No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP ANTONIO DAVIS,

Petitioner,

v.

JOE ALLBAUGH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT (10TH CIR. CASE NO. 18-6131)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the exclusion of evidence deemed necessary by Petitioner to present a complete defense and to combat the State's theory of guilt could be rationally justified when the State appellate Court applied a blanket rule governing the admissibility of general character trait evidence, despite the fact that excluded evidence of the alleged victim's conduct was directly related to the series of transactions at issue in the case and was not general character or character trait evidence.

2. In a case in which a criminal defendant asserts that his evidence was excluded without rational justification, are reviewing courts required to address the actual facts sought to be proven by the evidence, to determine whether the facts sought to be proven are material, and to determine whether the excluded evidence would have

any tendency to make those material facts more probable or less probable?

3. Under *Jackson v. Virginia,* is a State permitted to secure a first-degree murder conviction based on a wholly speculative conspiracy theory and to subsequently justify the conviction on appeal based on alternative theory of excessive force against an unknown intruder that was never placed before the jury or decided by the jury?

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Phillip Antonio Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the 10th Circuit in this matter.

OPINIONS BELOW

The decision of the Oklahoma Court of Criminal Appeals in *Phillip Davis v. State of Oklahoma*, Case No. F-2014-25, entered April 29, 2015, is reprinted in the Appendix at pg. 1. The Report and Recommendation of the Western District of Oklahoma entered 05/01/2018 in Phillip *Davis v. Joe Allbaugh*, Case No. CIV-16-855-M, is reprinted in the Appendix at pg.12. The Order and Judgment adopting the Report and Recommendation in the Western District of Oklahoma Case are reprinted in the Appendix at pgs. 59-63.The opinion of the 10th Circuit Court of Appeals in *Davis v. Allbaugh*, Case No. 18-6131, entered

on October 24, 2019, is reprinted in the Appendix at pg. 64.

JURISDICTION

The court of appeals entered its judgment on October 24, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In 2012, Phillip Davis was asked by a female friend (with whom he had some sexual relationship previously; he had a girlfriend at the time who also testified at trial) to stay the night at her home because she was afraid. The friend, Signolia Vaughn, told Mr. Davis that her home had been broken into and that she was buying a gun for protection. Mr. Davis agreed to spend the night at her home and brought a gun with him. At approximately 3 a.m., Mr. Davis was awakened by the friend and told that someone was attempting to break into the home. Mr. Davis retrieved his gun and walked into the living room, where he heard a person trying to break in through the window. The homeowner called 911, and much of the encounter is caught on the phone recording. After seeing the blinds move, indicating that the person had entered the home, Mr. Davis shot the intruder one time, killing him. Unbeknownst to Mr. Davis, the intruder was a person who the homeowner had allowed to stay in her home, before ordering him to leave due to his PCP use and violent threats towards her.

The woman testified that she did not know who the intruder was, but that she knew that it may have been the person with whom she had a relationship and stated this caused her to be afraid.

At trial, Signolia Vaughn, the State argued that Petitioner colluded with Signolia Vaughn to set up the alleged victim, Keaunce Mustin, and to make the indcident look like an illegal break-in. Mr. Davis was convicted of first-degree murder by a jury and sentenced to life imprisonment, the minimum sentence for that offense. The case was appealed to the Oklahoma Court of Criminal Appeals. Petitioner's principal contentions were that he was denied the right to present a complete defense and that the evidence was insufficient to support the First-Degree Murder conviction. In its Summary Opinion, The Oklahoma Court of Criminal Appeals (OCCA) applied the evidentiary rule governing the admissibility of character evidence and found that evidence sought to be introduced by Petitioner was irrelevant. The OCCA further found that "Speculation that Vaughn conspired with Appellant to kill the victim, and make it look like a home invasion, was not unbelievable,

given the peculiar circumstances surrounding the shooting."

The right of a criminally accused person to present a complete defense is fundamental to a fair justice system. If prosecutors are allowed to selectively exclude evidence offered by defendants without rational justification, then they are empowered to present virtually any speculative theory that they desire, as the criminal defendant is be unable to present the evidence that combats the State's theory. A rational jury, expecting to hear "the other side" of the story—the side that would exonerate the defendant, if believed—can be expected to presume that the absence of such facts that are beneficial to the defendant means that such exculpatory evidence does not exist. The State's theory then becomes the only one that the jury hears, making conviction inevitable.

This Court observed these risks when it stated, "Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve." *Michigan v. Lucas*, 500 U.S. 145, 151, 111 S.Ct. 1743, 114 L.Ed.2d 205

(1991). In the instant case, the State alleged at trial that Petitioner conspired with his friend, Signolia Vaughn to set up the decedent, and that Petitioner "laid in wait" for the decedent before shooting him. The State alleged that the decedent was breaking into the window of the home because he believed he was authorized to do so. The State argued directly to the jury that the Signolia Vaughn, the homeowner, never told the decedent that he was barred from her home. The State argued that Signolia Vaughn was "faking danger" when she called the police to report the intruding.

While the State could not offer any proof whatsoever to indicate that Petitioner knew about the decedent's existence, much less conspired to murder him, the State argued during oral argument that the homeowner "had to have told him" about the decedent.

Petitioner sought to offer several categories of evidence to combat the State's theory. To combat the State's assertion that the homeowner was "faking danger," Mr. Davis sought to submit the specific threats made by the decedent towards her in the days leading up to the incident. For example, the homeowner

testified at preliminary hearing that when she attempted to kick decedent out of the home, he refused to leave, and told her that if she called the police, he would burn her house down.

