application. *Postelle*, No. PCD-2009-94, slip op. at 18 n.9. The OCCA held that the claim was barred because Petitioner failed to raise it on direct appeal. *Id.* at 17-18.

As noted above, Petitioner does not seriously contend that Oklahoma's bar is inadequate or dependent on federal law. *Supra* pp. 11-12. And because this claim does not involve the ineffective assistance of trial counsel, the fact that Petitioner had trial and appellate attorneys from the same office is irrelevant. Petitioner instead attempts to show cause and prejudice for this Court to excuse the procedural default. Petitioner argues that his appellate counsel was ineffective in not raising the claim on direct appeal, and therefore he has cause for the default.

"A meritorious claim of ineffective assistance of counsel constitutes cause and prejudice for purposes of surmounting the procedural bar." *United States v. Harms*, 371 F.3d 1208, 1211 (10th Cir. 2004). But a non-meritorious ineffectiveness claim does not establish cause and prejudice. *Johnson v. Gibson*, 229 F.3d 1163, 2000 WL 1158335 at *4 (10th Cir. Aug. 16, 2000) (unpublished table opinion). Petitioner's ineffectiveness claims falls in the latter category. The Court has already addressed whether Petitioner's trial and appellate counsel were ineffective for not raising the Flynn Effect argument. *Supra* pp. 18-19, 27. The Court concluded that counsel's performance was not deficient for omitting the mental retardation claims. The Court has ruled that the ineffectiveness claim is not

meritorious; therefore, it cannot serve as cause to excuse the default. Ground Five is denied as procedurally barred.

V. Motions for Discovery and Evidentiary Hearing.

Petitioner has filed a motion for discovery (Doc. 20) as well as a motion for an evidentiary hearing (Doc. 30). These motions are **DENIED**. Petitioner's discovery request seeks to interview several individuals, many of whom were involved in Petitioner's trial. Doc. 20 at 3-4. Petitioner appears to be seeking information to supplement his mental retardation and ineffective assistance of counsel claims. Considering the list of individuals and the information Petitioner seeks, the Court cannot conclude that any of the discovery will 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 Grounds Four (victim impact testimony) and Five (mental retardation). Doc. 30 at 1. "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 Four and Five 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. 30) are hereby **DENIED**. A judgment will enter accordingly.

IT IS SO ORDERED this 2nd day of September, 2016.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

GILBERT RAY POSTELLE,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2009-94
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING APPLICATION FOR POST-CONVICTION RELIEF AND MOTION FOR EVIDENTIARY HEARING

A. JOHNSON, PRESIDING JUDGE:

Before the Court is Petitioner Gilbert Ray Postelle's original application for post-conviction relief and motion for evidentiary hearing. Postelle was convicted by jury of four counts of First Degree Murder (Counts 1-4), in violation of 21 O.S.Supp.2004, § 701.7, and one count of Conspiracy to Commit a Felony (Count 5), in violation of 21 O.S.2001 § 421, in the District Court of Oklahoma County, Case No. CF-2005-4759. The jury imposed the death penalty on Counts 1 and 4.[1] The jury fixed punishment of life imprisonment without the possibility of parole on Counts 2 and 3 and ten years imprisonment on Count 5. Judgment and Sentence were imposed by the district court in accordance with the jury's verdict and Postelle appealed.

[1]The jury found two aggravating circumstances: (1) that Postelle created a great risk of death to more than one person; and (2) that each of the murders was especially heinous, atrocious or cruel.

We affirmed Postelle's conviction and sentence in *Postelle v. State*, 2011 OK CR 30, ___P.3d___.

Postelle raises nine propositions of error in this application. None of these claims have merit. Under the Capital Post-Conviction Procedure Act, the only claims that may be raised are those that "[w]ere not and could not have been raised in a direct appeal" and that also "[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." 22 O.S.Supp.2006, § 1089(C)(1) and (2). The post-conviction process is not a second appeal and the doctrines of *res judicata* and waiver will apply where a claim either was, or could have been, raised in the petitioner's direct appeal. *Coddington v. State,* 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835. The burden is on the applicant to show that his claim is not procedurally barred. *See* 22 O.S.Supp.2006, § 1089(C).

GROUNDS FOR RELIEF

Current incompetency (preliminary request to hold proceeding in abeyance)

As a preliminary matter, Postelle's counsel contend that he is presently incompetent to proceed in this matter and they ask the Court to hold this post-conviction proceeding in abeyance until his competency is restored.[2] Counsel surmise that Postelle's current mental state is the result of chronic

[2] Postelle's collateral counsel, his direct appeal counsel and an investigator have filed affidavits, stating their belief that Postelle is presently incompetent. Postelle's counsel do not request a competency evaluation or assert any reason to believe that Postelle's competency may be restored at some point in the near future. Counsel ask instead for an indefinite stay of the proceedings.

methamphetamine use, low I.Q., organic brain damage and major mental illness. In support of counsel's belief of Postelle's incompetency, counsel reference the affidavit of Dr. William Ruwe who testified on Postelle's behalf in the second stage of his trial and who has been retained by Postelle's collateral counsel in this post-conviction proceeding to provide expert opinion pertaining to Postelle's psychiatric disorders.[3]

Even accepting as true collateral counsel's allegations that Postelle is unable to assist them in this post-conviction proceeding, we find that Postelle's request to hold this proceeding in abeyance until his competency is restored should be denied. Postelle's counsel acknowledge this Court's decision in *Fisher v. State,* 1992 OK CR 79, 845 P.2d 1272, rejecting the view that a capital post-conviction petitioner must be competent during post-conviction proceedings.[4] In that case, Fisher challenged his competency during post-conviction proceedings before the district court and this Court. This Court rejected Fisther's claim and request for an evidentiary hearing, relying on the *ABA Criminal Justice Mental Health Standards* (1989) (hereinafter "Standards"),

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[3] Postelle did not raise any issue with respect to his competency at trial or on direct appeal. Dr. Ruwe testified in second stage that he had some concern about Postelle's competency during his initial assessment and recommended a structured competency examination. (Tr. 2871) Whether or not such an evaluation was performed is not in the record. Dr. Ruwe makes no findings regarding Postelle's present competency in his affidavit.

[4] Counsel note that they have little confidence this Court would consider in a subsequent post-conviction application any new claim developed after Postelle becomes competent to assist counsel, the Court's holding in *Fisher* notwithstanding. Counsel believe it necessary to raise the competency issue now to preserve it for federal review.

particularly Standard 7-5.4 ("Mental incompetence at time of noncapital appeal").

The *Fisher* Court quoted Standard 7–5.4:

> (b) Mental incompetence of the defendant at time of appeal from conviction in a criminal case should not prohibit the continuation of such appeal as to matters deemed by counsel or by the court to be appropriate.
>
> (i) If, following the conviction of the defendant in a criminal case, there should arise a good faith doubt about the mental competence of the defendant during the time of appeal, counsel for the state or the defendant should make such doubt known to the court and include it in the record.
>
> (ii) Counsel for the defendant should proceed to prosecute the appeal on behalf of the defendant despite the defendant's incompetence and should raise on such appeal all issues deemed by counsel to be appropriate.
>
> (c) Mental incompetence of the defendant during the time of appeal shall be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for postconviction relief, any matter not raised on the initial appeal because of the defendant's incompetence.

The *Fisher* Court continued:

> Noticeably absent from the above Standards is any requirement that appellate proceedings be stayed in the event an appellant is deemed incompetent. The absence of such a rule is explained in the Commentary Introduction to Standard 7–5.4:
>
> > Because convicted defendants, like parties to appellate litigation in general, do not participate in appeal proceedings, mental incompetence rarely affects the fairness or accuracy of appellate decisions. Therefore, the standard envisions that appellate or postconviction review procedures will be carried to completion despite

> an appellant's mental incompetence, provided it later appears that matters important to review could not be presented because of mental incompetence, they should be considered in postconviction review proceedings.

Fisher, 1992 OK CR 79, ¶¶ 15-16, 845 P.2d at 1276-77.

The *Fisher* court held that the existence of a doubt as to an appellant's present mental competency should not serve as a basis to halt state appellate proceedings. *Id.* 1992 OK CR 79, ¶ 17, 845 P.2d at 1277 "Post-conviction review is available for important issues, revealed after an appellant attains competence, which were not raised during an earlier appeal because of incompetence." *Id.* The Court noted that post-conviction relief would not be automatic and would require the applicant to show prejudice related to mental incompetence before omitted issues would be considered in a subsequent appeal. *Id.* The Court found that the district court did not err in rejecting Fisher's incompetency claim and requests for an evidentiary hearing and stay, and rejected Fisher's renewed request on appeal for an evidentiary hearing. *Id.*

Post-conviction counsel argue that the reasoning in *Fisher* is no longer sound because of the current, more restrictive requirements to obtain successive post-conviction review. We disagree. Under 22 O.S.Supp.2006, § 1089(D)(8)(b), a petitioner may file a successive application for post-conviction relief when the claim could not have been previously raised because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence before being presented. Incompetency of the

applicant could serve as the basis for not discovering pertinent facts to support a claim and such facts would not have been ascertainable through the exercise of reasonable diligence because of the applicant's incompetency. A claim not raised because of incompetency would not be procedurally barred provided the applicant could show that the facts supporting the claim were not available during earlier appellate proceedings and the other conditions of the statute were met. Nothing in the current statute conflicts with the Court's decision in *Fisher* to consider in subsequent post-conviction proceedings claims omitted because of a defendant's incompetence during appellate proceedings as long as the required conditions are met.

Moreover, the right to counsel in a capital post-conviction proceeding comes from statute, not the Constitution. *See* 22 O.S.Supp.2006, § 1089 (B). In any capital post-conviction proceeding under 22 O.S.Supp.2006, § 1089, the "Oklahoma Indigent Defense System shall represent all indigent defendants in capital cases seeking post-conviction relief upon appointment by the appropriate district court after a hearing determining the indigency of any such defendant." This provision does not mention competence to assist counsel; it merely grants indigent petitioners under a sentence of death a statutory right to be represented by appointed counsel in a proceeding under 22 O.S.Supp.2006, § 1089. Nothing in the plain language of the statute requires that an indigent state prisoner under a sentence of death be competent to assist counsel before his post-conviction action may proceed. In addition,

nothing in the plain language provides any right to have the post-conviction proceeding stayed when the petitioner is not competent to communicate rationally with his counsel. And, neither the United States Supreme Court nor the United States Court of Appeals for the Tenth Circuit has ever found a right to be competent to assist counsel in a state post-conviction proceeding.

Under the statute prescribing the rules for the determination of competency, "competency" is defined as the "present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense." 22 O.S.Supp.2005, § 1175.1(1). "Criminal proceeding" is defined as "every stage of a criminal prosecution after arrest and before judgment, including, but not limited to, interrogation, lineup, preliminary hearing, motion dockets, discovery, pre-trial hearings and trial." 22 O.S.Supp.2005, § 1175.1(4). These definitions provide for competency determinations through trial, but not beyond trial. There is no requirement of competence for a capital post-conviction petitioner under either the Capital Post-Conviction Procedure Act (22 O.S.Supp.2006, § 1089) or in the procedures for the determination of competency at 22 O.S.Supp.2005, §§ 1175.1 – 1175.6.[5]

[5] We are not dealing with competency to be executed under 22 O.S.2001, § 1005.

Postelle's counsel argue that claims in his petition could be more compelling if he were competent to assist, referring specifically to Postelle's ineffective assistance of counsel claim concerning trial counsel's failure to adequately investigate his mental state and his social and family history. The investigator assigned to Postelle's case states in her affidavit that because she cannot obtain the necessary information from Postelle himself, she has relied on Postelle's family members to provide information about him and his life. Postelle's application contains twenty-eight attachments including affidavits from trial counsel, appellate counsel, twelve affidavits from family members and friends about Postelle's mental state and family history, and an affidavit from Dr. Ruwe delving into Postelle's mental health and family history. Whether or not Postelle could offer meaningful additional information pertaining to the issues raised before this Court is uncertain.

Post-conviction counsel have made this Court aware of concerns regarding Postelle's competency as directed in *Fisher*. Because there is no requirement of competence in a capital post-conviction proceeding and there is a procedure to raise a claim omitted due to an applicant's incompetency during post-conviction proceedings, we deny Postelle's invitation to reconsider our decision in *Fisher* and his request to hold this proceeding in abeyance.

1. Ineffective Assistance of Trial Counsel

Postelle claims that trial counsel was constitutionally ineffective. The Court in *Coddington v. State* explained the analysis of ineffective assistance of counsel claims on post-conviction:

> A claim of ineffective assistance of trial counsel is appropriate for post-conviction review if it has a factual basis that could not have been ascertained through the exercise of reasonable diligence on or before the time of the direct appeal. 22 O.S.Supp.2006, § 1089(D)(4)(b)(1). A claim of ineffective assistance of appellate counsel may be raised for the first time on post-conviction. 22 O.S.Supp.2006, § 1089(D)(4)(b)(2). We review post-conviction claims of ineffective assistance using United States Supreme Court precedents. 22 O.S.Supp.2006, § 1089(D)(4); *Davis v. State,* 2005 OK CR 21, ¶ 6, 123 P.3d 243, 245–46. [The applicant] must show that counsel's performance was deficient, and that he was so prejudiced by that performance that he was deprived of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We will not find counsel was ineffective if [the applicant] was not prejudiced by counsel's act or omission. *Harris v. State,* 2007 OK CR 32, ¶ 3, 167 P.3d 438, 441. A finding of prejudice requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v. State,* 2010 OK CR 24, ¶ 19, 245 P.3d 1233, 1239; *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* ___U.S.___, 131 S.Ct. 770, 790, 792, 178 L.Ed.2d 624 (2011). There is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. [The applicant] must show "that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy." *Davis,* 2005 OK CR 21, ¶ 7, 123 P.3d at 246. A strong presumption exists that, where counsel focuses on some issues to the exclusion of others, this reflects a strategic decision rather than neglect. *Richter,* 131 S.Ct. at 790. Appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes,* 463 U.S. 745, 753–54, 103 S.Ct. 3308, 3313–14, 77 L.Ed.2d 987 (1983).

Coddington, 2011 OK CR 21, ¶ 3, 259 P.3d at 835-36.

Specifically, Postelle contends trial counsel was ineffective for failing to present evidence, by way of admission of the ballistics report or use of an expert, to refute Randall Byus's testimony accounting for the presence of his DNA on one of the casings recovered at the scene. This claim is waived because it could have been raised on direct appeal as the factual basis for the claim was ascertainable through the exercise of reasonable diligence on or before that time. Postelle admits that trial counsel defended the case by attempting to prove that Byus was unworthy of belief and showing that Byus's version of events at the murder scene portraying himself as an innocent bystander was inconsistent with the physical evidence. Postelle concedes that trial counsel spent much of closing argument on this point. Postelle also admits that trial counsel made the very point in closing argument that he claims trial counsel should have better made using either an expert witness or through admission of the ballistics report, namely that the shell casing with Byus's DNA was fired from the weapon that Byus said was used by Postelle to murder the four victims not David Postelle's SKS rifle (the gun Byus claimed to have handled the previous day). Evidence concerning this claim was in the trial record and this claim is procedurally barred because it could have been raised on direct appeal.

Postelle also claims that trial counsel was constitutionally ineffective for failing to adequately investigate and present evidence of mental retardation. This claim is waived because it too could have been raised on direct appeal as the factual basis for the claim was ascertainable through the exercise of reasonable diligence on or before that time. Postelle admits that trial counsel had him evaluated early on to address suspicions that Postelle suffered from mental retardation. According to Postelle, the testing revealed I.Q. scores within the borderline range of mental retardation; the scores were too high, however, to qualify Postelle as mentally retarded for purposes of being ineligible for the death penalty. Postelle now claims that the I.Q. scores obtained failed to account for the scientific principle known as "the Flynn Effect" and the Standard Error of Measurement. When these factors are considered, Postelle argues that his I.Q. falls within the range required in 21 O.S.Supp.2006, § 701.10b (the statute setting forth the procedure to determine if a defendant is mentally retarded and ineligible for the death penalty).

Under 21 O.S.Supp.2006, § 701.10b, the defendant bears the burden of demonstrating, *inter alia,* significantly subaverage general intellectual functioning. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning. 21 O.S.Supp.2006, § 701.10b(C). "In determining the intelligence quotient, the standard

measurement of error for the test administrated shall be taken into account."[6] *Id.*

Postelle's I.Q. was calculated at 79 in November 2006 based on his scores on the Wechsler Adult Intelligence Scale – Third Edition (WAIS III) administered by Dr. Terese Hall. Dr. Ruwe calculated Postelle's I.Q. at 76 approximately a year later.[7] (Tr. 2861) Postelle maintains that both of his previous I.Q. scores fall into a range whose lower limits fall into the mentally retarded category when the standard error of measurement and Flynn Effect are considered for each score.

We rejected a similar claim in *Smith v. State,* 2010 OK CR 24, ¶ 10, 245 P.3d 1233, 1237 stating:

> The problem with this argument is that while the language of section 701.10b directs that an I.Q. score near the cutoff of 70 be treated as a range bounded by the limits of error, it also directs unequivocally that no such treatment be afforded to scores of 76 or above. In particular, after stating that "[i]n determining the intelligence quotient, the standard measurement of error for the test administered shall be taken into account," section 701.10b goes on to say: "however, in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on *any* individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section" (emphasis added). By directing that no defendant be considered mentally retarded who has received an I.Q. score of 76 or above on *any* scientifically recognized standardized test, the Legislature has

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[6] In *Smith v. State,* 2010 OK CR 24, ¶ 10, n. 6, 245 P.3d 1233, 1237 n. 6, this Court noted that under the Oklahoma statutory scheme, "the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants."

[7] Dr. Ruwe testified that Postelle was not mentally retarded during the second stage of trial.

> implicitly determined that any scores of 76 or above are in a range whose lower error-adjusted limit will always be above the threshold score of 70.

Neither Postelle's I.Q. nor the statute setting forth the procedure for determining mental retardation has changed since trial. The facts underlying Postelle's claim of mental retardation were known to both trial and appellate counsel. It stands to reason that neither trial nor appellate counsel pressed a claim under § 701.10b because Postelle's I.Q. scores prevented him from being found mentally retarded under the express language of the statute.[8] Because this claim could have been raised on direct appeal, the issue is waived.

Postelle claims trial counsel failed to investigate and present mitigating evidence about his background and mental health. Postelle concedes that trial counsel uncovered some mitigating evidence, but argues the information was incomplete and presented in a disjointed and unpersuasive manner.