To combat the State's assertion that the homeowner never notified the decedent that he was barred from her home (which would make the attempted break-in illegal), Petitioner attempted to ask Decedent's Mother about an altercation that she witnessed involving her son and the homeowner. The homeowner testified that she told the decedent that he was barred from the home in the presences of his mother. Petitioner was not allowed to ask decedent's mother about the incident. This enabled the State to accuse the homeowner of lying, and telling the jury that they should "hate" the homeowner.

To combat the State's theory that the decedent was merely attempting to enter the home peacefully when he attempted to break-in through the window, pointing to the fact that the decedent's belongings were found lying "neatly" on a table outside the home, Petitioner sought to submit evidence of the decedent's toxicology, which showed that he had an

extremely high phencyclidine (PCP) level in his blood. A glass vial of the type used to contain PCP was found nearby, as was a cigarette butt. This, from Petitioner's perspective, was evidence that the decedent was not acting peacefully when he broke into the home, as the State asserted. Peaceful individuals knock on the door or call on the phone. Criminals smoke PCP and break in through the window. Petitioner was prohibited from offering toxicological evidence, enabling the State to argue that there was no evidence linking the decedent to the PCP valve.

Additionally, the State argued that the homeowner was part of a conspiracy to commit murder and used this allegation to impeach her testimony that benefitted Petitioner. When Petitioner attempted to combat this tactic by pointing out that Vaughn was not charged with conspiracy, he was precluded from offering this information. The Oklahoma Court of Criminal Appeals found that it was error to exclude this evidence but found that the error was "harmless."

The 10th Circuit held in its Order and Judgment that the prosecution advanced at

trial a "rational justification for the exclusion of the disputed evidence" and that "there were rational grounds for exclusions by the trial court." The 10th Circuit's finding regarding the trial-court justifications is wholly conclusory, however, and does not even recount the justifications urged in the trial court. For instance, the trial court found that threats made by the decedent towards the homeowner were "hearsay." On Appeal, however, the State did not even defend this erroneous finding. The threats were not hearsay because they were offered to show the effect on the hearer, not to prove the truth of the matter asserted. The 10th Circuit, the District Court, and the Oklahoma Court of Criminal Appeals chose not to address the hearsay justification precisely because they knew it was not "rational."

The trial court excluded testimony of the decedent's own mother that would benefit Petitioner and directly combat the State's conspiracy theory on the grounds that decedent's mother testified that the altercation did not occur on the "same day" as the shooting. Again, no reviewing court attempts to show why the trial court's reasoning was "rational." The homeowner testified that she barred him

from the home in the presence of his mother, and that she did not see him again until he was breaking into the home. It is wholly irrelevant whether the incident occurred on the "same day" as the shooting. In fact, if it happened earlier, this would support the proposition that the decedent knew that he was not authorized to break in through the window.

Similarly, the 10th Circuit concludes that the Oklahoma Court of Criminal Appeals "analyzed [Davis's] evidence on the merits" and found it properly excluded." Again, the Court is conclusory. The Oklahoma Court of Criminal appeals found that the evidence was properly excluded because "for evidence of Mustin's past behavior to be relevant to whether Davis had a reasonable belief his use of deadly force was necessary to protect himself or others, it would have to show Davis knew he was shooting Mustin." This is wholly false and easily disproven. The State's theory specifically relied on several individual factual assertions that had nothing to do with Phillip Davis's knowledge of the identity of the intruder.

Specifically, the State argued to the jury that the homeowner never barred the decedent

from her home. The State made this claim so that it could argue that the decedent was only breaking in through the window because he did not have a key to the home, and because he believed he had a right to be there. The testimony from the decedent's mother, if believed, would have directly contradicted this critical building block of the State's case. The fact that it is so damaging to the State's case is precisely why it was excluded. Either way, Petitioner's knowledge of the intruder's identity is immaterial to this question of fact. The evidence was necessary to combat the State's case, not to support Petitioner's theory. This is precisely the purpose of cross-examination.

Further, the State argued that the homeowner was "faking danger" when she told Petitioner that there was an unknown intruder and called 911 to report the same. To combat this claim, Petitioner sought to offer evidence that the decedent had made direct threats to the homeowner. Again, it is the State that elected to make Signolia Vaughn's mental state an aspect of its conspiracy theory. By doing so, it became necessary to offer evidence to combat that theory, not merely to support Petitioner's theory.

The State argued that the decedent was breaking into the home simply because he thought he was authorized to be there, as he had not been notified that he was no longer allowed in the home. Petitioner sought to introduce evidence of the decedent's PCP use immediately before breaking into the home. This would combat the State's argument that the decedent was acting rationally because his items were lying neatly on the table. Again, the evidence was needed to combat the State's theory, and had nothing to do with Petitioner's knowledge of the identity of the intruder.

In order to impeach the homeowner's testimony, the State argued that she was involved in the murder, and therefore could not be trusted. This made it necessary to reveal to the jury that the homeowner was not charged with a crime. Again, the state created an issue to support its speculative conspiracy theory, and excluded, without justification, the evidence that contradicted their claim.

The State's case is so confused and muddled that the State made completely contradictory arguments at trial and on appeal. At trial, the State accused the homeowner and

Petitioner of specifically conspiring to kill the decedent. On appeal, however, the Sate argued that the evidence "clearly proved" that neither the homeowner or Petitioner knew the identity of the intruder.

To show that the evidence was sufficient to support Petitioner's conviction, the appellate courts argue that the elements of first-degree murder can be met simply by showing that Petitioner shot the intruder intentionally. This was not the issue posed to the jury, however. The State did not argue to the jury that Petitioner committed murder simply by shooting an unknown intruder. The State argued that Petitioner conspired beforehand to kill the decedent. It is disingenuous for the lower courts to speculate that a jury "could have" convicted Petitioner even without the State's conspiracy theory when completely different issues were presented at trial. Stated more clearly, Petitioner could only try the case that was presented to him. The State urged a conspiracy theory—and only the conspiracy theory. The evidence submitted by Petitioner was designed to combat that theory. Thus, the evidence should be sufficient to support the State's theory, not the theory that the appellate

courts believe "could have" been sufficient to support the conviction.

REASONS FOR GRANTING THE WRIT

1. **This Court should grant the writ to clarify that in cases in which the conduct of an alleged homicide victim is directly relevant to the issues sought to be proved, said conduct does not constitute "character" evidence and its admissibility must be determined under general principles governing the admissibility of evidence.**

At trial, the undisputed evidence showed that Petitioner Phillip Davis shot the alleged victim, Keaunce Mustin, as Mustin was in the process of breaking in through the window. The State attempted to show that Petitioner, along with the homeowner, Signolia Vaughn, colluded together to "set up" Mustin by enticing him to climb through the window at approximately 3 a.m. Petitioner's guilt hinged upon whether he had a reasonable belief that the intruder intended to commit a felony upon or inside the

dwelling at the time of the shooting. The State argued that Mustin did not intend to commit a felony within the dwelling, but that he was merely "coming home" from work. Signolia Vaughn, the homeowner, testified that she had barred Mustin from her home after catching him smoking phencyclidine (PCP) within her home, and that Mustin refused to leave. Vaughn testified at preliminary hearing the Mustin had told her that he would "burn her house down" if she called the police. Vaugn testified that she called Mustin's mother to her home to help her with Mustin, and that she told both Mustin and his mother, Velvet, that he was barred from her home.

The State argued that Vaughn was lying regarding these facts. The State argued that Vaughn never kicked Mustin out of her home, and that she was not afraid of Mustin. The State accused Vaughn of "faking danger." The State then argued that the jury could infer that Petitioner was involved in the alleged conspiracy to set up Mustin.

The State's theory that Vaughn had never communicated to Mustin that he was barred from the home could be rebutted only by

recounting the encounter described by Vaughn in which she told both the alleged victim and his mother that Mustin was barred from her home. However, when Petitioner sought to question the alleged victim's mother, Velvet Mustin, about the encounter, the evidence was excluded. Additionally, the specific threats made by Keaunce Mustin to Signolia Vaughn during the encounter were excluded. Also, evidence that Mustin was under the influence of PCP when he tried to climb through the window was excluded.

The Oklahoma court of Criminal Appeals (OCCA) determined that all of the above-listed evidence was excluded under a rule that limits the admissibility of character evidence. The OCCA stated:

> [E]vidence of the victim's drug use and threatening conduct toward Signolia Vaughn was not relevant to whether Appellant's use of deadly force was reasonable under the circumstances, because both Vaughn and Appellant claimed they had no idea who

> the would-be intruder was. *Davis v. State,* 2011 OK CR 29, ¶¶ 157-160, 268 P.3d 86, 125-26.

The court provided no further analysis as to why the evidence was excluded. The OCCA's adjudication of Petitioner's claim was unreasonable because the Court excluded the evidence on a per se and mechanistic basis. Specifically, the OCCA applies the rule regarding character evidence in a blanket fashion that excludes any evidence that bears negatively on the alleged victim.

In *Davis v. State*, 268 P.3d 86, 125-26, the Oklahoma Court of Criminal Appeals applied the evidentiary rule regarding character evidence of the victim in a homicide case, stating,

> " In a homicide case where the defense is that of self-defense, acts of violence by the victim antecedent to the homicide may be introduced where the defendant was aware of the specific prior acts of violence and that awareness or knowledge helped

> form the basis for his purported fear of the victim resulting in the alleged act of self-defense against the victim, and tending to establish the victim as the aggressor."

In *Davis,* the Defendant sought to introduce evidence in the form of police reports detailing the decedent's juvenile crimes of animal cruelty, burglary, and assault and battery. The Court excluded the evidence on the grounds of relevancy, because the Defendant failed to offer proof that he knew of these alleged acts at the time of the shooting. Because the Defendant was not aware of the decedent's actions, they could not form the basis for his purported fear of the victim.

The *Davis* court applied the state evidentiary rule regarding admissibility of character evidence, codified at OKLA. STAT. tit. 12 § 2404. The Oklahoma rule is virtually identical in substance to Fed. R. Evid. 404, which also governs the admissibility of character evidence. In the instant case, it was error to apply the rule regarding character evidence, as the

excluded evidence was not was not offered to prove the character of the alleged victim or an alleged character trait of the alleged victim. Instead, the excluded evidence was directly related to the transaction that was put at issue by the State.

Under the Oklahoma Rules of Evidence, "relevant evidence" is defined as "evidence having 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." OKLA. STAT. tit. 12 § 2401. Similarly, the Federal Rules of Evidence provides that evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." Under both rules, a proper analysis regarding admissibility mandates that the reviewing court determine what fats are of consequence to the determination of the action. The OCCA did not do that in this case. The Western District of Oklahoma and the 10th Circuit Court of Appeals each endorsed

the OCCA's error with conclusory analysis.

In his Brief on direct appeal, Petitioner explained why the testimony of the alleged victim's mother, Signolia Vaughn, was relevant:

> The trial court denied Appellant a fair trial by excluding testimony by Velvet Mustin, the mother of Keance Mustin, about incidents that she witnessed involving Signolia Vaughn and Keaunce Mustin during the week of the shooting incident. The trial court denied the evidence on the grounds of relevancy. The evidence that the defense attempted to elicit was relevant because it would have corroborated Signolia Vaughn's testimony that she had instructed Keaunce Mustin not to return to her home, that the decedent knew that he was not welcome at Signolia Vaughn's home, and that Signolia Vaughn was afraid of the Keaunce Mustin.