This claim is likewise waived because the facts underlying the claim were discoverable with reasonable diligence during direct appeal. Postelle criticizes trial counsel for using previously recorded testimony of his sister and uncle instead of presenting them live or through the use of video testimony. Trial counsel used the recorded testimony of Postelle's sister and uncle from his

[8] Postelle claims trial counsel was also ineffective for failing to investigate and present evidence of his adaptive functioning deficits to support a finding of mental retardation. Because trial counsel could not establish that Postelle had significantly subaverage general intellectual functioning through I.Q. tests, presenting evidence of adaptive functioning deficits would not have made any difference to the resolution of the issue.

brother's trial (substituting his name in place of his brother's) because his sister was unavailable because she was incarcerated in a juvenile facility out of state and his uncle was unavailable because he was in the hospital. (Tr. 2806, 2694, 2771) Trial counsel's efforts to present Postelle's sister via videotape were unsuccessful because the sound quality was too poor to be understandable. These facts were in the record and available to direct appeal counsel. The likely reason appellate counsel did not raise a claim of ineffective assistance of trial counsel on this basis is because the record showed that presenting the witnesses live was not an option and was beyond the control of trial counsel. This claim is waived.

And lastly, Postelle claims that trial counsel should have presented testimony from additional family members and lifelong friends about Postelle's symptoms of mental illness and the pervasive mental illness in his family. Postelle acknowledges that his defense team hired Dr. Ruwe to perform a full psychological and neuropsychological evaluation of him. Dr. Ruwe concluded that Postelle suffers from organic brain damage and mental illness. The defense team also presented testimony from several of Postelle's family members and friends about Postelle's drug abuse from an early age and his chaotic and abusive upbringing.

The crux of Postelle's claim is that while the evidence presented was relevant, it should have been presented in a more "compassionate and convincing manner" along with more evidence of Postelle's and his family's

history of mental illness. According to Postelle, had trial counsel done so, a reasonable probability exists that the jury would have returned a punishment less than death. This might be true, but to prevail on a claim that trial counsel was constitutionally ineffective for failing to adequately investigate and present mitigating evidence, Postelle's burden is two-fold and we are not persuaded that this claim meets either criterion.

First, with regard to trial counsel's allegedly deficient performance, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-688, 104 S.Ct. at 2064. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 2066. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's performance." *Id.* at 691, 2066.

Postelle criticizes trial counsel for focusing more on his organic brain damage in second stage rather than his mental illnesses. Postelle cites in support Dr. Ruwe's affidavit diagnosing him with Major Depressive Disorder, Recurrent, Severe, with Psychotic Features (a mental illness which causes delusions and/or hallucinations) and Post Traumatic Stress Disorder. Postelle also notes Dr. Ruwe's conclusion that he possibly suffers from Schizoaffective

Disorder or Schizophrenia, disorders both marked by delusions and/or hallucinations. Evidence of these illnesses, according to Postelle, would have shown his jury that his ability to exercise rational judgment and conform his conduct to the requirements of the law is significantly impaired.

That Postelle's ability to exercise rational judgment and consider the consequences of his actions was impaired was the substance of the mitigation case presented by the defense. Dr. Ruwe testified about Postelle's exposure to and abuse of methamphetamine from an early age. He also testified that Postelle's test scores suggested that he suffered from depression and Post Traumatic Stress Disorder. He explained how Postelle's chronic drug abuse damaged his teenage brain and affected its development, resulting in poor impulse control and an inability to make good decisions. Trial counsel understood the potential mitigating value of testimony that Postelle was incapable of making good decisions and controlling his actions. Attributing Postelle's poor judgment to drug abuse rather than mental illness was a sound strategy that was consistent with the expert testimony. Dr. Ruwe testified at trial that Postelle demonstrated no signs of a thought disorder, delusions or hallucinations during testing. His thought process was logical and goal oriented. Dr. Ruwe's observations of Postelle during his pre-trial evaluation contrast with symptoms of the mental illnesses with which Dr. Ruwe has diagnosed Postelle post verdict. Considering the circumstances existing at the time trial counsel investigated Postelle's mitigation case, and applying a heavy

measure of deference to counsel's actions, as we must under *Strickland*, we find that trial counsel's actions were objectively reasonable. Trial counsel's performance was not constitutionally deficient.

Second, even if it is assumed that trial counsel's failure to better present the mitigation case and include additional evidence of Postelle's and his family's history of mental illness was objectively unreasonable, and therefore constituted deficient performance, Postelle fails to show that he was prejudiced by that deficient performance. Postelle's jury was presented with compelling evidence that his ability to make good decisions and conform his behavior was impaired because of his chronic drug abuse. The very point he wishes to make with the additional evidence of mental illness, namely that his judgment is impaired, was made at trial. His jury also knew that he suffered from mental illness in the form of depression and post traumatic stress disorder. We are not convinced that additional evidence of mental illness would have made a difference in the jury's sentencing decision. Hence, we find Postelle has not shown that trial counsel was constitutionally ineffective.

2. Waived Claims

Postelle provides no explanation why the record-based claims in Propositions 2 through 7 were not raised on direct appeal. The claims are

therefore waived.[9] *Coddington,* 2011 OK CR 21, ¶ 2, 259 P.3d at 835; 22 O.S. 1089(C).

3. Ineffective Assistance of Appellate Counsel

Postelle claims that appellate counsel was ineffective for failing to challenge trial counsel's effectiveness based on the omissions outlined in his first proposition, and for failing to raise the record-based claims raised in Propositions 2 through 7. As we stated in *Coddington,* 2011 OK CR 21, ¶ 12, 259 P.3d at 837, "our scope of review does not encompass the substantive claim underlying the ineffective assistance argument." We decide only whether appellate counsel was ineffective for failing to raise the omitted issues. *Id.* In other words, we ask was it professionally unreasonable not to present the omitted claims and was the defendant prejudiced by counsel's omission. This Court adheres to the strong presumption that, where appellate counsel focuses on some issues to the exclusion of others, this reflects a strategic decision rather than neglect. *Id.* at ¶ 3, 259 P.3d at 835-36.

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[9] Proposition 2: Mr. Postelle's sentence is violative of his rights under the Eighth and Fourteenth Amendments, because he is mentally retarded;
Proposition 3: Mr. Postelle was tried by a biased judge in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights;
Proposition 4: Juror L. P. was not asked whether he would automatically vote to impose the death penalty upon a conviction of first degree murder, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution;
Proposition 5: Prosecutorial misconduct deprived Mr. Postelle of a fair trial and due process of law;
Proposition 6: The trial court's failure to provide a complete record of the proceedings leading to Mr. Postelle's convictions and sentences of death constitutes a violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution; and

Postelle cannot show that a reasonable probability exists that the outcome of his appeal would have been different had appellate counsel pressed a claim of ineffective assistance of trial counsel based on trial counsel's failure to admit the ballistics report or present expert testimony to impeach Randall Byus, trial counsel's failure to argue that Postelle was mentally retarded or trial counsel's failure to investigate and present mitigating evidence. As discussed in Postelle's ineffective assistance of trial counsel claim above, trial counsel challenged the credibility and factual account of Randall Byus during trial and in closing argument. Trial counsel argued Byus's explanation about his DNA on a casing at the crime scene was unworthy of belief because the casing was fired from the murder weapon that Byus allegedly never touched. This point was understandable without the admission of the ballistics report or expert testimony. Thus, appellate counsel's election to focus on other claims was not unreasonable.

Trial counsel could not contend, under 21 O.S.Supp.2006, § 701.10b, that Postelle was mentally retarded in order to avoid the death penalty because Postelle's I.Q. scores were 76 and above. *See Smith*, 2010 OK CR 24, ¶ 10, 245 P.3d at 1237. Nor was trial counsel ineffective for failing to better present Postelle's case in mitigation or present additional evidence of Postelle's mental

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Proposition 7: Because execution of the severely mentally ill serves no retributive or deterrent function, Mr. Postelle's death sentences violate the Eighth Amendment ban on cruel and unusual punishments.

illnesses or his family's history of mental illness for the reasons discussed in Section 1, *supra.*

Nor do we find that Postelle has shown that appellate counsel was ineffective for failing to raise the other record-based claims raised in this post-conviction application. Appellate counsel raised 20 well reasoned and supported claims of error in Postelle's direct appeal brief. Appellate counsel's decision to focus on the record-based issues included in the direct appeal brief to the exclusion of those in this post-conviction application can be attributed to strategy rather than neglect and Postelle has not shown the outcome of his direct appeal would have been different had appellate counsel included the omitted issues. This claim is therefore denied.

4. Accumulation of Error

Postelle also claims that an accumulation of errors identified in his direct appeal and in this post-conviction application requires relief. Having determined on direct appeal that there was no accumulation of error sufficient to warrant reversal of his conviction or modification of his sentence, and having found no merit to any of the claims raised here, there is no basis for granting post-conviction relief on this cumulative error claim.

5. Motion for Evidentiary Hearing

Also pending before the Court in connection with this application is Postelle's motion for an evidentiary hearing. A post-conviction applicant is

entitled to an evidentiary hearing only if "the application for hearing and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Additionally, in a post-conviction proceeding, we will remand for an evidentiary hearing only if we find there are "unresolved factual issues material to the legality of the applicant's confinement." 22 O.S.Supp.2006, § 1089(D)(5).

Based on the existing record and the affidavits proffered with Postelle's application for post-conviction relief, we fail to discern any disputed questions of fact that are material to Postelle's confinement. His request for an evidentiary hearing is denied.

DECISION

Having reviewed Postelle's application for post-conviction relief, we conclude: (1) there exist no controverted, previously unresolved factual issues material to the legality of his confinement; (2) Postelle's grounds for review have no merit or are barred from review; and (3) the Capital Post-Conviction Procedure Act warrants no relief in this case. Accordingly, Postelle's Application for Post-Conviction Relief and Motion for Evidentiary Hearing are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal*

Appeals, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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ATTORNEYS FOR THE STATE:

NO STATE RESPONSE

OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur
SMITH, J.: Concur

RA

LUMPKIN, JUDGE: CONCUR IN RESULT

I concur in the results reached by the Court, however, I continue to adhere to the law set out in my Concur in Result to *Fisher v. State*, 1992 OK CR 79, 845 P.2d 1272, 1278-1279.

As I stated in *Fisher* and reiterate here, i.e. "This Court should first review the Oklahoma Statutes to determine if a procedure exists to address this issue at the present stage of the proceedings." *Fisher*, 845 P.2d at 1278. While the ABA standards are nice aspirations in the application to trial procedures and appellate rights, the bottom line is those aspirations are not law. The Oklahoma Legislature determines the substantive and procedural law for this state and that should be the authority for any decision this Court makes in this regard.

Without authority and offering a dicta anticipation the opinion states, "Incompetency of the applicant could serve as the basis for not discovering pertinent facts to support a claim and such facts would not have been ascertainable through the exercise of reasonable diligence because of the applicants incompetency." *Slip* at 6. The opinion goes on to pontificate on how a future case might be decided. These statements have no legal basis and the issue is not before us as this case is presented.

While the aspirations of the ABA are good for reflective thought, we should not become so enamored with them that we forget we are bound by the law, not aspirations. Because of that, I compliment my colleague for finally

turning to the statutes and resolving the right to competency determinations under statutes. *Slip* at 7. I further compliment my colleague for reinforcing the fact that waiver and *res judicata* leaves few issues that can have merit at the post-conviction stage of the litigation. For that reason, the defendant's resources in a criminal prosecution should be focused primarily on the trial itself, and if necessary, the direct appeal. It is through the trial and direct appeal that a person charged and convicted of a crime has the primary opportunity to create a record that supports viable issues on appeal.

267 P.3d 114, 2011 OK CR 30
(Cite as: 267 P.3d 114)

H

Court of Criminal Appeals of Oklahoma.
Gilbert Ray POSTELLE, Appellant,
v.
The STATE of Oklahoma, Appellee.

No. D–2008–934.
Dec. 29, 2011.

Background: Defendant was convicted by jury in the District Court, Oklahoma County, Ray C. Elliott, J., of four counts of first-degree murder and conspiracy to commit a felony, and he received a sentence of death on two of the murder counts. Defendant appealed.

Holdings: The Court of Criminal Appeals, A. Johnson, P.J., held that:
(1) sufficient evidence supported defendant's conviction for conspiracy to commit murder;
(2) trial court's error in failing to instruct jury that the testimony of accomplice witnesses required corroboration was harmless;
(3) any error in admission of bartender's identification of defendant's brother from photo line-up was harmless;
(4) trial court did not abuse its discretion in excluding from guilt stage an in-life booking photograph of murder victim from an arrest five months before his murder;
(5) evidence of plea bargains that state entered into with prosecution witnesses, requiring that they testify truthfully in defendant's prosecution, did not constitute improper vouching;
(6) trial court did not abuse its discretion in denying defendant the use of a jury questionnaire during voir dire;
(7) trial court did not abuse its discretion in excusing eight prospective jurors for cause, based upon their views on the death penalty; and
(8) sufficient evidence supported jury's finding that the murders were especially heinous, atrocious, or cruel.

Affirmed.

West Headnotes

[1] Criminal Law 110 1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) k. Construction in favor of government, state, or prosecution. Most Cited Cases

Criminal Law 110 1159.2(7)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) k. Reasonable doubt. Most Cited Cases

The appellate court will uphold a verdict

of guilt if, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt.

[2] Criminal Law 110 1144.13(4)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(4) k. Evidence accepted as true. Most Cited Cases

Criminal Law 110 1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) k. Inferences or deductions from evidence. Most Cited Cases

In evaluating the evidence presented at trial, the appellate court accepts all reasons, inferences and credibility choices that tend to support the verdict.

[3] Criminal Law 110 507(2)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)1 In General
110k507 Accomplices Within Rules of Evidence
110k507(2) k. Knowledge and concealment of crime in general. Most Cited Cases

Witness was an "accomplice" of capital murder defendant's, and thus his testimony required corroboration; while witness was not present at murder scene, he testified that he heard defendant and his brother talking about their belief that victim had been somehow responsible for their father's motorcycle accident and that anyone responsible was "going to pay," he feared that, based on what he had heard, defendant and his brother were going to shoot victim later that day, and witness left a loaded rifle with defendant and his brother, suspecting they might well be on their way to victim's house intending to shoot him. 21 Okl.St.Ann. § 172; 22 Okl.St.Ann. § 742.

[4] Criminal Law 110 507(1)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)1 In General
110k507 Accomplices Within Rules of Evidence
110k507(1) k. In general. Most Cited Cases

Witness was an "accomplice" of capital murder defendant's, and thus his testimony required corroboration, as witness admitted being present when the murders were committed and his DNA was found on one of the projectiles found at the murder scene, he was charged in the same information as defendant with four counts of first degree

murder and one count of conspiracy, and he ultimately pled guilty before his scheduled trial to "accessory" as part of an agreement providing for his cooperation and testimony at trial. 21 Okl.St.Ann. § 172; 22 Okl.St.Ann. § 742.

[5] Criminal Law 110 ⚿507(1)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)1 In General
110k507 Accomplices Within Rules of Evidence
110k507(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿511.9

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.9 k. Testimony of third persons. Most Cited Cases

Witnesses were not accomplices of capital murder defendant's, and thus their testimony did not require corroboration under accomplice witness statute and their testimony could provide the necessary independent evidence to corroborate the testimony of defendant's accomplices, as there was no evidence supporting a finding that witnesses were present during the murders or aided or encouraged the commission of the murders in any way beforehand. 21 Okl.St.Ann. § 172; 22 Okl.St.Ann. § 742.

[6] Criminal Law 110 ⚿511.2

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.2 k. Connecting accused with crime. Most Cited Cases

Accomplice testimony must be corroborated with evidence that, standing alone, tends to link defendant to the commission of the crime charged. 22 Okl.St.Ann. § 742.

[7] Criminal Law 110 ⚿511.1(4)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.1 In General
110k511.1(4) k. Scope of corroboration in general. Most Cited Cases

Criminal Law 110 ⚿511.2

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.2 k. Connecting accused with crime. Most Cited Cases

An accomplice's testimony need not be corroborated in all material respects, but requires at least one material fact of independ-

ent evidence which tends to connect the defendant with the commission of the crime. 22 Okl.St.Ann. § 742.

[8] Criminal Law 110 ⚿511.2

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.2 k. Connecting accused with crime. Most Cited Cases

For purposes of statutory requirement that accomplice testimony be corroborated with evidence that, standing alone, tends to link the defendant to the commission of the crime charged, corroborative evidence is not sufficient if it requires any of the accomplice's testimony to form the link between the defendant and the crime, or if it tends to connect the defendant only with the perpetrators and not the crime itself. 22 Okl.St.Ann. § 742.

[9] Criminal Law 110 ⚿511.2

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.2 k. Connecting accused with crime. Most Cited Cases

The purpose of the statutory requirement that accomplice testimony be corroborated with evidence that, standing alone, tends to link the defendant to the commission of the crime charged is to ensure that an accused is not falsely implicated by someone equally culpable in order to seek clemency, or for motives of revenge or any other improper reason. 22 Okl.St.Ann. § 742.

[10] Criminal Law 110 ⚿507(1)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)1 In General
110k507 Accomplices Within Rules of Evidence
110k507(1) k. In general. Most Cited Cases

For purposes of statutory requirement that accomplice testimony be corroborated with evidence that, standing alone, tends to link the defendant to the commission of the crime charged, a witness is an "accomplice" to the crime at trial if the witness could be charged with the same offense. 22 Okl.St.Ann. § 742.

[11] Criminal Law 110 ⚿511.2

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.2 k. Connecting accused with crime. Most Cited Cases

If an accomplice's testimony is corroborated as to one material fact by independent evidence tending to connect the accused with the commission of the crime, the jury may infer that the accomplice speaks the truth as to all. 22 Okl.St.Ann. § 742.

[12] Criminal Law 110 ⚿511.7

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.7 k. Admissions and declarations by defendant. Most Cited Cases

An accused's admissions as well as an accused's attempts to conceal a crime can be sufficient to corroborate an accomplice's testimony. 22 Okl.St.Ann. § 742.

[13] Conspiracy 91 ⚿47(8)

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k44 Evidence
91k47 Weight and Sufficiency
91k47(3) Particular Conspiracies
91k47(8) k. Homicide, assault, rape, kidnapping, and abortion. Most Cited Cases

Sufficient evidence supported capital murder defendant's conviction for conspiracy to commit murder; evidence showed that defendant had gone to a friend's house for ammunition earlier that day, that defendant and accomplice loaded and taped together two thirty-round clips for accomplice's rifle, and according to accomplice's testimony, both defendant and his brother had discussed shooting victim in revenge for causing their father's motorcycle accident, and when another accomplice voiced concern and objection to direction of defendant's father to kill everyone there, defendant told other accomplice that victim was the one responsible for his father's motorcycle wreck.

[14] Criminal Law 110 ⚿780(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k780 Testimony of Accomplices and Codefendants
110k780(1) k. Necessity of instructions. Most Cited Cases

Trial court was required to instruct jury in capital murder case that testimony of accomplice witnesses required corroboration, as there was evidence from which jury could find that witnesses were accomplices. 22 Okl.St.Ann. § 742.

[15] Criminal Law 110 ⚿1173.2(6)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.2 Instructions on Particular Points
110k1173.2(6) k. Testimony of accomplices and codefendants. Most Cited Cases

Trial court's error in failing to instruct jury in capital murder case that the testimony of those witnesses who were accomplices required corroboration was harmless, as there was sufficient non-accomplice testimony to corroborate the testimony of the

accomplice witnesses. 22 Okl.St.Ann. § 742.

[16] Criminal Law 110 1173.2(6)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.2 Instructions on Particular Points
110k1173.2(6) k. Testimony of accomplices and codefendants. Most Cited Cases

The failure to submit instructions on the issue of accomplices and the need for accomplice testimony to be corroborated is harmless where sufficient corroborating evidence is otherwise present in the record. 22 Okl.St.Ann. § 742.

[17] Criminal Law 110 1039

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1039 k. Issues related to jury trial. Most Cited Cases

Court of Criminal Appeals would review for plain error only in capital murder prosecution the issues of whether the trial court abused its discretion by allowing the jury to view the crime scene and a firearms demonstration at police department gun range, where defense counsel failed to object at trial either to the jury view and the manner in which it was conducted or to the firearms demonstration. 20 Okl.St.Ann. § 3001.1.

[18] Criminal Law 110 1039

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1039 k. Issues related to jury trial. Most Cited Cases

No plain error occurred in capital murder prosecution with respect to trial court allowing the jury to view the crime scene and a firearms demonstration at police department gun range, where the record did not show, nor did defendant explain, how he was prejudiced by anything that occurred during the view or firearms demonstration. 20 Okl.St.Ann. § 3001.1.

[19] Criminal Law 110 1036.1(7)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(3) Particular Evidence
110k1036.1(7) k. Identification evidence. Most Cited Cases

Court of Criminal Appeals would review for plain error only the issue of whether capital murder defendant was denied due process by the admission of a tainted eyewitness identification of his brother, as defend-

ant failed to object to witness's identification of his brother on this basis at trial. U.S.C.A. Const.Amend. 14.

[20] Criminal Law 110 1036.1(7)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(3) Particular Evidence
110k1036.1(7) k. Identification evidence. Most Cited Cases

Any error in admission of bartender's identification of capital murder defendant's brother from photo line-up assembled by police detective was not plain, absent showing of prejudice; accomplice gave an eyewitness account of defendant's murderous actions, and the evidence showed that defendant used a rifle in a lethal rampage that left four people dead.

[21] Criminal Law 110 339.10(3)

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k339.5 Identity of Accused
110k339.10 Effect of Prior Events on Subsequent Identification
110k339.10(3) k. Prior confrontation in general. Most Cited Cases

Criminal Law 110 339.10(6.1)

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k339.5 Identity of Accused
110k339.10 Effect of Prior Events on Subsequent Identification
110k339.10(6) Independent Basis; Opportunity for Observation
110k339.10(6.1) k. In general. Most Cited Cases

Court considers several factors in determining whether a courtroom identification was tainted by a pre-trial confrontation, including: (1) the prior opportunity of the witness to observe the defendant during the alleged criminal act, (2) the degree of attention of the witness, (3) the accuracy of the witness's prior identification, (4) the witness's level of certainty, and (5) the time between the crime and the confrontation.

[22] Criminal Law 110 1036.1(3.1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(3) Particular Evidence
110k1036.1(3.1) k. In general. Most Cited Cases

Criminal Law 110 1036.1(7)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Res-

ervation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(3) Particular Evidence
110k1036.1(7) k. Identification evidence. Most Cited Cases

Court of Criminal Appeals would review for plain error only the issues of whether the trial court erred in admitting witness's extra-judicial identification of defendant's brother and the testimony of another witness concerning a conversation he had with defendant's brother about one of the victims, where defendant did not object at trial to the testimony of either witness.

[23] Homicide 203 983

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k983 k. Identity and presence of accused. Most Cited Cases

Bartender's extra-judicial identification of capital murder defendant's brother as the passenger in minivan that she observed leaving the crime scene was relevant to establishing the identity of the perpetrators of the murders, and thus the was admissible; bartender's testimony tended to prove and partially corroborate accomplice's testimony that it was defendant and defendant's brother and father who were with him in the minivan at the crime scene.

[24] Criminal Law 110 422(4)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k422 Grounds of Admissibility in General
110k422(4) k. Motive of accomplice or motive for conspiracy. Most Cited Cases

Witness's testimony that about a month before murders occurred, capital murder defendant's brother came to his shop and said he was angry with victim because some car parts had been stolen from his and defendant's car while it was stored on victim's property was admissible, as the testimony was probative of motive for killings and explained how defendant's and his brother's anger over the stripped car might have contributed to victim being targeted.

[25] Criminal Law 110 338(1)

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k338 Relevancy in General
110k338(1) k. In general. Most Cited Cases

Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue. 12 Okl.St.Ann. § 2401.

[26] Criminal Law 110 338(1)

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Rele-

vance
110k338 Relevancy in General
110k338(1) k. In general. Most Cited Cases

Criminal Law 110 382

110 Criminal Law
110XVII Evidence
110XVII(H) Materiality
110k382 k. Materiality in general. Most Cited Cases

Relevancy and materiality of evidence are matters within the sound discretion of the trial court.

[27] 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 did not abuse its discretion in excluding from guilt stage of capital murder prosecution an in-life booking photograph of murder victim from an arrest five months before his murder, offered by defendant, that reflected victim's condition as a methamphetamine addict, as the disputed issue in guilt stage of trial was who committed the murder, and it was of no consequence whether victim was a community leader of impeccable reputation or a methamphetamine addict. 12 Okl.St.Ann. § 2401.

[28] Criminal Law 110 1036.1(3.1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(3) Particular Evidence
110k1036.1(3.1) k. In general. Most Cited Cases

Capital murder defendant waived on appeal issue of whether trial court erred in denying defense counsel's request to introduce defense exhibit during guilt phase of trial, as defense counsel withdrew the exhibit in response to prosecutor's objection.

[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 district court's decision to admit or exclude evidence for an abuse of discretion.

[30] Criminal Law 110 2098(5)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel

110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(5) k. Credibility of other witnesses. Most Cited Cases

Evidence of plea bargains that state entered into with prosecution witnesses, requiring that they testify truthfully in capital murder prosecution, did not constitute improper vouching, as the prosecution elicited from each witness that the operative plea agreement was contingent upon full cooperation with the state and truthful testimony during the proceedings against defendant, and nothing in the plea agreements or in the record indicated that the prosecutor explicitly or implicitly suggested that he had means to verify the truthfulness of the testimony of the witnesses.

[31] Criminal Law 110 1152.21(1)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.21 Instructions
110k1152.21(1) k. In general. Most Cited Cases

Rulings on jury instructions are reviewed for an abuse of discretion.

[32] Criminal Law 110 822(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k822 Construction and Effect of Charge as a Whole
110k822(1) k. In general. Most Cited Cases

Appellate court will not interfere with the trial court's rulings on jury instructions provided the instructions, as a whole, accurately state the applicable law.

[33] Criminal Law 110 2098(5)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(5) k. Credibility of other witnesses. Most Cited Cases

There is no improper vouching that arises from provision in plea agreement with a prosecution witness that witness testify truthfully if the testimony does no more than reveal that the witness had an obligation to testify truthfully and explain the consequences of a breach of that obligation.

[34] Criminal Law 110 789(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k789 Reasonable Doubt
110k789(1) k. Necessity of defining reasonable doubt. Most Cited Cases

Reasonable doubt is self-explanatory, and rather than clarifying the meaning of the

phrase, definitions of reasonable doubt tend to confuse the jury.

[35] Criminal Law 110 1035(6)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(6) k. Summoning and impaneling jury. Most Cited Cases

Capital murder defendant waived all but plain error review on his appellate challenge to the "struck juror" method of selecting jurors, where he did not object at trial to this jury selection method.

[36] Criminal Law 110 1035(6)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(6) k. Summoning and impaneling jury. Most Cited Cases

No plain error resulted from trial court's employment of "struck juror" method of jury selection in capital murder prosecution, as defense counsel was allowed to question all potential jurors broadly.

[37] Jury 230 131(1)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(1) k. In general. Most Cited Cases

Jury 230 131(3)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(3) k. Laying foundation for peremptory challenges. Most Cited Cases

The purpose of voir dire examination is to discover whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges.

[38] Jury 230 131(2)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(2) k. Discretion of court. Most Cited Cases

The manner and extent of voir dire lies within the trial court's discretion.

[39] 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

Trial court did not abuse its discretion in not conducting individual voir dire in capital murder prosecution, as trial court observed the potential jurors exposed to pretrial news coverage and questioned them to ensure that they had not formed an opinion about defendant's guilt based upon what they had seen in media news reports, and the answers they gave concerning the news stories they had seen did not establish a need for further sequestered individual questioning.

[40] 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

Individual sequestered voir dire is appropriate in certain capital cases, particularly in those that have been the subject of extensive pretrial news coverage, where the record shows that jurors were not candid in their responses about the death penalty or where it appears that prospective jurors' responses were tailored to avoid jury service; however, the crux of the issue is whether defendant can receive a fair trial with fair and impartial jurors.

[41] Criminal Law 110 1134.38

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.38 k. Summoning, impaneling, or selection of jury. Most Cited Cases

Appellate court gives great deference to the district court's opinion of the candor of potential jurors during voir dire because the judge sees the potential jurors and hears their responses.

[42] 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

Trial court did not abuse its discretion in denying capital murder defendant the use of a jury questionnaire during voir dire, as defense counsel was allowed to thoroughly question prospective jurors about their views on the death penalty and other relevant issues for the purpose of challenging prospective jurors for cause and intelligently exercising peremptory challenges, and defendant did not identify any specific question he would have asked on a questionnaire that he did not ask, or could not have asked, during oral voir dire.

[43] 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 excusing eight prospective jurors for cause, based upon their views on the death penalty, in capital murder prosecution, as each of the jurors stated unequivocally that under no circumstances could he or she give meaningful consideration to the three penalties provided by law, the court followed up on any response that could be construed as equivocal for assurance that the juror could not follow the law, and, in the end, each juror informed the court that he or she would not consider all three statutory penalties regardless of the law and evidence.

[44] 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

A prospective juror must be excused for cause in a capital case when the panelist's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

[45] Constitutional Law 92 ⚿4754

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)7 Jury
92k4754 k. Fair and impartial jury. Most Cited Cases

Due process of law requires that a prospective juror be willing to consider all the penalties provided by law and not be irrevocably committed to a particular punishment before the trial begins. U.S.C.A. Const.Amend. 14.

[46] 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

For purposes of determining when prospective juror may be excluded for cause because of his views on the death penalty, the juror's bias need not be proven with unmistakable clarity, nor does it require that the juror express an intention to vote against the death penalty automatically.

[47] Criminal Law 110 ⚿1134.38

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.38 k. Summoning, impaneling, or selection of jury. Most Cited Cases

On appellate review of trial court's decision to dismiss a prospective juror for cause because of his views on the death penalty, deference must be paid to the trial judge who sees and hears the jurors.

[48] 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

A juror in a death penalty case must be willing to consider each of the three statutory punishments: the death penalty, life imprisonment without the possibility of parole, and life imprisonment with the possibility of parole.

[49] 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

Appellate court reviews a juror's voir dire examination in its entirety to determine if the trial court properly excused the juror for cause.

[50] Jury 230 131(8)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal opinions and conscientious scruples. Most Cited Cases

Where the trial court has appropriately questioned prospective jurors regarding their eligibility to serve on a capital jury, it is not error to deny defense counsel a chance to rehabilitate jurors excused for inability to impose the death penalty.

[51] 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

Statute providing that challenge for implied bias may be taken for entertaining such conscientious opinions as would preclude juror's finding defendant guilty of offense punishable with death, in which case juror shall neither be permitted nor compelled to serve as juror, does not prohibit excusing a juror for cause based on inability to consider death penalty. 22 Okl.St.Ann. § 660(8).

[52] Criminal Law 110 1035(6)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(6) k. Summoning and impaneling jury. Most Cited Cases

267 P.3d 114, 2011 OK CR 30
(Cite as: 267 P.3d 114)

Court of Criminal Appeals would review for plain error only capital murder defendant's claim on appeal that "lecture" trial court made during voir dire denied him due process, where defendant did not object to trial court's remarks at trial. U.S.C.A. Const.Amend. 14.

[53] Jury 230 131(10)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(10) k. Examination by court. Most Cited Cases

Trial court's remarks, in addition to the material in the uniform opening instructions during voir dire in capital murder prosecution, did not indicate to prospective jurors what verdict they should reach, skew deliberations in favor of the prosecution, or otherwise undermined the presumption of innocence; rather, the trial court's additional remarks focused on the presumption of innocence, the burden of proof, and some procedural aspects of the deliberation process.

[54] Jury 230 131(1)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(1) k. In general. Most Cited Cases

An important aspect of voir dire is to educate prospective jurors on what will be asked of them under the law.

[55] Jury 230 131(1)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(1) k. In general. Most Cited Cases

In voir dire, the trial court must not influence jurors in their decision-making process.

[56] Criminal Law 110 754.1

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k754 Instructions Invading Province of Jury
110k754.1 k. In general. Most Cited Cases

Criminal Law 110 805(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k805 Form and Language in General
110k805(1) k. In general. Most Cited Cases

Analogies and examples may be used to illustrate the uniform opening instructions, but trial courts should be objective and careful not to appear to guide the jury to a particular decision.

[57] Sentencing and Punishment 350H 1627

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1627 k. Review. Most Cited Cases

State's capital sentencing scheme was not rendered unconstitutional on basis that appellate review did not include proportionality review; Eighth Amendment did not require appellate courts to conduct proportionality review, and mandatory statutory sentence review, as well as other procedural safeguards, provided a mechanism for meaningful appellate review to ensure that death sentences were not a product of arbitrary sentencing. U.S.C.A. Const.Amend. 8; 21 Okl.St.Ann. § 701.13(C).

[58] Sentencing and Punishment 350H 1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or disposition of co-participant or codefendant. Most Cited Cases

Death sentences imposed on defendant on two of his four murder convictions were not the result of arbitrary or capricious action, as the safeguards in the state's statutory capital sentencing scheme were well observed in defendant's case, and while defendant's brother, who was also the only co-defendant to go to trial, received a sentence less than death, the evidence presented against defendant was different in significant ways from the evidence presented against his brother. 21 Okl.St.Ann. § 701.13(C).

[59] Sentencing and Punishment 350H 1758(1)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1758 Death Penalty
350Hk1758(1) k. In general. Most Cited Cases

Trial court's refusal to allow admission of mitigating evidence of sentence received by co-defendant that was less than death at sentencing phase of capital murder prosecution was not constitutional error; trial court found that the sentence received by co-defendant was not relevant and that there was evidence showing that defendant was by far the most culpable and participated to a larger degree than any of the other charged individuals, and defendant was permitted to present mitigating evidence concerning his character and record, as well as evidence rebutting the aggravating circumstances.

[60] Sentencing and Punishment 350H 1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in mitigation in general. Most Cited Cases

There is a low threshold for relevance applicable to mitigating evidence for sentencing purposes in capital cases.

[61] Sentencing and Punishment 350H 1782

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1782 k. Reception of evidence. Most Cited Cases

Trial court did not abuse its discretion in excluding as cumulative three videotape clips proffered as mitigating evidence during sentencing phase of capital murder trial, which depicted defendant and his brother as children rollerskating in front of their grandfather, and defendant's father before and after motorcycle accident that defendant believed was caused by victim, as the substance of this mitigating evidence was separately presented to his jury via the testimony of family members, who testified about the relationships defendant had with his grandfather and father.

[62] Sentencing and Punishment 350H 1653

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1653 k. Mitigating circumstances in general. Most Cited Cases

The sentencer in capital cases should not be precluded from considering any relevant mitigating evidence.

[63] Sentencing and Punishment 350H 1782

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1782 k. Reception of evidence. Most Cited Cases

A ruling at the sentencing phase of a capital murder prosecution excluding mitigating evidence as cumulative is proper only to the extent that the ruling prevents needless presentation of cumulative evidence that would unnecessarily lengthen a trial.

[64] 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 would review for plain error only on appeal capital murder defendant's challenge to witnesses' victim impact testimony, where defendant failed to object to admission of witnesses' testimony. 21 Okl.St.Ann. § 701.10(C); 22 O.S.2010, § 984.

[65] Sentencing and Punishment 350H 1763

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

Victim impact testimony was properly admitted, in sentencing phase of capital murder prosecution; the testimony clearly related to the physical effects of the crime, the manner in which it was carried out, and the emotional and psychological impact of the murders of victims on their families, the testimony was concise and narrowly focused on the permissible subjects and was within the bounds of admissible victim impact testimony, and the testimony did not unfairly prejudice defendant or divert the jury from its duty to reach a reasoned moral decision regarding whether to impose the death penalty. 21 Okl.St.Ann. § 701.10(C); 22 O.S.2010, § 984.

[66] 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 jury's finding during sentencing phase of capital murder prosecution that the murders were especially heinous, atrocious, or cruel; defendant chased two of his four victims from trailer outside to the places where their bodies were ultimately found, defendant's attack on victims appeared to be a blitz-style attack, and evidence supported the inference that victims were aware of the attacks on defendant's two other victims and that they knew they were running for their lives when they were each shot and killed.

[67] Sentencing and Punishment 350H 1789(6)

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(6) k. Presumptions. Most Cited Cases

Sentencing and Punishment 350H 1789(8)

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(8) k. Verdict and findings. Most Cited Cases

Appellate court reviews the record to determine whether the evidence, considered in the light most favorable to the state, was sufficient for a rational trier of fact to find the aggravating circumstance beyond a reasonable doubt in a capital murder prosecution.