Similarly, Petitioner explained why the evidence of the threats made by the alleged victim towards Signolia Vaughn was relevant:

> Signolia Vaughn was prohibited from testifying about specific behavior exhibited by the decedent which led her to conclude that she could not deal with Keuaunce Mustin on her own. The prosecution objected to the introduction of said evidence and the trial court sustained the prosecution's objection on the grounds that it was irrelevant. (Tr. II 99).The evidence was clearly relevant to show that Signolia Vaughn was genuinely fearful for her life, to corroborate her testimony that she had ordered the decedent to leave her home, and to corroborate her testimony that she asked Appellant to stay with her because she was scared. See, *Bechtel v. State*, 1992 OK CR 55, 840 P.2d 1.

Further, Petitioner explained why the evidence of the alleged victim's PCP intoxication at the time he sought to break into the window was relevant:

> The fact that Keaunce Mustin was intoxicated with PCP was relevant to counter the state's claim that he was acting "reasonably" when he attempted to break into the home through the window, to corroborate Signolia Vaughn's testimony that she was afraid for her life at the time of the shooting, and to corroborate Phillip Davis' statement during his interview with police that Signolia Vaughn had told him generally about a "PCP dude" who posed a danger. In a case where the state relied upon speculation and innuendo, Keaunce Mustin's toxicology presented one verifiable fact which could elucidate several of the events surrounding the homicide.

...

It is likely that the decedent's PCP use would be admitted in trial if the decedent had not been killed and was charged with burglary. Evidence is considered "res gestae" when it is so closely connected to the charged offense as to form a part of the entire transaction, when it is necessary to give the jury a complete understanding of the crime, or when it is central to the chain of events. See Rogers v. State, 1995 OK CR 8, 890 P.2d 959; See also Davis v. State, 1996 OK CR 15, 916 P.2d 251. If the decedent argued that he did not intend to commit a felony within the dwelling, and that it was reasonable for him to enter the home through the window rather than knocking on the door or calling the lawful inhabitant who was inside, then the prosecution would probably be allowed to offer

> proof of his PCP intoxication and to show that there was a freshly dropped PCP vial found a short distance from the window he was attempting to enter. It was unjust for the court to exclude evidence which would elucidate Mustin's mental state and give context to the chain of events simply because doing so would benefit Phillip Davis.

Notably, the evidence sought to be admitted did not relate to the general character or to a character trait of the decedent. Further, Petitioner was not attempting to prove that he had knowledge of specific acts of violence that helped form his fear of the alleged victim. Contrarily, the evidence was necessary to combat the State's theory, and to rebut evidence submitted by the State.

For instance, the State argued that Signolia Vaughn never told Keaunce Mustin that he was barred from her home. This purported fact was vital to the State's conspiracy theory, as it was necessary for

the State to show that Mustin believed he was welcome within the home when he attempted to break in through the window. Thus, proving that Vaughn did in fact tell Mustin that he was barred from her home for using PCP was vital to Petitioner's defense.

According to Signolia Vaughn, only two living persons were present for the conversation: Signolia Vaughn and Velvet Mustin. Signolia Vaughn testified that she told Velvet Mustin on two occasions that the decedent was not allowed in her home. Aplt. App. at 451, Lines 8-16. Vaughn testified that she told Velvet Mustin that her son was no longer allowed in her home on the same day that she changed the locks. Aplt. App. at 451, Lines 8-16. This testimony directly contradicted a key aspect of the State's theory, which claimed that Vaughn changed the locks and deliberately failed to communicate to Mustin that he was not allowed in her home.

Further, evidence of the alleged victim's PCP intoxication was necessary to rebut the State's claim that the fact that Mustin's things were "laying neatly" on a table at the time of

the break-in supported the inference that he was not breaking into the home for a nefarious purpose:

> Does this look incredibly neat to anybody? Just nice and stacked there. Oh, look, I've got to put my stuff down right here. Does this look like-the actions of a crazed burglar that's just out for some crazy action? Or does this look like a guy that just got home from work, that just set his stuff down.

Aplt. App. at 454, Lines 8-13.

Petitioner had the right to cross-examine the witness in a manner that revealed the decedent was not acting lawfully when he attempted to break into the home. Evidence that the decedent smoked PCP immediately before breaking is much stronger evidence of the decedent's felonious intent than the fact that his things were laying on the table. By restricting Petitioner's right to elicit evidence of the decedent's PCP intoxication at the time of the break-in, the State Court further denied Petitioner's right to present a complete defense.

Finally, evidence of specific threats made by Keaunce Mustin towards Signolia Vaugn was necessary to rebut the State's evidence and the inferences sought to be elicited therefrom. The evidence of threats would also corroborate Vaughn's testimony that she barred the alleged victim from her home. The State claimed that Vaughn was lying when she testified that she barred the alleged victim from her home:

> "Then during the week of October 19th, [Signolia Vaughn] will tell you that she decided to end this relationship, but what you won't understand is whether or not she actually told Keaunce Mustin she was ending the relationship." Aplt. App. at 369, Lines 16-19.

Given the State's theory, it was imperative that Petitioner be allowed to present a complete picture of the events leading up to the break-in and shooting. The State claimed that Mustin did not intend to commit a felony upon or inside the dwelling. The State put Mustin's

mental state at the time of the break-in at issue. Clearly then, it was relevant that he had threatened to burn the house down, and that he smoked PCP (a felony) immediately before the break-in.