[68] Sentencing and Punishment 350H 1684

350H Sentencing and Punishment

267 P.3d 114, 2011 OK CR 30
(Cite as: 267 P.3d 114)

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

A particular murder is especially heinous, atrocious, or cruel, for purposes of capital sentencing, where the evidence shows: (1) that the murder was preceded by either torture of the victim or serious physical abuse, and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious or cruel.

[69] 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

"Torture," under the capital sentencing scheme for proving that a murder was especially heinous, atrocious or cruel, means the infliction of either great physical anguish or extreme mental cruelty.

[70] 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

Serious physical abuse or great physical anguish occurred, as required to find that the murder was especially, heinous, atrocious, or cruel under the capital sentencing scheme, if the victim experienced conscious physical suffering prior to his death.

[71] 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

For purposes of determining whether murder was especially, heinous, atrocious, or cruel under the capital sentencing scheme, "heinous" means extremely wicked or shockingly evil, the term "atrocious" means outrageously wicked and vile, and the term "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

[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

Evidence that the victim was conscious and aware of the attack supports a finding of torture, for purposes of determining whether murder was especially, heinous, atrocious, or cruel under the capital sentencing scheme.

[73] 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 anticipation of death caused by the knowledge that others around the victim are being shot is sufficient to support the mental anguish requirement of the aggravating circumstance of death penalty sentencing scheme that the murder was especially, heinous, atrocious, or cruel.

[74] 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

Heinous, atrocious, or cruel aggravating circumstances that is used to support imposition of death sentence for capital murder is neither vague nor overbroad.

[75] 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 would review for plain error on defendant's appeal in capital murder prosecution the issue of whether permissive language in instruction defining mitigating circumstances allowed the jury to disregard the mitigating evidence presented by defendant during the sentencing phase, where defendant did not object to the instruction at trial.

[76] 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

Permissive language in instruction defining mitigating circumstances as those which may be considered to extenuate a defendant's conduct and reduce the degree of blame did not allow the jury to disregard the mitigating evidence presented by defendant during second stage of capital murder prosecution.

[77] 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

Instructions to jurors during sentencing phase of capital murder prosecution did not prevent them from considering life or life without parole as sentencing options if they found the existence of an aggravating circumstance.

[78] Criminal Law 110 1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and authorities. Most Cited Cases

Capital murder defendant waived on appeal his challenge to the death penalty scheme in its entirety for vagueness, overbreadth, abuse of prosecutorial discretion, arbitrariness, and because it constituted cruel and unusual punishment, as his brief provided neither argument nor authority to support these sweeping allegations. U.S.C.A. Const.Amend. 8; Court of Criminal Appeals Rule 3.5(A)(5), 22 O.S.A. Ch. 18, App.

[79] Criminal Law 110 1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and authorities. Most Cited Cases

Capital murder defendant waived on appeal issue of whether trial court erred in denying his motion to strike the state's death penalty sentencing procedure as unconstitutional because it required a jury to make special findings of fact prohibited by State Constitution, as defendant failed to provide any argument or authority to support his claim. Const. Art. 7, § 15; Court of Criminal Appeals Rule 3.5(A)(5), 22 O.S.A. Ch. 18, App.

[80] Criminal Law 110 1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and authorities. Most Cited Cases

Capital murder defendant waived on appeal issue of whether trial court erred in denying his motion to allow him the right of allocution and to make the last argument to the jury, as he provided no argument or authority to support this claim. Court of Criminal Appeals Rule 3.5(A)(5), 22 O.S.A. Ch. 18, App.

[81] Sentencing and Punishment 350H 1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k. Mode of execution. Most Cited Cases

State's use of lethal injection is not cruel and unusual punishment in violation of the Federal and State Constitutions. U.S.C.A. Const.Amend. 8; Const. Art. 2, § 9.

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[82] Sentencing and Punishment 350H ⚿1763

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

Victim impact evidence in a capital murder prosecution is not a "superaggravator" and does not skew the sentencing proceeding in violation of the Eighth Amendment. U.S.C.A. Const.Amend. 8.

[83] 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

Instruction during sentencing phase of capital murder prosecution that permitted jurors to consider that the victims were individuals whose deaths could represent a "unique loss to society" and their families did not improperly allow jurors to consider the impact of the loss of the victims on society at large rather than simply the impact of the deaths on their immediate families.

[84] Criminal Law 110 ⚿1186.1

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1186.1 k. Grounds in general. Most Cited Cases

Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceedings.

[85] Sentencing and Punishment 350H ⚿1679

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1679 k. Endangering or creating risk to others. Most Cited Cases

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

Capital murder defendant's two death sentences were not the result of trial error or improper evidence or witness testimony, nor were the sentences imposed under the influence of any arbitrary factor, passion or prejudice; defendant created a great risk of death to more than one person, the murders were especially heinous, atrocious or cruel, and the aggravating circumstances outweighed the mitigating circumstances. 21 Okl.St.Ann. § 701.13(E).

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***122** ¶ 0 An Appeal from the District Court of Oklahoma County; The Honorable Ray C. Elliott, District Judge.Catherine Hammarsten, James Hughes, Asst. Public Defenders, Oklahoma City, Oklahoma, attorneys for defendant at trial.

David Prater, District Attorney, Steve Deutsch, Assistant District Attorney, Oklahoma***123** City, Oklahoma, attorneys for State at trial.

Andrea Digilio Miller, Oklahoma County Public Defender's Office, Oklahoma City, Oklahoma, attorney for appellant on appeal.

W.A. Drew Edmondson, Oklahoma Attorney General, Seth S. Branham, Assistant Attorney General, Oklahoma City, Oklahoma, attorneys for appellee on appeal.

OPINION

A. JOHNSON, Presiding Judge.

¶ 1 Appellant Gilbert Ray Postelle was tried by jury and convicted in the District Court of Oklahoma County, Case No. CF–2005–4759, of four counts of First Degree Murder (Counts 1–4), in violation of 21 O.S.Supp.2004, § 701.7, and one count of Conspiracy to Commit a Felony (Count 5), in violation of 21 O.S.2001 § 421.[FN1] The jury imposed the death penalty on Counts 1 and 4 after finding that Postelle created a great risk of death to more than one person and that each of those murders was especially heinous, atrocious or cruel. 21 O.S.2001, § 701.12(2) & (4). The jury fixed punishment at life imprisonment without the possibility of parole on Counts 2 and 3 and ten years imprisonment on Count 5. The Honorable Ray C. Elliott, who presided at trial, sentenced Postelle accordingly and ordered the sentences in Counts 2, 3 and 5 to be served consecutively. From this judgment and sentence Postelle appeals. We affirm.

FN1. Count 1 charged Postelle with the murder of Amy Wright, Count 2 charged Postelle with the murder of Terry Smith, Count 3 charged Postelle with the murder of James Donnie Swindle and Count 4 charged Postelle with the murder of James Alderson. Postelle was charged jointly with his father, Earl Bradford Postelle, his brother, David Bradford Postelle, and Randall Wade Byus.

BACKGROUND

¶ 2 On Memorial Day, 2005, James Donnie Swindle, Terry Smith, Amy Wright and James Alderson were shot to death outside Swindle's trailer located next to a salvage yard and alignment shop in an industrial area of Del City, Oklahoma. [FN2] Several witnesses in the area heard multiple gunshots and saw a maroon Dodge Caravan leaving the salvage yard shortly after the shots were fired. The owner of a flower shop nearby saw four men in the minivan; she testified that the men had dark hair and that she believed they were either Caucasian or Hispanic. A security camera across the street from the salvage yard captured on videotape the minivan entering and leaving the salvage yard driveway. Neither the license tag nor the occupants could be seen on the videotape. Sandra Frame, a bartender working at a bar next to the alignment shop, heard gunshots around 6:15 p.m. She heard the minivan accelerating and saw it leaving the crime scene. She could see there were at least two men in the minivan and she observed them laughing. She glimpsed the man in the passenger seat for a few seconds; he was young with dark hair and facial hair,

possibly Hispanic. She was later shown a photographic lineup and was "eighty-five percent sure" that David Postelle was the man she saw in the passenger seat of the minivan that day.

> FN2. James Donnie Swindle was known as and referred to throughout the record as Donnie Swindle.

¶ 3 Oklahoma City Police Officer Rocky Gregory was on traffic duty down the street from the salvage yard when two people approached him and reported hearing gunfire from the vicinity of the salvage yard. Gregory and his partner investigated and found Smith and Swindle, each dead from multiple gunshot wounds. The bodies of the two other victims, Alderson and Wright, were discovered further north after other officers arrived.

¶ 4 Several people who were at the Postelle home on Memorial Day testified at Gilbert Postelle's trial, including Crystal Baumann,[FN3] Arthur Wilder, [FN4] Alvis "Jay" Sanders [FN5] ***124** and Randall Byus.[FN6] The Postelle home was routinely used by these four and others as a place to smoke methamphetamine in the "smoke room." Memorial Day 2005 was no different. Crystal Baumann and Arthur Wilder, admitted methamphetamine addicts, testified they had gone to the Postelle home on Memorial Day to get high. On that day, they both said, Gilbert and David Postelle talked about their belief that Donnie Swindle was responsible for the motorcycle accident that left their father, Brad, both physically and mentally impaired.[FN7] Wilder recalled Gilbert and David Postelle naming Swindle as one of those responsible for the accident and saying that those responsible were "going to pay" for the damage done to their father.[FN8] Their conversation subsequently turned to target shooting. Wilder had come equipped with his newly acquired MAK–90 rifle to go target shooting with the Postelle brothers.[FN9] David Postelle had an SKS rifle he used for target practice. Because they needed ammunition, Gilbert Postelle, Baumann and Wilder went to a house in Del City where a friend gave Gilbert Postelle a speed loader for the MAK–90 rifle and a bag of bullets that could be used in both the MAK–90 and SKS rifles.

> FN3. Baumann faced charges for several crimes related to this case. She entered into an immunity agreement in August 2005 providing for her full cooperation with the State to prosecute these murders in exchange for immunity from prosecution for any crimes she could be held liable for stemming from this incident, provided there would be no immunity from prosecution for any crime that would make Baumann a principal to the crime of homicide in any degree. (Defendant's Exhibit 35)

> FN4. Wilder was charged with Accessory After the Fact, Unlawful Possession of a Firearm, Concealing Stolen Property and Possession of a Sawed-off Shotgun. Wilder entered a blind plea and was sentenced to 180 years imprisonment subject to one-year judicial review. On judicial review, Wilder agreed to testify and his sentence was vacated by the sentencing judge, who agreed to entertain a new recommendation following the trials related to this matter. Wilder signed an Agreement to Co-

operate and Testify Truthfully that provided he would be allowed to withdraw his original plea and re-enter a new plea of nolo contendere to the previous charges, plus some drug charges, and receive five years on each count to be served concurrently and with credit for time served. Wilder testified that the acceptance by the court of this plea bargain would result in his release from prison because of his credit for time served. (Defendant's Exhibit 41)

FN5. Sanders entered a guilty plea to Accessory After the Fact to the offense of First Degree Murder for his disposal of evidence after the murders. In exchange for his truthful testimony, the State recommended, and Sanders was given, a 12–year split sentence per his plea agreement of six years imprisonment with the remaining six years suspended. According to Sanders, he had discharged his sentence by the time of Postelle's trial. (Defendant's Exhibit 38)

FN6. Byus was originally charged in the same Information with Postelle with four counts of First Degree Murder and one count of Conspiracy to Commit Murder. He pled guilty to Accessory to a Felony (First Degree Murder). In exchange for his truthful testimony, the State agreed to recommend a split sentence of six years imprisonment with the remaining fourteen years suspended. (Defendant's Exhibit 39)

FN7. Gilbert Postelle's father, Earl Bradford Postelle, was referred to as "Brad" throughout the record.

FN8. There was also testimony that David and Gilbert Postelle were angry with Swindle because Swindle allowed someone to steal parts off of one of their cars that was stored on Swindle's property.

FN9. Wilder's rifle was referred to by several witnesses as an AK–47, but the State's firearm and toolmark examiner identified it as a MAK–90.

¶ 5 Later that day, Gilbert, David and Brad Postelle, along with Wilder, Baumann and Randall Byus left in the Postelles' maroon Dodge Caravan. Baumann denied knowing about a plan to shoot Swindle at the time they left. She and Wilder were dropped off at the home of Wilder's brother. Wilder, however, testified that he had heard the Postelles talking about a plan to go to Swindle's house and shoot him. He was unsure they would go through with it, but their conversation worried Wilder enough to insist the Postelles take him and Baumann home. Hours later David Postelle returned Wilder's MAK–90 to him. Wilder and Baumann took the gun to their storage unit and hid it. Wilder heard about the murders from a friend, put "two-and-two together" and worried that the rifle he had left in the Postelles' minivan had been used in the murders. Wilder's fear that the Postelles had used his rifle to commit murder was confirmed when he saw the Postelles' minivan leaving Swindle's property on a surveillance camera video on the local news. A few days after the murders, Gilbert Postelle told Wilder how he had chased everyone outside after breaching the door of Swindle's trailer

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***125** and how he then shot them outside. Gilbert Postelle then noticed Baumann standing nearby and ordered her to keep quiet about what she had overheard.

¶ 6 Jay Sanders testified that he had been living at the Postelle home the month before the murders.[FN10] Sanders said that the patriarch, Brad Postelle, talked about having bad dreams about his motorcycle accident and his conviction that Swindle was responsible for that accident. According to Sanders, Gilbert and David Postelle were devastated by the accident and its effect on their father.

FN10. Sanders's real name is Alvis Earl Sanders, Jr. but he was known as and referred to as "Jay."

¶ 7 On Memorial Day, Sanders said he was in and out of the smoke room throughout the day, getting high and working on his broken-down van. Sanders was in the smoke room when he learned that the Postelles were going to go target shooting. Sanders said someone put the SKS rifle in the Postelles' minivan, and he helped Brad Postelle into the van. David, Gilbert and Brad Postelle left with Wilder and Byus, but only the Postelles returned.[FN11] Later that night or the next morning, Sanders learned of the murders from the news; all the television sets in the Postelle home were tuned to news stations showing the security videotape of the minivan entering and leaving the murder scene. The Postelles also received several telephone calls from friends telling them about the murders. Sanders recalled that the Postelle home had "a different kind of atmosphere" and that there was a lot of whispering among the Postelle family.

FN11. Sanders recalled that Baumann left in another vehicle with a friend.

¶ 8 Sanders testified that a couple of days after the murders, the Postelles were discussing different ideas about what to do with the minivan "since it might be the van on the news." It was decided that Sanders and Daniel Ashcraft would take the minivan to Indiana, set it on fire and ultimately put it in a lake.[FN12] Sanders wiped the van down and drove it to Indiana to the home of a Postelle relative. Sanders also purged the Postelle home of drugs and drug paraphernalia. He buried gun parts and the minivan license plate in the backyard. After Sanders returned from Indiana, he was privy to a conversation in which Gilbert Postelle said, "I shut that bitch up in the corner" and mimed shooting a rifle at someone. Sanders testified that he, Gilbert, David and some other Postelle family members discussed fabricating a story for the police to shield the Postelles from being implicated in the murders.

FN12. Sanders and Ashcraft did not follow through with burning the van and submerging it in a lake. The police later found the van.

¶ 9 The State's firearm and toolmark examiner examined the many casings collected at the murder scene and determined that they were fired from two guns: Wilder's MAK–90 rifle and another rifle, possibly an SKS rifle. David Postelle's SKS rifle was never found. Law enforcement located the Postelles' van in Indiana and searched it. The alterations to the van observed by the investigators were consistent with Sanders's testimony about efforts to disguise it.

¶ 10 Randall Byus was with the Postelles when they shot the victims. According to Byus, he accompanied the Postelles, Wilder and Baumann, believing the Postelles were taking Baumann and Wilder home and then going target shooting. He saw Wilder's MAK–90 and David Postelle's SKS rifle in the Postelles' minivan. Nothing appeared unusual as they dropped off Baumann and Wilder. When David Postelle turned the van around and headed away from their normal place for target shooting, Byus asked where they were going, and was told that they were going to Swindle's house first, for some "shit," which Byus understood meant drugs. Byus first understood the Postelles' murderous plan when Gilbert Postelle asked his father a block from Swindle's trailer what to do if Donnie Swindle's father was there and Brad Postelle said to kill everybody there. Byus voiced disbelief and Brad Postelle responded that Donnie Swindle had tried to kill him. At the trailer, Byus witnessed Gilbert Postelle open the van door and shoot Terry Smith, who was near the minivan, in the face. Gilbert Postelle and his father then shot Donnie Swindle, causing him to fall to the ground. Swindle looked up and asked what ***126** was going on and David Postelle took the gun from his father and shot Swindle in the head. Gilbert Postelle turned and ran through the trailer, looking for others and firing his gun. He emerged and chased down James Alderson and shot him as Alderson tried to seek cover under a boat. After David Postelle told his cadre to get in the van, Byus heard two more shots. When Gilbert Postelle got in the van, he said, "that bitch almost got away." As they drove away, Brad Postelle hugged his sons and said, "That's my boys." On the way back to the Postelle home, the Postelles warned Byus against telling anyone what they had done.

1. Sufficiency of the Evidence

¶ 11 Postelle argues that the only evidence putting him among the assailants at the murder scene and implicating him in these crimes was the trial testimony of accomplices, namely Randall Byus, Arthur Wilder, Crystal Baumann and Jay Sanders. The accomplice testimony, he contends, was not sufficiently corroborated resulting in insufficient evidence to support his convictions. Postelle filed a Motion to Quash and Dismiss prior to trial, arguing that the lack of corroborating evidence of accomplice testimony required dismissal. The district court denied the motion. Postelle demurred to the State's evidence during trial, renewing the argument that there was no corroboration of the accomplice testimony.

[1][2] ¶ 12 This Court will uphold a verdict of guilt if, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *Logsdon v. State,* 2010 OK CR 7, ¶ 5, 231 P.3d 1156.1161; *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203–04. In evaluating the evidence presented at trial, we accept all reasons, inferences and credibility choices that tend to support the verdict. *Warner v. State,* 2006 OK CR 40, ¶ 35, 144 P.3d 838, 863.

[3][4][5][6][7][8][9] ¶ 13 Under Oklahoma law, a conviction cannot rest upon the testimony of an accomplice unless the accomplice's testimony is corroborated by other evidence that tends to connect the defendant with the commission of the offense. 22 O.S.2001, § 742. Accomplice testimony must be corroborated with evidence that, standing alone, tends to link the defendant to

the commission of the crime charged. *Pink v. State,* 2004 OK CR 37, ¶ 15, 104 P.3d 584, 590. An accomplice's testimony need not be corroborated in all material respects, but requires "at least one material fact of independent evidence which tends to connect the defendant with the commission of the crime." *Cummings v. State,* 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830. Corroborative evidence is not sufficient if it requires any of the accomplice's testimony to form the link between the defendant and the crime, or if it tends to connect the defendant only with the perpetrators and not the crime itself. *Glossip v. State,* 2007 OK CR 12, ¶ 42, 157 P.3d 143, 152. The purpose of the accomplice corroboration rule is to ensure that an accused is not falsely implicated by someone equally culpable in order to seek clemency, or for motives of revenge or any other reason. *Collier v. State,* 1974 OK CR 49, ¶ 7, 520 P.2d 681, 683.

¶ 14 Specifically, Postelle argues that Randall Byus was an accomplice and that Byus's testimony placing him at the murder scene was not corroborated by independent evidence. Postelle contends that the testimony of Baumann, Wilder and Sanders is insufficient to corroborate Byus's testimony because they are accomplices as well. Furthermore, Postelle argues that, even if the testimony of Baumann, Wilder and Sanders is sufficient to corroborate Byus's testimony that he was present during the murders, these witnesses cannot corroborate Byus's testimony that Postelle shot each victim and was responsible for all four murders.

[10] ¶ 15 A witness is an accomplice to the crime at trial if the witness could be charged with the same offense. *Jones v. State,* 2006 OK CR 5, ¶ 33, 128 P.3d 521, 538. Under 21 O.S.2001, § 172, all persons who directly commit the act constituting the offense or aid and abet in its commission, even if not present, are principals and can be charged as an accomplice and held criminally ***127** liable.[FN13] Wilder testified that on Memorial Day 2005 he heard the Postelle brothers talking about their conviction that Swindle had been somehow responsible for their father's motorcycle accident and that anyone responsible "is going to pay." From these conversations, Wilder feared that Gilbert and David Postelle planned to shoot Swindle later that day. He got in the van with them along with Brad Postelle, Randall Byus and Crystal Baumann. He brought his loaded MAK–90 rifle with him (on the trip to his brother's house) and left it with the Postelles, suspecting they might well be on their way to Swindle's house intending to shoot him. A rational jury could reasonably conclude from such evidence that Wilder, although not present, aided the Postelles in the murders, by knowingly providing the murder weapon and find that he could have been charged as an accomplice.

FN13. OUJI–CR(2d) 9–26 defines accomplice as:

> An "accomplice" is one who, with criminal intent, is involved with others in the commission of a crime. A person becomes an accomplice either by being present and participating in a crime or, regardless of whether he/she is present during the commission of a crime, by aiding and abetting before or during its commission, or by having advised or encouraged its commission.

¶ 16 Randall Byus admitted being present when the murders were committed and his DNA was found on one of the projectiles found at the murder scene. He was charged in the same Information as Postelle with four counts of First Degree Murder and one count of Conspiracy. Byus ultimately pled guilty before his scheduled trial to "accessory" as part of an agreement providing for his cooperation and testimony in this case. Regardless of the crime for which he was ultimately convicted, a rational jury could have rejected Byus's trial testimony minimizing his involvement and found that he participated in the murders and was properly charged with Postelle as an accomplice. Under the test for accomplice liability, the evidence was susceptible to a finding that Byus and Wilder were accomplices whose testimony required corroboration. There is no evidence, however, supporting a finding that either Baumann or Sanders were present during the murders or aided or encouraged the commission of the murders in any way beforehand. Hence, they could not be accomplices to the murders and their testimony could be considered without any need for corroborating evidence. Their testimony can also provide the necessary independent evidence to corroborate the testimony of Byus and Wilder. *Cummings,* 1998 OK CR 45, ¶ 20, 968 P.2d at 830 (at least one material fact of independent evidence tending to connect the defendant with the crime is sufficient corroboration of accomplice testimony).

¶ 17 Sanders testified that he helped Brad Postelle into the Postelles' maroon Dodge Caravan to go target shooting with his sons, and Byus and Wilder in the late afternoon of Memorial Day 2005. He saw David Postelle's SKS rifle in the van; Wilder's MAK–90 was proven to be one of the two weapons used in the killings. Sanders recognized the Postelles' van entering and leaving Swindle's property on the surveillance videotape on the news because of a missing hubcap. Sanders testified about conversations with Gilbert Postelle and his family about concealing evidence and concocting a story to tell the police. Sanders also repeated an admission he heard Gilbert Postelle make about killing Amy Wright while he mimed shooting a rifle. Baumann heard Gilbert Postelle take responsibility for the murders on another occasion and observed him make a "spraying" motion as though he were shooting people. Postelle threatened Baumann, ordering her to say nothing about what she had heard. Baumann said that Gilbert Postelle mentioned his gun jamming when he switched clips. The State's firearms expert testified that a live round is often ejected to clear a gun jam and one live round was found at the crime scene. The discovery of the live round further corroborates Gilbert Postelle's confession and, in turn, Baumann's testimony repeating it.

[11][12] ¶ 18 If an accomplice's testimony is corroborated as to one material fact by independent evidence tending to connect the accused with the commission of the crime, the jury may infer that the accomplice speaks the truth as to all. *Glossip,* 2007 OK CR 12, ¶ 42, 157 P.3d at 152. An accused's ***128** admissions as well as an accused's attempts to conceal a crime can be sufficient to corroborate an accomplice's testimony. *See Id.* at ¶ 47, 157 P.3d at 153; *Wackerly v. State,* 2000 OK CR 15, ¶ 24, 12 P.3d 1, 11. The testimony of Sanders and Baumann about Gilbert Postelle's admissions and involvement in conversations about concealing evidence of the murders provided the

necessary independent evidence specifically connecting Gilbert Postelle with the commission of the murders. The testimony of Wilder and Byus was sufficiently corroborated, making the evidence overall sufficient to support Gilbert Postelle's convictions.

[13] ¶ 19 Postelle also claims the evidence was insufficient to prove he was part of a conspiracy to commit murder. He maintains that the evidence showed that he was not a party to a conspiracy to murder, but rather simply followed the order his father gave as they pulled into Swindle's driveway—to kill everyone at Swindle's trailer. We disagree. Gilbert Postelle's actions and statements prove otherwise.

¶ 20 The evidence showed that Postelle had gone to a friend's house for ammunition earlier that day. He and Wilder loaded and taped together two thirty-round clips for Wilder's MAK–90. According to Wilder, both Gilbert and David Postelle had discussed shooting Swindle in revenge for causing their father's motorcycle accident. When Byus voiced concern and objection to Brad Postelle's direction to kill everyone there, Gilbert Postelle told Byus that Swindle was the one responsible for his father's motorcycle wreck. This evidence tended to prove that Gilbert Postelle knew they were there to kill Swindle and that he was part of a conspiracy to murder him. The conspirators' plan included leaving no witnesses and Postelle simply hoped that he would not have to kill someone he liked. The evidence was sufficient for a rational jury to find Postelle guilty of conspiracy to commit murder beyond a reasonable doubt. Postelle's claims challenging the sufficiency of the evidence supporting his convictions are denied.

2. Accomplice Instructions

[14][15] ¶ 21 Postelle argues that the district court erred in failing to instruct the jury on the need for corroboration of accomplice testimony. Postelle requested accomplice instructions and the court denied the request, finding that the evidence did not support a finding that Byus, Wilder, Sanders or Baumann were accomplices.[FN14] Postelle contends that the failure to submit appropriate instructions on accomplice testimony relieved the State of its burden of proof and denied him a fair trial in both stages of trial because the testimony of accomplice Byus was the basis for both finding him guilty and for imposing the death penalty.

> FN14. The defense requested OUJI–CR(2d) 9–25 Use of Accomplice Testimony, 9–26 Accomplice Defined, 9–28 Corroborating Evidence Needed for Accomplice Testimony, 9–29 Determination of Accomplice Status by Jury for Alvis "Jay" Sanders, Arthur Wilder, Randall Byus, and Crystal Baumann, 9–31 When Corroboration by Accomplice is Insufficient and 9–32 Determining when Corroboration by Accomplice is Sufficient. Postelle asked the trial court to instruct the jury that Sanders, Byus and Baumann were accomplices as a matter of law and to have the jury decide Wilder's status.

¶ 22 This Court has set forth rules for submitting accomplice instructions many times.

> If the evidence is uncontroverted and it establishes that the witness is an accomplice, the trial judge must so rule as a matter of

> law and instruct the jury that his testimony requires corroboration. Likewise, if the undisputed evidence indicates that the connection of the witness with the crime was innocent and lacking in criminal intent, or that he merely had knowledge and therefore is not an accomplice, the trial judge must so rule. However, if evidence is susceptible to alternative findings that the witness is or is not an accomplice, then the issue is a question of fact to be submitted to the jury under proper instruction.

Nunley v. State, 1979 OKCR 107, ¶ 10, 601 P.2d 459, 462–63; *see also Bryson v. State,* 1994 OK CR 32, ¶ 38, 876 P.2d 240, 256.

[16] ¶ 23 As discussed above, there was evidence from which a jury could find that both Byus and Wilder were accomplices. ***129** The district court erred in failing to submit accomplice instructions concerning these witnesses. The failure to submit instructions on the issue of accomplices and the need for accomplice testimony to be corroborated is harmless where sufficient corroborating evidence is otherwise present in the record. See *Howell v. State,* 1994 OK CR 62, ¶ 28, 882 P.2d 1086, 1092; *Bryson,* 1994 OK CR 32, ¶ 39, 876 P.2d at 256. The testimony of Byus and Wilder implicating Gilbert Postelle in the murders was corroborated by the non-accomplice testimony of Baumann and Sanders. Wilder's testimony that on Memorial Day the Postelle brothers discussed their conviction that Donnie Swindle was responsible for their father's accident was corroborated by Crystal Baumann. Baumann further corroborated Wilder's and Byus's testimony that Gilbert Postelle was in the van with his brother, his father and Byus when she and Wilder were dropped off. Ballistics evidence corroborated Byus's testimony that Wilder's rifle was one of the murder weapons used in the quadruple homicide. The physical evidence at the crime scene also corroborated Byus's account of the shooting rampage. Jay Sanders corroborated Wilder's testimony that the group traveled in the Postelles' minivan the afternoon of the shooting and that David Postelle's SKS rifle was in the van. The flower shop owner saw four men leaving the murder scene in the minivan, corroborating Byus's testimony that he and the three Postelles were in the van. The most compelling evidence corroborating Byus's and Wilder's testimony, however, came from Gilbert Postelle himself, in his statements to Baumann and Sanders about the murders and, specifically, his statements about killing Amy Wright. The record contains sufficient evidence corroborating any accomplice testimony. Any error resulting from the court's failure to give appropriate accomplice instructions was harmless and did not contribute to the conviction or sentence in this case.

3. Jury View

[17][18] ¶ 24 Postelle argues that the district court abused its discretion by allowing the jury to view the crime scene and a firearms demonstration at the Oklahoma City Police Department gun range. *See Suggs v. State,* 1973 OK CR 236, ¶¶ 13–14, 509 P.2d 1374, 1377(allowing jurors to view place of offense is within discretion of district court and is governed by 22 O.S., § 851). He complains that: 1) the crime scene was in a materially different condition than at the time of the murders; 2) a crime scene technical investigator was allowed to narrate where evidence was located during the crime scene investigation; 3) the jury was allowed to go inside the bar and see where

the bartender was standing when she observed the minivan leaving the scene; 4) the jury was allowed to see where the surveillance camera was located; and 5) a juror was allowed to ask a question.[FN15]

> FN15. Title 22 O.S.2001, § 851 provides:
>
> > When, in the opinion of the court, it is proper that the jury should view the place in which the offense was charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by a person appointed by the court for that purpose, and the officers must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

¶ 25 Defense counsel objected neither to the jury view and the manner in which it was conducted nor to the firearms demonstration. Review is for plain error only. *See Simpson v. State,* 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698 (plain error is error that counsel failed to preserve through a trial objection, but upon appellate review, is clear from the record and affected the defendant's substantial rights). This claim merits little discussion because the record does not show, nor does Postelle explain, how he was prejudiced by anything that occurred during the view or firearms demonstration. It is his burden to show that alleged error affected his substantial rights and he has not done so here. *See Cuesta–Rodriguez v. State,* 2010 OK CR 23, ¶ 109, 241 P.3d 214, 246, *cert. denied,* —— U.S. ——, 132 S.Ct. 259, 181 L.Ed.2d 151 (2011) (holding that plain error requires, among other things, showing that error affected a substantial right); 20 O.S.2001, § 3001.1 (prohibiting***130** setting aside of judgment unless reviewing court is of opinion that alleged error constitutes substantial violation of constitutional right or statutory right or has probably resulted in a miscarriage of justice). This claim is denied.

4. Extra–Judicial Identification

[19][20] ¶ 26 Postelle argues that he was denied due process by the admission of a tainted eyewitness identification of his brother, David Postelle. Postelle did not object to bartender Sandra Frame's identification of David Postelle on this basis; review is for plain error only. *See Harmon v. State,* 2011 OK CR 6, ¶ 42, 248 P.3d 918, 935, *cert. denied,* —— U.S. ——, 132 S.Ct. 338, 181 L.Ed.2d 211 (2011); *Cole v. State,* 1988 OK CR 288, ¶ 6, 766 P.2d 358, 359.

¶ 27 Frame identified David Postelle's photograph from a six-man photo line-up assembled by a police detective. Frame indicated that she was 85% sure the photo of David Postelle was the man she saw in the front passenger seat of the minivan leaving the crime scene. Postelle complains that Frame's extra-judicial identification should have been excluded because the photographic identification procedure was impermissibly suggestive. He contends Frame's identification of David Postelle was tainted because she did not view the photo lineup until after she saw David Postelle's booking photograph in a newspaper article about the murders and because the photograph of Da-

vid Postelle in the lineup was the same booking photo featured in the newspaper article.

[21] ¶ 28 The rule governing an eyewitness's identification of a defendant at trial after a pretrial identification of that defendant by a photograph was set forth in *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). The Supreme Court held that convictions based on "eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* Neither this rule nor the others traditionally used in analyzing this type of claim fit the situation presented here.[FN16] This is so because generally when a defendant contests an eyewitness's identification, the eyewitness has identified the defendant as the perpetrator and the reviewing court must decide if a pre-trial confrontation tainted the witness's identification of the defendant at trial. The cases cited by Postelle involve such situations and do not address a witness's identification of someone other than the defendant.

FN16. For instance, this Court considers several factors in determining whether a courtroom identification was tainted by a pre-trial confrontation, including (1) the prior opportunity of the witness to observe the defendant during the alleged criminal act; (2) the degree of attention of the witness; (3) the accuracy of the witness's prior identification; (4) the witness's level of certainty; and (5) the time between the crime and the confrontation. *See Harmon,* 2011 OK CR 6, ¶ 45, 248 P.3d at 936.

¶ 29 We do not decide if Postelle's right to due process was violated by admission of Frame's possibly tainted identification of someone else because we are convinced that error, if any, was harmless beyond a reasonable doubt. The key, and most compelling, evidence against Postelle came from Randall Byus, who was present during the murders and gave an eyewitness account of Postelle's murderous actions. His identification of Gilbert Postelle was not based on any pretrial identification by photograph, but rather on his personal observation and familiarity with Postelle. The evidence showed that Postelle used Wilder's MAK–90 in a lethal rampage that left four people dead. Postelle participated in conversations about covering up the crime and made statements implicating himself in the murders, particularly in the murder of Amy Wright. We conclude that the minds of an average jury would not have found the State's case significantly less persuasive had Frame's identification of David Postelle been excluded. Our review of the record leaves us with no reasonable doubt that the jury would have reached a different verdict without the identification. We find any error in the admission of Frame's identification of David Postelle did not contribute ***131** to the verdict in this case and was harmless beyond a reasonable doubt.

5. Evidentiary Issues

[22][23][24] ¶ 30 Postelle argues that the district court erred in admitting Sandra Frame's identification of David Postelle and the testimony of Richard Vinson concerning a conversation he had with David Postelle about one of the victims. The purpose of this evidence, according to Postelle, was to es-

tablish his guilt by his association with his brother. Postelle contends that the testimony should have been excluded because it was irrelevant; and alternatively, if the evidence was somehow relevant, it should have been excluded because it was overly prejudicial. Postelle did not object to the testimony of either witness; review is for plain error only. *See Simpson v. State,* 2010 OK CR 6, ¶ 33, 230 P.3d 888, 900, *cert. denied,* —— U.S. ——, 131 S.Ct. 1009, 178 L.Ed.2d 838 (2011).

[25][26] ¶ 31 Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Taylor v. State,* 2011 OK CR 8, ¶ 40, 248 P.3d 362, 375–76; 12 O.S.2001, § 2401. "Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue." *Taylor,* 2011 OK CR 8, ¶ 40, 248 P.3d at 376. Relevancy and materiality of evidence are matters within the sound discretion of the trial court. *Id.* Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence. *Grissom v. State,* 2011 OK CR 3, ¶ 59, 253 P.3d 969, 989–90, *cert. denied,* —— U.S. ——, 132 S.Ct. 825, 181 L.Ed.2d 534 (2011); 12 O.S.Supp.2003, § 2403.

¶ 32 Sandra Frame's identification of David Postelle as the passenger in the maroon minivan that she observed leaving the crime scene was relevant to establishing the identity of the perpetrators of the murders. Other witness testimony placed Postelle and his brother in the same van shortly before and after the murders with the murder weapons. Frame's testimony tended to prove and partially corroborate Byus's testimony that it was Gilbert, David and Brad with him in the van at the crime scene. Frame's testimony was probative of the identity of the perpetrators and was more probative than prejudicial in this case. Postelle has not shown that its admission was plain error.

¶ 33 The testimony of Richard Vinson was properly admitted. Vinson testified that David Postelle came to his shop a month before the murders and that David said he was angry with Donnie Swindle because some car parts had been stolen from the Postelles' car while it was stored on Swindle's property. Although it appears Gilbert Postelle was not present during this conversation, other testimony from Sanders and Pino Georgio Amico confirmed that both of the Postelle brothers were angry with Swindle about the car being vandalized. Vinson's testimony was probative of motive for the killings and explained how the Postelle brothers' anger over the stripped car may have contributed to Swindle being targeted. The testimony was relevant and any danger of unfair prejudice was outweighed by its probative value. There was no error here.