To date, no court, including the Court of Criminal Appeals, the Western District of Oklahoma, or the 10th Circuit Court of Appeals has analyzed Petitioner's claim in light of the facts actually sought to be proven by Petitioner. As explained above, the Court of Criminal Appeals applied a blanket rule pertaining to "character evidence" in self-defense cases. The Western District concluded that the OCCA's reasoning was "reasonable" in a wholly conclusory manner:

> Petitioner has not shown that the OCCA improperly applied Oklahoma's rules of evidence "in a per se or mechanistic manner"; rather, the state court "analyzed [the defense's] evidence on the merits" and found it properly excludable. *Dodd*, 753 F.3d at 988 (internal quotation marks omitted);

> *see* OCCA Summ. Op. at 3. As to each of the evidentiary rulings set forth above, the prosecution advanced a "'rational justification'" for the exclusion of the disputed evidence, and "there were rational grounds for exclusion" by the trial court. *Dodd*, 753 F.3d at 987 (quoting *Crane*, 476 U.S. at 691); *see* Vol. II Trial Tr. 33-36, 90-92, 95-96, 97-98, 99, 202-06, 229-34; OR 166-69. Likewise, the OCCA's conclusion on direct appeal that the disputed evidence was irrelevant is supported by a reasoned discussion and analysis. *See* OCCA Summ. Op. at 2-3 (citing cases).
>
> *Report and Recommendation, p. 6.*

The Report and Recommendation does not even recite the OCCA's reason for deeming that the evidence was properly excluded. The Report and Recommendation does not

mention the material facts that Petitioner sought to prove by offering the evidence.

The 10th Circuit Order and Judgment is similarly conclusory. The 10th Circuit states:

> *Dodd* forecloses Davis's assertion that he is entitled to relief on this aspect of his habeas claim. 753 F.3d at 985–89. Davis has not shown the OCCA applied Oklahoma's rules of evidence "in a per se or mechanistic manner"; instead, the OCCA "analyzed [Davis's] evidence on the merits" and found it properly excluded. Id. at 988 (quotation omitted). The prosecution advanced at trial a "rational justification" for exclusion of the disputed evidence and "there were rational grounds for exclusion" by the trial court. Id. at 987 (quotation omitted)3; see also Mag. J. Report and Recommendation, May 1, 2018, at 6 (collecting trial transcript citations). Furthermore, the trial court's evidentiary rulings did not result in

> wholesale exclusion of this type of evidence.4 Even if this court might have made different rulings on the admissibility of the evidence, the OCCA's decision was not contrary to or an unreasonable application of Supreme Court precedent, nor was it based on an unreasonable determination of the facts. Id. Because Davis cannot demonstrate the OCCA's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," habeas relief must be denied. Harrington v. Richter, 562 U.S. 86, 103 (2011).

Again, the 10th Circuit does not address the actual material facts sought to be proven by Petitioner. Instead, the Court endorses the OCCA's erroneous application of the rule governing character evidence without addressing Petitioner's arguments as to why the evidence was relevant.

2. This Court should grant the writ to clarify that when a defendant challenges a conviction on the basis that evidence was wrongfully excluded, reviewing courts must review the relevancy issue in light of the actual issues sought to be proved by the evidence and must directly address the defendant's stated reasons for offering the excluded evidence.

The Western District of Oklahoma and Tenth Circuit Courts both quote this court's opinion in *Crane v. Kentucky* in conclusory fashion. Both Courts state the trial court and OCCA presented "rational justifications" for excluding Petitioner's evidence, but neither court engages in the analysis mandated by *Crane*. In *Crane*, the trial court excluded evidence pertaining to the duration and manner of the interrogation of the defendant. The State court excluded the proposed evidence on the ground that the evidence "related solely to voluntariness," which, under Kentucky law, was a legal question. *Crane v. Kentucky,* 476

U.S. 683, 90 L.Ed.2d 636, 686, 106 S.Ct. 2142 (1986). Because the issue of voluntariness had been litigated before trial, the court ruled, the defendant could not "develop in front of the jury" any evidence pertaining to the duration of the interrogation or the identities of the persons present. *Id.*

The error in the State court's reasoning in *Crane* was that it failed to take into consideration the actual reason the Defendant sought to introduce the excluded evidence. The *Crane* court did not challenge Kentucky's evidentiary rule that made the voluntariness question a legal question. Instead, this Court pointed out that excluded evidence had a purpose that was separate and distinct from the issue of voluntariness. This Court ruled that the State could not disregard the defendant's rationale for offering the evidence. In other words, an item of evidence may be properly excluded for reason "A," but the same item of evidence may be admissible if offered for reason "B." The *Crane* opinion makes clear that courts may not indiscriminately apply an evidentiary rule to a situation in which a defendant seeks to offer evidence for reasons

not implicated by the evidentiary rule, which is precisely what has been done in this case.

In the instant case, Petitioner does not challenge the validity of the Oklahoma rule of evidence stated in *Davis v. State*. The rule is logical. But it is one-hundred percent illogical to apply that rule in this case. *Davis v. State* has nothing to do with this case. Petitioner has never attempted to offer evidence for the purpose addressed in *Davis*. There is no reason to cite the case in this matter.

While the Crane court addressed evidence pertaining to the credibility of a confession, the Court made clear that the fundamental right at stake is broad. *Id.* at 690 ("We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." Internal quotations omitted). Petitioner has been denied procedural fairness at every level, as each court has refused to address the admissibility issues in a manner that is case-specific; no court has

even recited Petitioner's stated reasons for offering the excluded evidence. The "see no evil" approach taken by the lower courts is precisely the type of injustice that the *Crane* court sought to avert.

This Court should grant the Writ of Certiorari in this case to re-affirm that when addressing the relevancy of a criminal defendant's proposed evidence, a court's analysis must be specific to the facts sought to be proven in that particular case and must address the peculiar issues that must be proven in that defendant's trial.