6. Photographs

[27][28] ¶ 34 Postelle argues that the district court erred and denied him the right of confrontation by excluding the in-life photograph of Donnie Swindle offered by the defense during the first-stage of trial. The prosecution, without objection, called a relative of each of the victims in the first-stage of trial to sponsor an in-life photograph of their loved one (State's Exhibits 11–14). *See* 12 O.S.Supp.2003, § 2403 (in

homicide prosecutions, prosecutor may admit "appropriate photograph of the victim while alive" to show the victim's "general appearance and condition" while alive). James Swindle, Donnie Swindle's father, identified a photograph of his son and stated that the photograph was eight to ten years old. He admitted that his son had an ongoing methamphetamine problem at the time of his death. Defense counsel***132** sought on cross-examination to introduce a booking photograph of Donnie Swindle from an arrest five months before his murder. (Defendant's Exhibit 23) The defense argued that this photograph more accurately depicted Swindle and his condition as a methamphetamine addict near the time of his death. The district court sustained the prosecutor's objection and excluded the photograph. The district court noted that evidence that a murder victim had prior drug convictions, that he had repeated problems with law enforcement or that he had drugs in his home at the time of his death is inadmissible in the first-stage of trial.[FN17]

> FN17. Postelle seems to argue that the district court also erred in denying defense counsel's request to introduce Defendant's Exhibit 23 during Arthur Wilder's testimony. The record shows that defense counsel withdrew Defendant's Exhibit 23 in response to the prosecutor's objection, noting "we just want to have it identified for potential admission in Stage Two." Postelle's withdrawal of the exhibit constitutes abandonment of that request and waiver of the issue for appellate review regarding admission of the exhibit during the first-stage of trial. See *Johnson v. State,* 2004 OK CR 25, ¶ 15, 95 P.3d 1099, 1104.

[29] ¶ 35 We review a district court's decision to admit or exclude evidence for an abuse of discretion. *See Underwood v. State,* 2011 OK CR 12, ¶ 45, 252 P.3d 221, 242. In *Marquez–Burrola v. State,* 2007 OK CR 14, ¶ 31, 157 P.3d 749, 760, the appellant argued that 12 O.S.Supp.2003, § 2403 was facially unconstitutional because it permitted only prosecutors, not defendants, to offer photographs of a homicide victim. We rejected the claim, noting "[t]he statute does not expressly bar a defendant from introducing such evidence, and we find nothing in the more general provisions of the Evidence Code which would prevent him from doing just that, so long as the victim's appearance is somehow relevant to the issues in the case." *Id.*

¶ 36 The question presented is whether the photograph Postelle sought to admit of Swindle was relevant in first-stage. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2001, § 2401. There was no dispute that Donnie Swindle was murdered. The disputed issue in the first-stage of trial was who committed the murder and it was of no consequence whether Swindle was a community leader of impeccable reputation or a methamphetamine addict. The in-life photograph Postelle sought to introduce had no tendency to shed any light on the real issue, namely the identity of Swindle's killer. Arguably, the photograph was relevant in second-stage and it and a photograph of Terry Smith were admitted depicting their appearance and condition near the time of their deaths. We

find that the exclusion of the defense's photograph of Swindle in the first-stage of trial was neither an abuse of discretion nor a denial of Postelle's right of confrontation.

7. Instructional Errors

[30] ¶ 37 Postelle claims the district court erred in rejecting two of his proposed instructions in the first-stage of trial. First, he complains that the court erred in rejecting defense counsel's proposed instruction telling the jury that plea bargains involving the requirement of truthful testimony did not constitute vouching by the prosecution. This instruction was directed towards the testimony of Byus, Wilder, Sanders and Baumann.

[31][32] ¶ 38 Rulings on jury instructions are reviewed for an abuse of discretion. *See Harney v. State,* 2011 OK CR 10, ¶ 10, 256 P.3d 1002. 1005. This Court will not interfere with the trial court's judgment provided the instructions, as a whole, accurately state the applicable law. *Id.*

[33] ¶ 39 In *Nickell v. State,* 1994 OK CR 73, ¶¶ 7–10, 885 P.2d 670, 673–74, this Court considered whether evidence of a witness's obligation to testify truthfully as part of a plea agreement—so-called "truthfulness provisions"—constituted improper vouching of the witness's credibility. We held that evidence of truthfulness provisions in plea agreements becomes impermissible vouching only when a prosecutor explicitly or implicitly indicates that he or she can monitor and accurately verify the truthfulness of the witness's testimony. *Id.* at ¶ 8, 885 P.2d at 673. ***133** "There is no improper vouching if the testimony does 'no more than reveal that the witnesses had an obligation to testify truthfully and explain the consequences of a breach of that obligation.' " *Id.* (*quoting United States v. Bowie,* 892 F.2d 1494, 1499). We relied in part on a federal case that likened the truthfulness provision in a plea agreement to the oath every witness takes before testifying. *Id.* at ¶ 9, 885 P.2d at 673–74. We agreed that neither the mere revelation of the obligation to testify truthfully nor the recognition of the consequences of testifying falsely does anything more than reiterate the obligation that all witnesses face when they take the oath at the beginning of their testimony. *Id.* at ¶ 9, 885 P.2d at 673–74. We noted that evidence of these provisions counter-balances the impeaching effect that a plea agreement has in the minds of the jury, but that it in no way removes the jury's duty to weigh the credibility of each witness. *Id.*

¶ 40 There was no improper vouching in this case. The prosecution elicited from each witness that the operative plea agreement was contingent upon full cooperation with the State and truthful testimony during the proceedings against Postelle. Nothing in the plea agreements or in the record indicates that the prosecutor explicitly or implicitly suggested that he had means to verify the truthfulness of the testimony of Byus, Wilder, Sanders or Baumann. The court properly instructed the jury on evaluating the credibility of witnesses. Because evidence of truthfulness provisions in a plea agreement does not constitute impermissible vouching and there was no impermissible vouching elsewhere in this trial, we find the court did not err in rejecting Postelle's proposed instruction on the subject.

[34] ¶ 41 Postelle also argues that the court erred in rejecting his proffered jury instruction on reasonable doubt. We have

consistently and repeatedly held that reasonable doubt is self-explanatory, and that rather than clarifying the meaning of the phrase, definitions of reasonable doubt tend to confuse the jury.[FN18] Postelle offers nothing new that warrants reconsideration of this settled issue. This claim is denied.

FN18. *See* *Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 62, 241 P.3d at 234 (declining to revisit settled issue of whether jury should receive instruction on reasonable doubt) and cases cited therein.

8. Jury Selection: Individual Questioning and Questionnaires

[35][36] ¶ 42 Postelle claims that the jury selection process in his case denied him due process. He complains about the "struck juror" method used in selecting jurors in this case.[FN19] He also argues that his inability to use jury questionnaires and to conduct individual sequestered *voir dire* about the death penalty denied him the ability to intelligently exercise his peremptory challenges to strike biased jurors.[FN20] He complains specifically that the district court judge did not permit individual questioning of jurors, but allowed only *en masse* questioning of the group. According to Postelle, this was a superficial mode of examining jurors that provided little information about individual jurors and necessitated the need for either individual questioning***134** or questionnaires. He further complains that placing thirty potential jurors in the courtroom for *voir dire* examination, created uncomfortable conditions for the jurors and an atmosphere not conducive to discovering bias, interest, or partiality.

FN19. Under the district court's "struck juror" method, thirty prospective jurors were called to be questioned by the court and the attorneys. As potential jurors were removed for cause, they were replaced until there was a panel of thirty potential jurors who were passed for cause by the parties. The parties then utilized nine peremptory challenges each, leaving twelve jurors to hear the case.

FN20. Postelle filed a pre-trial motion for the use of jury questionnaires with a proposed questionnaire, and for individual sequestered *voir dire* on the death penalty and pretrial publicity. The district court denied Postelle's motion to use questionnaires, but granted Postelle's request for individual *voir dire* on the death penalty and pretrial news coverage. On the first attempt to hold a trial in this case, the district court utilized individual *voir dire* during that portion of jury selection relating to death qualification and pretrial publicity. That trial ended in mistrial before a jury was impaneled. The district court decided not to utilize individual *voir dire* in this trial which resulted in the convictions and death sentences presently under review. Postelle states in his brief that the request for sequestered *voir dire* was renewed during jury selection, but the passage cited, as well as the overall record, does not show that trial counsel renewed objections to the absence of individual *voir dire* or jury questionnaires.

[37][38] ¶ 43 The purpose of *voir dire*

examination is to discover whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges. *Sanchez v. State,* 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997, *cert. denied,* —— U.S. ——, 131 S.Ct. 326, 178 L.Ed.2d 212 (2010). "The manner and extent of *voir dire* lies within the District Court's discretion." *Id.* Postelle did not object to the "struck juror" method of selecting jurors in his case, waiving review for all but plain error. *See Harmon,* 2011 OK CR 6, ¶ 12, 248 P.3d at 928; *Simpson,* 1994 OK CR 40, ¶ 23, 876 P.2d at 698. "The 'struck juror' method of jury selection has been upheld where the record shows that the defendant was provided 'the opportunity to examine each prospective juror to determine whether grounds existed to challenge the juror for cause and was allowed to exercise all of his peremptory challenges provided by law.' " *Harmon,* 2011 OK CR 6, ¶ 12, 248 P.3d at 928 (*quoting Jones,* 2006 OK CR 5, ¶ 8, 128 P.3d at 533). The record shows that Postelle's attorney was allowed to question all potential jurors broadly. We cannot agree that the district court's method of conducting *voir dire* of this large group was either clearly erroneous or manifestly unreasonable. *See Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 55, 241 P.3d at 233. Hence, Postelle has shown neither that the "struck juror" method affected his substantial rights nor that he was prejudiced by the method of jury selection employed in his case. *See Harmon,* 2011 OK CR 6, ¶ 12, 248 P.3d at 929.

[39][40] ¶ 44 Nor do we find that jury selection was unfair because the trial court chose not to conduct individual sequestered *voir dire.* We have left the decision regarding individual *voir dire* to the discretion of the district court and have rejected requests for a mandatory rule requiring the use of individual sequestered *voir dire* in capital cases. *See Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 57, 241 P.3d at 233; *Jones v. State,* 2006 OK CR 17, ¶ 16, 134 P.3d 150, 156; *Childress v. State,* 2000 OK CR 10, ¶ 40, 1 P.3d 1006, 1015 (use of individual *voir dire* discretionary with trial court). Individual sequestered *voir dire* is appropriate in certain cases, particularly in those that have been the subject of extensive pretrial news coverage, where the record shows that jurors were not candid in their responses about the death penalty or where it appears that prospective jurors' responses were tailored to avoid jury service. *See e.g., Harmon,* 2011 OK CR 6, ¶ 13, 248 P.3d at 929; *Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 57, 241 P.3d at 233. "The crux of the issue, however, is whether the defendant can receive a fair trial with fair and impartial jurors." *Harmon,* 2011 OK CR 6, ¶ 13, 248 P.3d at 929; *Childress,* 2000 OK CR 10, ¶ 40, 1 P.3d at 1015.

[41] ¶ 45 Postelle cites remarks from several potential jurors exposed to news stories about the murders to argue that it was error not to conduct individual *voir dire* and not to allow questionnaires. The district court judge questioned these panelists to ensure that no one had formed an opinion about Postelle's guilt based upon what they had seen on the news. We give great deference to the district court's opinion of the candor of potential jurors because the judge sees the potential jurors and hears their responses. *Id.* at ¶ 14, 248 P.3d at 929. The trial judge in this case observed the potential jurors exposed to pretrial news coverage. The answers they gave concerning the news stories they had seen did not establish a need for further sequestered individual questioning. Our review shows that the remarks of

these panelists contained nothing prejudicial that could have tainted the other potential jurors who heard them. The district court's decision not to conduct individual *voir dire* was not an abuse of discretion.

[42] ¶ 46 Nor can we find that the district court's decision denying the use of a jury questionnaire in this case amounted to an abuse of discretion. While the use of jury ***135** questionnaires is not required.[FN21] we have noted their value as a screening tool in capital cases. *See Harmon,* 2011 OK CR 6, ¶ 15, 248 P.3d at 929; *Eizember v. State,* 2007 OK CR 29, ¶ 40 n. 6, 164 P.3d 208, 221 n. 6. In this case, however, defense counsel was allowed to thoroughly question prospective jurors about their views on the death penalty and other relevant issues for the purpose of challenging prospective jurors for cause and intelligently exercising peremptory challenges. Significantly, Postelle does not identify any specific question he would have asked on a questionnaire that he did not ask, or could not have asked, during oral *voir dire.* We cannot find, therefore, that Postelle's constitutional right to due process was violated by the lack of juror questionnaires in the *voir dire* process.

FN21. *See* Notes on Use to OUJI–CR(2d) 1–10 (use of juror questionnaire is discretionary).

9. Jury Selection: Erroneous Removal of Panelists for Cause Based on Opposition to the Death Penalty

[43] ¶ 47 Postelle claims that the district court failed to follow the proper procedure in excusing eight panelists for cause based upon the panelists' views on the death penalty. He argues that the district court judge did not ask the proper questions of potential jurors and that the judge should have given his attorney a chance to question panelists before they were excused based upon their expressed opposition to the death penalty.

[44][45][46][47] ¶ 48 A prospective juror must be excused for cause in a capital case when the panelist's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). "Due process of law requires that a prospective juror be willing to consider all the penalties provided by law and not be irrevocably committed to a particular punishment before the trial begins." *Sanchez,* 2009 OK CR 31, ¶ 44, 223 P.3d at 997. Under the *Witt* standard, however, the juror's bias need not be proven with unmistakable clarity; nor does it require that the juror express an intention to vote against the death penalty automatically. *Witt,* 469 U.S. at 424, 105 S.Ct. at 852. "[D]eference must be paid to the trial judge who sees and hears the jurors." *id.,* 469 U.S. at 426, 105 S.Ct. at 853; *see also Miller–El v. Cockrell,* 537 U.S. 322, 339, 123 S.Ct. 1029, 1041, 154 L.Ed.2d 931 (2003) ("Deference [on jury-selection issues] is necessary because a reviewing court, which analyzes only the transcripts from *voir dire,* is not as well positioned as the trial court to make credibility determinations."); *Grant v. State,* 2009 OK CR 11, ¶ 17, 205 P.3d 1, 11, *cert. denied,* —— U.S. ——, 130 S.Ct. 404, 175 L.Ed.2d 276 (2009) (deference to the trial court is appropriate because the court is able to personally observe the panelists, and take into account a number of non-verbal factors that do not transfer well, if at all, to the transcript page).

[48][49] ¶ 49 *Witt* requires only that each juror be willing to consider each of the three statutory punishments: the death penalty, life imprisonment without the possibility of parole and life imprisonment with the possibility of parole. *Hogan v. State,* 2006 OK CR 19, ¶ 17, 139 P.3d 907, 918. "We review a juror's *voir dire* examination in its entirety to determine if the trial court properly excused the juror for cause." *Harmon,* 2011 OK CR 6, ¶ 19, 248 P.3d at 930.

¶ 50 The eight prospective jurors identified by Postelle were all examined by the district court judge. Each of them stated unequivocally that under no circumstances could he or she give meaningful consideration to the three penalties provided by law. The district court followed up on any response that could be construed as equivocal for assurance that the prospective juror could not follow the law. In the end, each panelist informed the court that he or she would not consider all three penalties regardless of the law and evidence.

[50] ¶ 51 A review of *voir dire* shows that the district court neither erred in denying defense counsel's request to further question these panelists nor erred in its questioning. "Where the trial court has appropriately questioned prospective jurors regarding their eligibility to serve on a capital jury, it is not ***136** error to deny defense counsel a chance to rehabilitate jurors excused for inability to impose the death penalty." *Coddington v. State,* 2011 OK CR 17, ¶ 10, 254 P.3d 684, 695; *Littlejohn v. State,* 2004 OK CR 6, ¶ 49, 85 P.3d 287, 301–02.

¶ 52 The district court judge used an older version of the qualifying question for a capital case juror with Panelist G. When the mistake was brought to his attention, he substituted the question prescribed by OUJI–CR(2d) 1–5 for qualifying capital case jurors. The judge informed the panelists of the jury's duty to assess guilt and, if necessary, punishment, the three punishment options, the meaning of aggravating and mitigating circumstances, and the requirement of weighing aggravating and mitigating circumstances.[FN22] He then asked each panelist if he or she could consider the three penalties provided by law and impose the punishment warranted by the law and evidence. If the panelist said "no," the judge asked if the panelist's reservations were so strong that regardless of the law and evidence, the panelist could not consider all three penalties. The court's question about the panelist's willingness to consider the three penalties was taken nearly verbatim from OUJI–CR(2d) 1–5 and was sufficient to identify those panelists who could not or would not consider the three punishments no matter what the law or facts. [FN23] *See Harmon,* 2011 OK CR 6, ¶ 22, 248 P.3d at 931; *Williams v. State,* 2001 OK CR 9, ¶ 13, 22 P.3d 702, 710. Based on this record we find the district court did not abuse its discretion in removing the eight challenged panelists for cause.

FN22. OUJI–CR(2d) 1–5 provides:

> The defendant is charged with murder in the first degree. It will be the duty of the jury to determine whether the defendant is guilty or not guilty after considering the evidence and instructions of law presented in court.
>
> If the jury finds beyond a reasonable doubt that the defendant is

guilty of murder in the first degree, the jury will then have the duty to assess punishment. The punishment for murder in the first degree is death, imprisonment for life without parole or imprisonment for life.

You may not consider imposing the death penalty unless you find that one or more aggravating circumstances exist beyond a reasonable doubt. Aggravating circumstances are those which increase the defendant's guilt or enormity of the offense. You also may not consider imposing the death penalty unless you unanimously find that the aggravating circumstance or circumstances outweigh any mitigating circumstances which may be present. 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. Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

If you find the defendant guilty of murder in the first degree, can you consider all three of these legal punishments—death, imprisonment for life without parole or imprisonment for life—and weigh the aggravating circumstance(s) against the mitigating circumstances to impose the punishment warranted by the law and evidence? **[If the answer to the preceding question is negative]**

If you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of **death/(imprisonment for life without parole)/(imprisonment for life),** are your reservations about the penalty of **death/(imprisonment for life without parole)/(imprisonment for life)** so strong that regardless of the law, the facts and circumstances of the case, you would not consider the imposition of the penalty of **death/(imprisonment for life without parole)/ (imprisonment for life)?**

FN23. Even though the court used a former version of OUJI–CR(2d) 1–5 in questioning Panelist G, the questioning sufficiently probed the issue of whether Panelist G was able to consider the three penalties provided by law. Panelist G was firm that he could not consider the death penalty and the judge found that further questioning was unnecessary because he was "pretty emphatic about it."