There is nothing unique about the idea that evidence may be inadmissible for one reason but admissible for another. For example, both the Oklahoma Evidence Code and the Federal Rules of Evidence provide that "other crimes" evidence is inadmissible if offered to show that a person is acting in conformity with a character trait. Yet both Oklahoma and Federal rules permit such evidence if it is offered for "other purposes," such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. OKLA. STAT. tit. 12 § 2404; Fed. R. Evid., 404(b)(2). If a litigant

offers "other crimes" evidence to prove intent and knowledge, it would be irrational for the court to exclude the evidence under the rule that such evidence is inadmissible under the rule excluding "other crimes" evidence offered to prove that the person acted in conformity with a character trait. Obviously, any good-faith analysis on the issue of relevance must address the actual reason the evidence is being offered.

Another example is hearsay evidence. Under the Oklahoma and Federal evidence codes, an out-of-court statement may constitute inadmissible hearsay if it is offered to prove the truth of the matter asserted in the statement. However, the same statement may be admissible if offered for another purpose, such as to prove the state-of-mind of a person who heard the statement. A court analyzing the admissibility of the out-of-court statement would be required to review the proposed evidence based on the reason that it is offered.

Requiring courts to consider the specific reason evidence is being offered when making rulings as to admissibility would not impose a new obligation, but would naturally follow from the fact that relevancy, by definition, is

dependent upon the material facts that are sought to be proven or disproven. The Oklahoma Court of Criminal Appeals has expressed total agreement with this notion. *See Hawkins v. State*, 891 P.2d 586, 593, 1994 OK CR 83 ("Relevancy, of course, depends on the issues which must be proven at trial"). Notably, the Oklahoma Court of Criminal Appeals in *Hawkins* deems the concept to be so fundamental, that it describes this principle as "obvious" and does not even feel compelled to include a citation to authority on this point.

Further, this Court has emphasized the fact that the relevance of a defendant's evidence is dependent upon the theory of guilt sought to be proven by the prosecutor. In *Crane*, this Court emphasized that one protected purpose of a defendant's evidence is to protect he basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *Crane v. Kentucky*, 476 U.S. 683, 690-91, 90 L.Ed.2d 636, 106 S.Ct. 2142 (1986)(citing *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

The issue raised in Question II of this Petition is subtly distinct from the issue in

Question I. Question I concerns the process at the trial level and whether Petitioner was denied the right to present a complete defense. Question II is targeted towards the habeas and appellate process itself. The Writ of Certiorari should be granted to direct lower courts that when a habeas petitioner challenges a conviction by contending that relevant evidence was improperly excluded, courts must actually address the Petitioner's argument by assessing the issues sought to be proven and disproven at trial. Allowing courts to rule on evidentiary issues with the "straw-man" fallacy, ignoring the Petitioner's actual reason for offering the evidence and applying a rule unrelated to the case, renders the right to habeas review an empty one.

Just as in *Crane*, the trial court's evidentiary rulings prevented Petitioner from adequately addressing the question that central to the State's conspiracy theory: Why was the decedent climbing through the window? The State asserts that the decedent believed he had a right to break into the window. To controvert this theory, Petitioner needed to develop the entire story, including the altercation between the decedent and the

homeowner, in which he threatened to burn her house down and told her she would never live in Oklahoma. While the State argued that the homeowner never kicked Mustin out of the home, Petitioner needed to show that the entire altercation, including the threats, was the result of the homeowner kicking him out. Because the State accused the homeowner of engaging in a conspiracy and lying about the altercation, it was necessary for Petitioner to present the account of the only other living witness to the altercation, the decedent's Mother. Petitioner needed to develop the image of the decedent, who, after being kicked out of the home, walked to the rear of the home at 3:00 a.m., smoked PCP, and proceeded to break-in through the window, without knocking at the door.

Just as the State was able to present its theory, Petitioner had the right, under this Court's authorities, to present the counter-story to the jury. It is the purview of the jury to decide which theory was more believable. The trial court had no right to exclude evidence simply because it contradicted the State's theory.

The failure of the lower courts to even address the reasoning set forth in the preceding two paragraphs has prejudiced Petitioner. Instead of engaging in a good-faith examination of the excluded evidence, Petitioner has been forced to repeat the same arguments, at each level, hoping that some court would address the issues, as opposed to ignoring them. Now, after spending more than $500.00 dollars in filing fees seeking an answer, Petitioner has landed in this court, spending another $200.00 in hopes of getting a realistic, rational answer. This Court should grant the writ so that no one is forced to go through the same process in the future.

3. **This Court should grant the writ to clarify that the government may not obtain a conviction based on speculation as to a conspiracy to commit murder and subsequently justify the conviction under an alternative excessive force theory that was never submitted to the jury.**

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt that the accused acted with the absence of heat of passion on sudden provocation when the issue is properly presented in a homicide case. *Mullaney v. Wilbur*, 421 U.S. 684, 704, 95 S.Ct. 1881, 44 L.Ed.2d 508. Similarly, Oklahoma law requires the State to prove beyond a reasonable doubt that a defendant accused of homicide was not acting in defense of property, defense of self, and/or defense of others. OUJI (Criminal) Instruction No. 8-17 (defense of property); OUJI (Criminal) Instruction No. 8-5 (defense of others); OUJI (Criminal) Instruction No. 8-49 (self-defense). The Supreme Court has noted that the State's burden of proving the absence of self-defense, is "in all practical effect, identical to the burden involved in negating the heat of passion on sudden provocation." *Mullaney v. Wilbur*, 421 U.S. 684, 702, 95 S.Ct. 1881, 44 L.Ed.2d 508.

The State sought to meet its burden of proof at trial by alleging that Petitioner "set up" the decedent and "laid in wait" prior to the shooting. Aplt. App. at 660-61 .On Appeal,

however, the State argued, "As thoroughly argued herein, the evidence proved Petitioner did not know who was breaking into Ms. Vaughn's apartment at the time he fired the shotgun. Aplt. App. at 44. These contradictory positions reflect the different objectives of the State at trial and on appeal. The State did not argue to the jury that Phillip Davis was guilty of first-degree murder simply because he shot an unknown intruder. Such a theory would be contrary to the laws governing defense of habitation, defense of self, and defense of others. Specifically, OKLA. STAT. tit. 21 § 733 provides:[1]

> A. Homicide is also justifiable when committed by any person in any of the following cases:
>
> 1. When resisting any attempt to murder such person, or to commit any felony upon him, or upon or in

---

[1] When performing an analysis under *Jackson,* the reviewing court must look to the applicable law of the State to define the elements of the crime that must be proven. *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)

any dwelling house in which such person is;

2. When committed in the lawful defense of such person or of another, when the person using force reasonably believes such force is necessary to prevent death or great bodily harm to himself or herself or another or to terminate or prevent the commission of a forcible felony; or

3. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace.

B. As used in this section, "forcible felony" means any felony which involves the use or threat of physical force or violence against any person.

The Court of Criminal Appeals has made clear that defendant's reasonable belief that a threat is posed is controlling:

> The Oklahoma statutes addressing self-defense, defense of others, defense of habitation, and defense of property are numerous and often confusing and inconsistent. However, one common aspect is shared. Exoneration is dependent on facts which an innocent defender may not know or be able to know until it is too late, and legal conclusions about those facts which the lay person cannot be expected to make, particularly when one is facing an attacker or unknown intruder.
>
> *State v. Anderson*, 972 P.2d 32, 1998 OK CR 67,

Based on the above-cited authorities, it is easy to understand why the State did not simply argue that Petitioner was guilty of first-degree murder by shooting an

unknown person who was attempting to break-in through the window.

The Oklahoma Court of Criminal Appeals stated that it was appropriate for the State and the jury to "speculate" that Vaughn conspired with Appellant to kill the victim, and make it look like a home invasion. Aplt. App. at 239, 240. The OCCA's finding that "speculation" on the part of the State is proper in a criminal case is contrary to this Court's holding in *Jackson v. Virginia* and its progeny that each element of the conviction must be supported by evidence.

The Oklahoma Court of Criminal Appeals' holding that it was proper for the jury to speculate as to the existence of a conspiracy is contrary to Oklahoma law as well. As explained by the Oklahoma Supreme Court, "An inference upon an inference is permitted, if the first inference is a justifiable conclusion from evidence, testimonial or circumstantial, and if the second inference is a justifiable conclusion from fist inference by itself or in connection with other evidence. *McConnell v. Oklahoma Gas & Elec. Co.*, 563 P.2d 632, 1977 OK 65.

In the instant case, the State admitted, "the evidence proved Petitioner did not know who was breaking into Ms. Vaughn's apartment at the time he fired the shotgun." Aplt. App. at 44. Thus, the "speculation" called for by the Court of Criminal Appeals would call on the jury to infer, based on mere conjecture, that Signolia Vaughn told Petitioner of the alleged victim's existence. From there, the jury would have to speculate that when she told Petitioner about the alleged victim, the two of them colluded to set up the decedent and make it appear to be a break-in. The OCCA's analysis calls for rank speculation on top of rank speculation. The OCCA's adjudication of Petitioner's constitutes an unreasonable application of *Jackson.*

This Court has held that when performing an analysis of the sufficiency of the evidence, courts must review the facts in the light most favorable to the prosecution, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). There is a glaring difference, however, between reviewing the evidence in the light most favorable to the prosecution and encouraging the jury to speculate as to a existence of facts that were not

proven at all. This Court has made clear that "a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *Id.* at 314.

As this Court has stated, "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 313, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)(citing *Cole v. State of Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *Presnell v. Georgia*, , 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). This rule falls under the broader principle that "a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Id.* In the instant case Petitioner dedicated his defense to combatting the State's only theory of guilt set forth at trial: that he engaged in a conspiracy to murder the decedent. Petitioner was obviously successful, since, the Oklahoma Attorney General conceded that the evidence proved he did not know who was breaking in through the window. The reviewing courts affirmed the murder conviction, not on the basis of the State's theory at trial, but under

the state's theory on appeal that shooting an unknown intruder in Oklahoma can support a first-degree murder conviction. Even assuming the State is correct on this point,[2] Jackson makes clear that Petitioner's conviction cannot be affirmed on this basis, as Petitioner was never given a "meaningful opportunity to defend" against the excessive force theory.

When an element of the State's case is premeditation, that element is obviously much easier to prove by claiming the defendant planned the homicide in advance and "laid in wait" to execute the plan, as opposed to arguing that the requisite mental state was formed in the moments after being awakened by a panicked homeowner who informed him of an unknown intruder and seeing the unknown

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[2] Petitioner does not concede that under Oklahoma law, a defendant may be guilty of first-degree murder by shooting an unknown person attempting to break into a dwelling that is lawfully occupied by the defendant. The OCCA does not squarely address this question in its opinion, as it does not take the specific circumstances of this case into account in concluding that the evidence was sufficient to support the conviction.

person actually entering the home. At the very least, it must be conceded that a jury is more likely to either acquit the defendant entirely, or convict on a lesser charge, when the State's case is based upon the latter theory.