10. Jury Selection: Implied Bias and 22 O.S.2001 § 660(8)

[51] ¶ 53 Postelle claims that it is a violation of 22 O.S.2001, § 660 to remove a prospective juror for cause based on the panelist's opposition to the death penalty because Section 660(8) allows for the removal of only those panelists whose views on capital punishment would prevent them from finding the ***137** defendant guilty.[FN24] The misapplication of the implied bias statute, he maintains, allows the automatic removal for cause of those jurors who are not death-penalty prone rather than requiring the State to exercise peremptory challenges to exclude them. Hence, argues Postelle, the State receives more strikes under our capital jury selection system than it is entitled to, resulting in juries prone to imposing the death penalty. We have rejected this same argument in two recent cases. *See Coddington,* 2011 OK CR 17, ¶¶ 14–15, 254 P.3d at 696–97; *Harmon,* 2011 OK CR 6, ¶ 23, 248 P.3d at 931. Postelle offers no new authority or argument warranting reconsideration of this claim and it is denied.

FN24. Section 660 provides:

> A challenge for implied bias may be taken for all or any of the following cases, and for no other ...
>
> 8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror.

11. Lecture

[52][53] ¶ 54 Postelle claims that the district court judge made numerous improper comments during a "lecture" in *voir dire* that denied him due process and a fundamentally fair trial. Among other things, Postelle complains that the trial court judge gave instructions during *voir dire* that were designed to encourage jurors to abandon their own beliefs to reach a verdict and that these instructions had a coercive effect on the jury. He argues that the court's remarks were often biased in favor of the prosecution, diminished his presumption of innocence and were confusing and prejudicial. Because Postelle did not object to the remarks, we review for plain error. *See McElmurry v. State,* 2002 OK CR 40, ¶ 26, 60 P.3d 4, 16–17 (holding that objections to nature or extent of *voir dire* not made before start of testimony are waived except for plain error).

[54][55][56] ¶ 55 "An important aspect of *voir dire* is to educate prospective jurors on what will be asked of them under the law." *Eizember,* 2007 OK CR 29, ¶ 40, 164 P.3d at 221. A trial court, however, must not influence jurors in their decision-making process. *Johnson v. State,* 2009 OK CR 26, ¶ 4, 218 P.3d 520, 522. The Oklahoma Uniform Jury Instructions–Criminal (2d) are comprehensive instructions that follow a chronology designed to give jurors as much information as they need about the trial proceedings. Trial courts should follow the introductory information provided in the Oklahoma Uniform Jury Instructions. If the court determines that jurors should be instructed on a matter not included within the Uniform Jury Instructions, the court should give an instruction that is "simple, brief, impartial and free from argument." 12 O.S.2001, § 577.2. Analogies and examples may be used to illustrate the uniform opening instructions, but trial courts should be objective and careful not to appear to guide

the jury to a particular decision. *Johnson,* 2009 OK CR 26, ¶ 4, 218 P.3d at 522.

¶ 56 In *Johnson,* 2009 OK CR 26, ¶ 5, 218 P.3d at 522, reversal was required because the court's remarks emphasized the potential cost of the proceedings and potential consequences of the jurors' failure to follow the court's instructions. The court's remarks in *Johnson* about the deliberation process were premature and amounted to a preemptive deadlocked jury charge. *Id.*

¶ 57 The remarks in Postelle's case are nothing like those condemned in *Johnson.* The trial court judge discussed neither the costs of the proceedings nor the ramifications of failing to follow the court's instructions. The court's commentary that was in addition to the material in the uniform instructions focused on the presumption of innocence, the burden of proof and some procedural aspects of the deliberation process. Contrary to Postelle's claim, the court's remarks concerning deliberations—that the jury would not be allowed to communicate with outsiders or separate until a verdict was reached—did not compel jurors to hastily return a guilty verdict. [FN25] The court emphasized that there was ***138** no time limitation on deliberations and that meals, if necessary, would be provided. Never did the trial court tell prospective jurors what verdict they should reach. Nor does our review of the record support Postelle's claim that the court's remarks somehow skewed deliberations in favor of the prosecution or otherwise undermined the presumption of innocence. The court's comments were accurate statements of the law that were neither coercive nor encouraged jurors to abandon their personal beliefs to reach a verdict. This claim is denied.

FN25. The remarks in this case are also not like the ones that necessitated relief recently in *Bills v. State,* Case No. F–2009–404, unpublished (May 4, 2011). In *Bills,* the judge tried to instruct the jury on how to avoid deadlock during *voir dire,* similar to a so-called "*Allen* charge," known as the Deadlocked Jury Charge at Instruction No. 10–11 OUJI–CR(2d). The trial court's *voir dire* comments in *Bills* urging jurors to reach a verdict quickly and urging jurors in the majority to reel in individual jurors whose views were impeding a decision was a misstatement of the law and was an inherently coercive intrusion into the deliberative process. No comparable comments were made in Postelle's case.

12. Constitutionality of Death Penalty: Proportionality Review

[57][58] ¶ 58 Postelle contends that Oklahoma's capital sentencing scheme is unconstitutional because this Court's appellate review does not include proportionality review. He claims that his case shows that death sentences in Oklahoma are imposed arbitrarily and capriciously because his brother received a sentence less than death based on almost identical evidence in both stages of trial.[FN26] To bolster this claim, Postelle cites the American Law Institute's position that the death penalty cannot be fairly administered.

FN26. This Court notes that the evidence admitted against Postelle was not "almost identical" to the evidence against his brother because co-defendant Randall Byus did not testi-

fy at David Postelle's trial.

¶ 59 The Supreme Court's Eighth Amendment jurisprudence has required that a state's capital sentencing scheme channel the sentencer's discretion by clear and objective standards that provide specific, detailed guidance and make the death sentencing process rationally reviewable on appeal. *Sanchez,* 2009 OK CR 31, ¶ 82, 223 P.3d at 1007. In *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the Supreme Court concluded that "[t]here is ... no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it." *Id.* at 50–51, 104 S.Ct. at 879. In *Battenfield v. State,* 1991 OK CR 82, ¶ 27, 816 P.2d 555, 563–64, we held that barring a statutory mandate, this Court need not conduct a proportionality review in capital cases.

¶ 60 To ensure the reliability of death verdicts, this Court is charged with conducting a mandatory review of every death sentence imposed to determine: 1) whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and 2) whether sufficient evidence was presented to support the jury's finding of statutory aggravating circumstances. 21 O.S.2001. § 701.13(C). This mandatory sentence review, as well as other procedural safeguards, provides a mechanism for meaningful appellate review to ensure that death sentences are not a product of arbitrary sentencing. The record before us shows that Postelle's jury was properly instructed on the statutory aggravating circumstances alleged in this case. The capital jury instructions provided that Postelle's jury could not consider the death penalty unless it unanimously found at least one aggravating circumstance beyond a reasonable doubt. Postelle's jury was further instructed that a death penalty verdict is *never* required, even where the balance of aggravating and mitigating factors may fully justify it. It is apparent that Postelle's jury understood and followed these instructions because, despite finding the existence of two aggravating circumstances on each of the four murder counts, it imposed the death penalty on only two of those counts.

¶ 61 Postelle was constitutionally entitled to a determination of his individual culpability and he received that individualized consideration. The Constitution does not demand that he receive a review of his comparative responsibility as well. *Accord United States v. Barrett,* 496 F.3d 1079, 1109 (10th Cir.2007) (Eighth Amendment does not require state courts to conduct proportionality review ***139** of a death sentence); *Pickens v. Lockhart,* 4 F.3d 1446, 1454 n. 4 (8th Cir.1993) ("Comparative proportionality review of death sentences is not constitutionally required."); *Brogdon v. Blackburn,* 790 F.2d 1164, 1170 (5th Cir.1986) ("A State need not even undertake any sort of proportionality review of death sentences so long as the underlying sentencing scheme minimizes arbitrary and capricious sentencing."); *Roach v. Martin,* 757 F.2d 1463, 1482 (4th Cir.1985) (holding that "a comparative [proportionality] review is not constitutionally mandated"). Oklahoma's capital sentencing scheme channels the jury's discretion by clear and objective standards. We find that these procedural safeguards give capital defendants the necessary ineprotection from wholly arbitrary sentencing and that Oklahoma's capital sentencing scheme

passes constitutional muster.[FN27]

> FN27. Postelle's reliance on the American Law Institute's stance on the death penalty is not unlike earlier arguments urging this Court to adopt the resolution of the American Bar Association recommending a moratorium on the imposition of the death penalty. We consistently rejected this position, noting that Oklahoma's death penalty statutes have been repeatedly upheld as constitutional. *See Martinez v. State,* 1999 OK CR 47, ¶ 27, 992 P.2d 426, 432; *Alverson v. State,* 1999 OK CR 21, ¶ 58, 983 P.2d 498, 517. This argument is a policy-type argument which is best directed to the legislature. *See Hogan v. State,* 2006 OK CR 19, ¶ 82, 139 P.3d 907, 934 (policy matters fall within the purview of the legislature and not the courts).

13. Constitutionality of the Death Penalty: *Furman v. Georgia*

¶ 62 Postelle continues his claim that his death sentences are unconstitutional and should be set aside. He maintains that his death sentences are disproportionate to those of his equally culpable co-defendants and that the disparity in the sentences of the co-defendants in his case shows that Oklahoma applies the death penalty in a manner that does not comport with the constitutional mandate of consistent, evenhanded application set out in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). To support the notion that the death penalty was imposed arbitrarily in this case, Postelle provides his view on the relative culpability of his co-defendants and the subsequent outcome of their cases. He asks the Court to modify his two death sentences to life in prison to reflect his level of culpability in comparison to the other, older and more mature participants, under whose direction he was operating.

¶ 63 As discussed in Section 12 above, proportionality review is not constitutionally required. For the reasons explained in Section 12, the constitutionality of Postelle's death sentences is not in doubt given the safeguards in Oklahoma's capital sentencing scheme that were well observed in Postelle's case. We further note that the evidence presented against Postelle was different in significant ways from the evidence presented against his brother, David Postelle, the only other co-defendant to go to trial. Co-defendant Randall Byus did not testify at David Postelle's trial and it was not until after David's trial that Byus struck a deal with the State and agreed to cooperate. During Gilbert Postelle's trial, Byus supplied a first-hand account of the quadruple homicide for the jury that was not available to his brother's jury. Byus's testimony established that Postelle was more culpable than his brother or the other co-defendants in the commission of the murders. According to Byus, Postelle initiated the attack by opening the van door and immediately shooting Terry Smith in the head. Byus testified that Postelle participated in the murder of Donnie Swindle and then personally chased down and alone murdered James Alderson and Amy Wright as they attempted to flee. The testimony of Randall Byus provided a rational basis upon which Postelle's jury could find him more culpable than his co-defendants.

¶ 64 Furthermore, this Court has found that an accomplice's lesser sentence or im-

munity from prosecution does not render a defendant's sentence excessive and is not proof of error. *See* *Wackerly,* 2000 OK CR 15, ¶ 48, 12 P.3d 1, 15, *Romano,* 1995 OK CR 74, ¶ 65, 909 P.2d 92, 117. Postelle's jury was fully aware during the second-stage of trial of the circumstances of Byus's plea agreement and so was able to evaluate his credibility about the relative culpability of those involved. The competency or trial status of co-defendant, Brad Postelle, Postelle's ***140** father, was not relevant to the jury's second-stage evaluation of Postelle's character, his record or the circumstances of the offense. *See* *Harris v. State,* 2007 OK CR 28, ¶ 24, 164 P.3d 1103, 1113. The defense presented evidence of Postelle's age relative to his co-defendants, as well as his alleged mental deficits from years of drug abuse, as mitigating evidence for the jury's consideration. The defense portrayed Gilbert Postelle as a young man who was at the mercy of his older co-defendants and who was so desperate for his father's affection that he would kill for his father to gain love and approval. The defense emphasized that Byus had much to gain from his testimony and pointed out the inherent unfairness in young Gilbert Postelle facing the death penalty while the older, more mature Byus—who did and said nothing to stop his friend Brad Postelle from carrying out the plot to murder Swindle—would spend little time in prison. The defense also asked the jury to consider the minor sentences received by others involved, including Sanders, Wilder and Baumann. The defense put forth every reason to spare Postelle's life, emphasizing his limited mental faculties and his firm, albeit misguided, desire to avenge and please his father. The jury weighed the evidence under proper instruction and imposed punishment. We find on this record that the death sentences imposed are valid and were not the result of arbitrary or capricious action.

14. Mitigating Evidence: David Postelle's Sentence

[59] ¶ 65 Postelle argues that it was error to exclude David Postelle's Judgment and Sentence for the murders and to prevent the jury from considering, as a mitigating circumstance, the fact that David Postelle was sentenced to life imprisonment without the possibility of parole. According to Postelle, the fact that other equally culpable co-defendants have not been sentenced to death falls within the purview of mitigating circumstances. That circumstance, he claims, is one which in fairness, sympathy or mercy may lead a jury to impose a sentence less than death.

¶ 66 The leading case from the United States Supreme Court on the issue of what constitutes mitigating evidence that the defense must be permitted to present to the jury in a death penalty case is *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The *Lockett* Court held that the sentencer must be permitted to consider "*as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense." *Id.,* 438 U.S. at 604, 98 S.Ct. at 2964 (emphasis in original).

¶ 67 In *Harris,* we explained:

> A capital defendant "must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense." "It is settled that a defendant may present in mitigation any aspect of his record or character, and any circumstances of the crime that could possibly convince a jury

> that he is entitled to a sentence less than death. Likewise, a defendant is also entitled to present any evidence that may assist in rebutting an aggravating circumstance." When considering whether to recommend the death penalty, jurors must look at both the circumstances of the crime and the personal characteristics and propensities of the defendant.

Harris, 2007 OK CR 28, ¶ 24, 164 P.3d at 1113 (citations and footnotes omitted).

¶ 68 Courts are divided on whether the admission of evidence concerning the disposition of a co-defendant's case is relevant mitigating evidence. *Compare* *Ex parte Burgess,* 811 So.2d 617, 628 (Ala.2000) (the lenient treatment of accomplices was appropriate mitigating factor that trial court should have given greater weight), *State v. Ferguson,* 642 A.2d 1267, 1269 (Del.Super.1992) (the disposition of co-defendants' cases is relevant, mitigating evidence), and *State v. Marlow,* 163 Ariz. 65, 786 P.2d 395, 402 (1989) (disparity between sentences of accomplices must be considered and may be found a mitigating circumstance and weighed against any aggravating circumstances in determining whether to impose death penalty), *with* ***141***People v. Moore,* 51 Cal.4th 1104, 127 Cal.Rptr.3d 2, 253 P.3d 1153, 1181 (2011) (evidence concerning co-participants' sentences is properly excluded from penalty phase of capital trial because such evidence is irrelevant), *Meyer v. Branker,* 506 F.3d 358, 375–76 (4th Cir.2007) (constitution does not mandate admission of co-perpetrator's sentence under *Lockett* and progeny), *Saldano v. State,* 232 S.W.3d 77, 100 (Tex.Crim.App.2007) (evidence of co-defendant's conviction and punishment is not mitigating evidence that defendant has a right to present because the evidence does not relate to the defendant's own circumstances), *Commonwealth v. Williams,* 586 Pa. 553, 896 A.2d 523, 524 (2006) (rejecting argument that criminal disposition of defendant's cohorts has any relevance in mitigation to defendant's own punishment), *Beardslee v. Woodford,* 358 F.3d 560, 579 (9th Cir.2004) (trial court does not commit constitutional error under *Lockett* by excluding evidence of co-defendants' non-capital sentences), and *Brogdon v. Blackburn,* 790 F.2d 1164, 1169 (5th Cir.1986) (*Lockett* does not require trial court to allow capital defendant to introduce evidence not relevant to his character, prior record or circumstances of his offense; evidence of co-defendant's life sentence is relevant only to task of comparing proportionality of defendant's sentence to sentences of others similarly situated, a function assigned by statute to Louisiana Supreme Court).

[60] ¶ 69 We recognize that there is a "low threshold for relevance" applicable to mitigating evidence in capital cases. *Tennard v. Dretke,* 542 U.S. 274, 284, 124 S.Ct. 2562, 2570, 159 L.Ed.2d 384 (2004) (meaning of "relevance" is no different in context of mitigating evidence introduced in capital sentencing proceeding than in any other context). Relevant mitigating evidence tends logically to prove or disprove some fact or circumstance that a fact-finder could reasonably deem to have mitigating value. *Id.* Under *Lockett,* the proffered evidence, however, must necessarily relate to the defendant's personal circumstances, *i.e.,* his character, record or circumstance of the offense.

¶ 70 The district court found that the sentence received by David Postelle was not

relevant and that there was evidence showing that Postelle was "by far the most culpable and participated to a larger degree than any of the other charged individuals." Postelle was permitted to present mitigating evidence concerning his character and record, as well as evidence rebutting the aggravating circumstances. The jury examined the evidence and sentenced Postelle to death on the two murder counts where the evidence showed Postelle pursued James Alderson and Amy Wright by himself and shot them as they tried to run away or seek cover. Although a trial court is not necessarily precluded from allowing consideration of co-defendant sentences, we find that the district court did not commit constitutional error under *Lockett* by refusing to allow evidence of David Postelle's sentence in this case.

15. Mitigating Evidence: Videotapes

[61] ¶ 71 Postelle argues that the district court erred in excluding three videotape clips that he sought to introduce as mitigating evidence during the penalty phase. The first video clip shows Postelle and his brother as children roller skating in front of their grandfather. The second video clip shows a "young," "healthy," "fit" Brad Postelle before his motorcycle accident "being silly for the camera." And the third video clip shows a frail and weak Brad Postelle after his motorcycle accident and the murders, stating that he loves and misses his sons. (Court's Exhibit 11) The State objected to the video clips on relevancy grounds, arguing that the clips did not extenuate or reduce the moral culpability of Postelle. The district court relied on *Fox v. State,* 1989 OK CR 51, ¶¶ 42–44, 779 P.2d 562, 572, and excluded the video clips as cumulative after defense counsel acknowledged that she would be calling family members to testify about the relationship Postelle had with his grandfather and father.

[62] ¶ 72 "The sentencer in capital cases should not be precluded from considering any relevant mitigating evidence." *Coddington v. State,* 2006 OK CR 34, ¶ 90, 142 P.3d 437, 460, (*citing Skipper v. South Carolina,* 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986)). In *Fox,* this Court held that the trial court's exclusion of five affidavits from people unable to attend trial was ***142** not error. *Fox,* 1989 OK CR 51, ¶¶ 42–44, 779 P.2d at 572. The affiants therein stated that the defendant's life had meaning and asked the jury to spare his life. *Id.* at ¶ 42, 779 P.2d at 572. This Court found that the affidavits were cumulative to the testimony of the fifty-four live witnesses who testified and made pleas for mercy and that the affidavits were therefore properly excluded under 12 O.S., § 2403. *Id.* at ¶ 44, 779 P.2d at 572. The *Fox* court noted that the excluded mitigating evidence was not "exclusive to the particular affiants" as was the excluded testimony that required relief in *Skipper v. South Carolina. Id.*

¶ 73 In *Coddington,* 2006 OK CR 34, ¶ 77, 142 P.3d at 457–58, we found that it was error to exclude the videotaped statement of the defendant's mother. The State objected to the admission of the videotape because the statement was not taken in strict compliance with the applicable statute. The district court ultimately excluded the videotape and allowed only the testimony of the defendant's mother to be read into the record. We held that the exclusion of the videotape in its entirety based on strict adherence to the rules of evidence and to the procedures outlined in 22 O.S.2001, §§ 781 *et. seq.* deprived the defendant of due process of law

and a reliable capital sentencing hearing. *Coddington,* 2006 OK CR 34, ¶ 81, 142 P.3d at 458. We noted "a compelling difference between seeing the witness testify to this valuable mitigation evidence and hearing someone read her testimony." *Id.* at ¶ 81, 142 P.3d at 458. This was because the "videotaped examination showed her demeanor—it showed her distress and sadness she had for her son in a way that the cold reading of a transcript [of her testimony] could not portray." *Id.* at ¶ 90, 142 P.3d at 460.

[63] ¶ 74 This Court finds that this case is more like *Fox* than *Coddington.* Through live testimony, family members explained Postelle's relationships with his father and grandfather. They described the respect and admiration he had for both men and how he cared for his father after his motorcycle accident and for his grandfather after a stroke. Photographs of Postelle's grandfather before and after his stoke were admitted. Photographs of Postelle's father before the motorcycle accident were also admitted, and his condition after the accident was described by many. The proffered video clips do not show Postelle interacting with his father at all and show only momentary interaction with his grandfather. The substance of the mitigating evidence that Postelle sought to reinforce through the three to four minutes of video clips was separately presented to his jury. Hence, we find that the district court did not abuse its discretion in excluding the video clips. *See Underwood,* 2011 OK CR 12, ¶ 45, 252 P.3d at 242 (holding decision to admit or exclude evidence is reviewed for abuse of discretion). We caution, however, that a ruling excluding mitigating evidence as "cumulative" is proper only to the extent that the ruling prevents needless presentation of cumulative evidence that would unnecessarily lengthen a trial. In a case like this one, where reversal is costly and the presentation of mitigating evidence adds no more than a few minutes to the proceedings, the better practice is to err on the side of admitting the proffered mitigating evidence.

16. Victim Impact Evidence

[64][65] ¶ 75 Postelle challenges the victim impact testimony of John Alderson and Janet Wright. He claims that their testimony focused almost exclusively on the emotional impact of their loved one's death and that this is the kind of testimony that undermines the jury's ability to make a reasoned moral response in assessing the death penalty.

¶ 76 The district court judge held a hearing outside the presence of the jury to consider the proposed victim impact evidence. The prosecutor informed the court that he had given copies of the proposed statements of these witnesses to defense counsel, that defense counsel had excised out objectionable material and that the State agreed with the redactions made by the defense. The prosecutor further advised that the redacted statements would be admitted without objection and defense counsel agreed. Postelle's failure to object limits our review to that of plain error only. *Murphy v. State,* 2002 OK CR 24, ¶ 42, 47 P.3d 876, 885.

***143** ¶ 77 Evidence about the victim, the physical effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated and about the financial, emotional, psychological and physical impact of the murder on the victim's family is admissible. 22 O.S.2001, § 984; 21 O.S.2001, § 701.10(C). The challenged testimony in this case clearly

related to the physical effects of the crime, the manner in which it was carried out, and the emotional and psychological impact of the murders of Alderson and Wright on their families. The victim impact evidence was concise and narrowly focused on the permissible subjects and was within the bounds of admissible victim impact testimony. The evidence did not unfairly prejudice Postelle or divert the jury from its duty to reach a reasoned moral decision regarding whether to impose the death penalty. Postelle has not shown that the admission of this victim impact evidence was error.

17. The Murder Was Especially Heinous, Atrocious or Cruel: Sufficiency of the Evidence

[66][67] ¶ 78 Postelle claims that the evidence was insufficient to prove beyond a reasonable doubt that the murders of James Alderson and Amy Wright were especially heinous, atrocious or cruel. This Court reviews the record to determine whether the evidence, considered in the light most favorable to the State, was sufficient for a rational trier of fact to find the aggravating circumstance beyond a reasonable doubt. *See* *Magnan v. State,* 2009 OKCR 16, ¶ 29, 207 P.3d 397, 407, *cert. denied,* —— U.S. ——, 130 S.Ct. 276, 175 L.Ed.2d 185 (2009).

[68][69][70][71] ¶ 79 A particular murder is especially heinous, atrocious or cruel where the evidence shows: (1) that the murder was preceded by either torture of the victim or serious physical abuse; and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious or cruel. *DeRosa v. State,* 2004 OK CR 19, ¶ 96, 89 P.3d 1124, 1156. The "term 'torture' means the infliction of either great physical anguish or extreme mental cruelty." *Id.* A finding of "serious physical abuse" or "great physical anguish" requires that the victim have experienced conscious physical suffering prior to death. *Id.* "[T]he term 'heinous' means extremely wicked or shockingly evil; the term 'atrocious' means outrageously wicked and vile; and the term 'cruel' means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others." *Id.*

¶ 80 Postelle focuses on the short time frame in which the murders were committed and the rapidly fatal nature of Alderson's and Wright's wounds to support his argument that these murders were not especially heinous, atrocious or cruel. We disagree. According to Randall Byus, after Donnie Swindle and Terry Smith were shot in a barrage of semi-automatic gunfire, Postelle ran inside the trailer firing the MAK–90. Byus heard gunshots coming from inside the trailer, a fact confirmed by technical investigators. Tom Bevel, the State's crime scene reconstruction expert, testified that based upon the physical evidence, six shots were fired inside the trailer, but there was no evidence of blood.

¶ 81 Byus testified that Postelle chased Alderson to a boat near the steel corrugated fence that outlined the outer boundary of the salvage yard. Byus witnessed Postelle shoot Alderson, as Alderson was trying to crawl underneath a parked boat. Alderson's hands and clothing revealed the presence of gravel and grass and he had chipped and damaged fingernails with dirt underneath them. This was consistent with Alderson trying to escape by digging underneath the boat before being shot twice in the head from behind.

¶ 82 Byus testified that after witnessing

Alderson's murder, he returned to the van and heard additional gunfire behind him. As the van started down the driveway, Postelle got in and said, "The bitch almost got away." Byus had not seen Amy Wright, but concluded later that Postelle was obviously referring to her. Wright's body was found face down in front of a parked car not far from Alderson's body. Her escape was cut off by the car and the corrugated metal boundary fence. Wright was barefoot, suggesting that she ran from the trailer in a desperate attempt to escape. Wright suffered three gunshot***144** wounds to the head and lower back, all of which were fired from behind.

[72][73] ¶ 83 The record evidence supports the inference that Postelle chased Alderson and Wright from the trailer outside to the places where their bodies were ultimately found. Bevel testified that, based upon the physical evidence, this appeared to be a blitz-style attack. That Wright was found without shoes, combined with the absence of blood inside the trailer, supports the theory of a sudden, surprise attack that sent both her and Alderson out the back of the trailer, fleeing from gunfire after hearing the flurry of gunfire (some twenty-four shots) that resulted in the deaths of Swindle and Smith moments before. The evidence supports the reasonable inference that Wright and Alderson were aware of the attacks on Swindle and Smith and that they knew they were running for their lives when they were each shot and killed. "Evidence that the victim was conscious and aware of the attack supports a finding of torture." *Pavatt v. State,* 2007 OK CR 19, ¶ 75, 159 P.3d 272, 294. Furthermore, the anticipation of death caused by the knowledge that others around the victim are being shot is sufficient to support the mental anguish requirement of the aggravator. *See Jones v. State,* 2009 OK CR 1, ¶ 80, 201 P.3d 869, 889, *cert. denied,* —— U.S. ——, 130 S.Ct. 237, 175 L.Ed.2d 163 (2009) (evidence sufficient to support aggravator where unarmed victim was fatally shot after witnessing the shooting of his friends and his sister); *Hancock v. State,* 2007 OK CR 9, ¶ 121, 155 P.3d 796, 824 (evidence sufficient to support aggravator where unarmed victim witnessed shooting of friend and was fatally shot while attempting to help friend); *Hamilton v. State,* 1997 OK CR 14, ¶ 56, 937 P.2d 1001, 1014 (evidence of aggravator held sufficient where four employees made to kneel while each one was systematically shot in head and died), *abrogated on other grounds by, Alverson v. State,* 1999 OK CR 21, ¶ 83 n. 109, 983 P.2d 498, 521 n. 109. There was sufficient evidence for the jury to find beyond a reasonable doubt that the murders of Alderson and Wright were especially heinous, atrocious or cruel.

18. Constitutionality of Aggravating Circumstance

[74] ¶ 84 Postelle claims that the especially heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague and overbroad. He maintains that this Court's attempts to limit and narrow this aggravating circumstance have been unsuccessful. This Court has rejected similar challenges to the constitutionality of this aggravating circumstance. *See, e.g., Harmon,* 2011 OK CR 6, ¶ 78, 248 P.3d at 943; *Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 80, 241 P.3d at 238; *Thacker v. State,* 2004 OK CR 32, ¶ 26, 100 P.3d 1052, 1058 and cases cited therein. The analysis and authorities presented by Postelle raise nothing new. We continue to find that the instructions given

regarding the especially heinous, atrocious or cruel aggravating circumstance sufficiently narrow its application to pass constitutional muster. This claim is denied.

19. Reconsideration of Previously Decided Issues

[75] ¶ 85 Postelle raises eight claims challenging various sentencing-phase jury instructions, the constitutionality of Oklahoma's death penalty scheme, and the manner in which the death penalty is carried out. All of these claims have been rejected by this Court.[FN28]

> FN28. We are aware that raising these settled issues will tend to prevent a finding of waiver in any subsequent state or federal proceedings in this case.

[76] ¶ 86 Postelle first challenges the sentencing-phase jury Instruction No. 53, as taken from Instruction No. 4–78, OUJI–CR(2d).[FN29] He argues that instructing the ***145** jury in permissive language that mitigating circumstances are those which "may" be considered to extenuate a defendant's conduct and reduce the degree of blame allowed the jury to disregard mitigating evidence Postelle's failure to object to the permissive language waives the issue on appeal and review is for plain error only.[FN30] *See Myers v. State,* 2006 OK CR 12, ¶ 27, 133 P.3d 312, 324 (when specific objection is made at trial, this Court will not entertain different objection on appeal). Postelle's claim and the authorities upon which he relies are the same ones we recently rejected in *Harmon,* 2011 OK CR 6, ¶ 85, 248 P.3d at 944–45 (holding that second-stage instructions, when read as a whole, do not allow jury to disregard the mitigating evidence presented). We are not persuaded to reconsider this claim and it is denied.

> FN29. OUJI–CR(2d) 4–78 provides:
>
> > Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.
> >
> > While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

> FN30. Postelle asked the trial court to give a modified version of the instruction insofar as the instruction defined the term "mitigating circumstances," but he did not object to the permissive language and, in fact, used the same permissive language in his proposed instruction as well.

[77] ¶ 87 Postelle argues that Instruction No 51, taken verbatim from Instruction No

4–76, OUJI–CR(2d), erroneously implies that a life sentence is appropriate only if the jury failed to find the existence of an aggravating circumstance This exact claim was also rejected in *Harmon,* 2011 OK CR 6, ¶ 86, 248 P.3d at 945. We note that this claim is specifically rebutted by the court's submission of Instruction No. 4–80, OUJI–CR(2d) (Instruction 55), which explicitly provided that the jury could impose a sentence of life imprisonment, with or without parole, even if the jury found that the aggravating circumstance(s) outweigh(s) any mitigating circumstance(s). Thus, there is no reasonable possibility that jurors read Instruction No. 51 as preventing them from considering life or life without parole as sentencing options if they found the existence of an aggravating circumstance. This is particularly evident in this case because Postelle's jury sentenced him to life imprisonment without the possibility of parole on two of the four murder charges, despite finding the existence of aggravating circumstances.

[78] ¶ 88 Postelle also challenges Oklahoma's death penalty scheme in its entirety as unconstitutional for vagueness, overbreadth, abuse of prosecutorial discretion, arbitrariness and because it constitutes cruel and unusual punishment. His brief provides neither argument nor authority to support these sweeping allegations. He purports, however, to "incorporate by reference" into his brief the arguments and authorities on these issues as they were raised in pretrial motions in the trial court. This claim does not comport with Rule 3.5(A)(5), *Rules of the Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011), which requires an appellant's argument and authority to be contained within the pages of his brief. Failure to comply with the rule results in waiver of the issue on appeal. *See Harmon,* 2011 OK CR 6, ¶ 87, 248 P.3d at 945

[79] ¶ 89 Postelle further contends that the trial court erroneously denied his motion to strike Oklahoma's death penalty sentencing procedure as unconstitutional because it requires a jury to make special findings of fact prohibited by Okla. Const. art. VII, § 15.[FN31] Postelle asks us to reconsider our prior decision on this issue as set out in *Duckett v. State,* 1995 OK CR 61, ¶ 91, 919 P.2d 7, 27, but provides no argument or authority to support his claim. This issue is waived. Rule 3.5(A)(5), *Rules of the Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011); *see also Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 105, 241 P.3d at 245; *Harmon,* 2011 OK CR 6, ¶ 88, 248 P.3d at 945.

FN31. Section 15 provides:

> In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.

[80] ¶ 90 Postelle claims that the district court erroneously denied his motion to allow ***146** him the right of allocution and to make the last argument to the jury, but provides no argument or authority to support this claim. The issue is waived under Rule 3.5(A)(5), *Rules of the Court of Criminal Appeals,* Title 22, Ch. 18, App. (2011); *see also Harmon,* 2011 OK CR 6, ¶ 90, 248 P.3d at 946.

[81] ¶ 91 Like the defendants in *Harmon* and *Cuesta–Rodriguez,* Postelle claims that

Oklahoma's use of lethal injection is cruel and unusual punishment in violation of the Federal and Oklahoma Constitutions. *See* U.S. Const. amend. VIII; Okla. Const. art. II, § 9. Postelle makes the same argument based on the same authorities that we rejected in our previous cases. *Harmon,* 2011 OK CR 6, ¶¶ 91–92, 248 P.3d at 946; *Cuesta–Rodriguez,* 2010 OK CR 23, ¶¶ 108–109, 241 P.3d at 245–46. Postelle gives us no reason to reconsider our prior decisions on this issue and we decline to do so.

[82] ¶ 92 Postelle claims that victim impact evidence is not relevant to proving either the aggravating or mitigating factors necessary to perform the narrowing function for application of the death penalty. He argues that victim impact evidence acts instead as a "superaggravator" and skews the sentencing proceeding in violation of the Eighth Amendment. We have repeatedly rejected this argument in the past and the authority relied upon by Postelle fails to persuade us to reach a different result here. *See Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 71, 241 P.3d at 236; *Hogan,* 2006 OK CR 19, ¶ 71, 139 P.3d at 932; *Thacker v. State,* 2005 OK CR 18, ¶ 16, 120 P.3d 1193, 1196; *Harris v. State,* 2004 OK CR 1, ¶ 58, 84 P.3d 731, 752.

[83] ¶ 93 Postelle claims that the jury was improperly instructed as to the scope of victim impact evidence. Specifically, he argues that Instruction No. 9–45, OUJI–CR (2d), which the district court gave as Instruction No. 61 of the second-stage jury instructions, contained language permitting jurors to consider that the victims were "individuals whose death may represent a unique loss to society and their families." Postelle argues that the phrase "unique loss to society" improperly allowed jurors to consider the impact of the loss of the victims on society at large rather than simply the impact of the deaths on their immediate families. This identical claim was recently rejected in *Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 74, 241 P.3d at 237. We reject it here for the reasons stated in that case.

20. Cumulative Error

[84] ¶ 94 Postelle asks this Court to consider the impact of the errors cumulatively, if no individual error warrants relief because of insufficient prejudice. "Cumulative error, however, does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceedings." *Hanson v. State,* 2009 OK CR 13, ¶ 55, 206 P.3d 1020, 1035, *cert. denied,* —— U.S. ——, 130 S.Ct. 808, 175 L.Ed.2d 568 (2009). Postelle's claims, neither individually nor collectively, warrant relief.

21. Mandatory Sentence Review

[85] ¶ 95 Title 21 O.S.2001, § 701.13 requires this Court to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance." After conducting this review, this Court may order any corrective relief that is warranted or affirm the sentence. 21 O.S.2001, § 701.13(E).

¶ 96 Having reviewed the record in this case, we find that Postelle's death sentences were not the result of trial error or improper evidence or witness testimony and that the death sentences were not imposed under the influence of any arbitrary factor, passion or prejudice.

¶ 97 The jury's finding that Postelle created a great risk of death to more than one person and that the murders were especially heinous, atrocious or cruel were amply supported by the evidence. Weighing the aggravating circumstances and evidence against the mitigating evidence presented, we find, as did the jury below, that the aggravating circumstances in this case outweigh the mitigating circumstances.

***147 DECISION**

¶ 98 The Judgment and Sentence of the District Court is **AFFIRMED.** 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.

LEWIS, V.P.J., LUMPKIN, JOHNSON, and SMITH, JJ.: concur.

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