The State never attempted to articulate to the jury a theory of guilt that would support a conviction based on the use of deadly force against an unknown intruder. The lower courts affirmed Petitioner's murder conviction based upon a "charge not tried." The writ of certiorari should be granted to clarify that under applicable Supreme Court authorities, States may not obtain a conviction by urging one theory of guilt at trial, only to abandon that theory on appeal in favor of a theory that is mutually exclusive from the theory used to obtain the conviction.

This Court should make clear that a conviction of a criminal defendant may only be upheld on the basis of the theory (or theories) of guilt that are actually tried. Any other rule would merely encourage the shell-game approach utilized by the State of Oklahoma in this case and eviscerating the fundamental right of a defendant to due process and a

meaningful opportunity to defend against the charges for which he is imprisoned.

CONCLUSION

The petition for writ of certiorari should be granted. The 10th Circuit Order and Judgment should be vacated, and this Court should grant Petitioner's Petition for Writ of Habeas Corpus. Petitioner's conviction for Murder in the First Degree should be reversed with instructions to dismiss the charge of Murder in the First Degree.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PHILLIP ANTONIO DAVIS,	)
Appellant,	)
	) **NOT FOR**
vs.	)**PUBLICATION**
	)
THE STATE OF OKLAHOMA,	)**NO. F-2014-25**
Appellee.	)**Filed:04/29/15**

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Appellant, Phillip Antonio Davis, was convicted by a jury in Oklahoma County District Court, Case No. CF-2012-6782, of Count 1: First Degree Murder (21 O.S.2011, § 701.7), and Count 2: Possession of a Firearm After Conviction of a Felony (21 O.S.2011, § 1283). On December 18, 2013, the Honorable Cindy Truong, District Judge, sentenced him in accordance with the jury's recommendation to life imprisonment on Count 1, and two years

imprisonment on Count 2, and ordered the sentences to be served concurrently.

Davis raises nine propositions of error in support of his appeal:

PROPOSITION I. THE. TRIAL COURT DENIED THE RIGHT OF THE APPELLANT TO PRESENT EVIDENCE IN HIS DEFENSE AND THEREFORE DENIED THE APPELLANT'S RIGHT TO A FAIR TRIAL.

PROPOSITION II. THE TRIAL COURT DEPRIVED APPELLANT'S RIGHT TO A FULL DEFENSE AND FAIR TRIAL BY REFUSING TO ALLOW TWO A'ITORNEYS TO MAKE A CLOSING ARGUMENT ON BEHALF OF THE APPELLANT.

PROPOSITION Ill. THE PROSECUTION MADE NUMEROUS STATEMENTS DURING CWSING ARGUMENT WHICH CONSTITUTED PROSECUTORIAL MISCONDUCT.

PROPOSITION IV. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATIORNEYS FAILED TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENTS.

PROPOSITION V. APPELLANT WAS UNCONSTITUTIONALLY DENIED BAIL

AND WAS UNLAWFULLY DENIED THE RIGHT TO A MEANINGFUL *BRILL* HEARING WHEN THE TRIAL COURT ERRONEOUSLY APPLIED THE LAW AT THE BAIL HEARING.

PROPOSITION VI. APPELLANT'S CONVICTION FOR MURDER IN THE FIRST DEGREE SHOULD BE REVERSED AND DISMISSED BECAUSE THE MAGISTRATE DETERMINED THAT THE STATE DID NOT OFFER ANY EVIDENCE OF MALICE AFORETHOUGHT AT THE PRELIMINARY HEARING.

PROPOSTION VII. APPELLANT WAS DENIED DUE PROCESS WHEN THE PROSECUTION CHANGED ITS THEORY AT TRIAL.

PROPOSTION VIII. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO JUSTIFY A CONVICTION FOR MURDER IN THE FIRST DEGREE. PROPOSTION IX. THE ACCUMULATION OF ERROR REQUIRES VACATION OF MR. DAVIS' CONVICTION.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm. Appellant was convicted of using a shotgun (which he was prohibited from possessing) to kill

Keaunce Mustin at the apartment home of Signolia Vaughn. Mustin had been in a relationship with Vaughn, and had been living at her apartment. Vaughn also had an intimate relationship with Appellant during this time. Vaughn testified that in the days before the shooting, she asked Mustin to move out and changed the lock on the front door. She also purchased a pistol with Appellant's advice, and asked Appellant to stay the night at her apartment. Appellant agreed,and brought his own shotgun with him. When Mustin got off work around 2:00 a.m., he went to Vaughn's apartment. Hearing a commotion outside, Vaughn called 911 to report an intruder. While Vaughn was talking to the dispatcher, Appellant retrieved his shotgun and fired a single shot through the living-room window at Mustin, who was standing in front of the window, killing him. After initially claiming he did not know who fired the shot, Appellant admitted to police that he was the shooter, and claimed the person was trying to open the living-room window when he (Appellant) fired the gun. However, he maintained to police, and Vaughn herself maintained at trial, that they had no idea who the person was. The jury rejected Appellant's claim that the shooting was justified in self-

defense, defense of another, and/or defense of habitation. As to Proposition I, evidence of the victim's drug use and threatening conduct toward Signolia Vaughn was not relevant to whether Appellant's use of deadly force was reasonable under the circumstances, because both Vaughn and Appellant claimed they had no idea who the would-be intruder was. *Davis v. State,* 2011 OK CR 29, ¶¶ 157-160, 268 P.3d 86, 125-26. In any event, the jury did, in fact, hear a fair amount of testimony on these subjects. *Boltz v. State,* 1991 OK CR 1, if 19, 806 P.2d 1117, 1123. Because a witness's possible bias is always a proper inquiry, the trial court erred by not allowing defense counsel to ask Vaughn whether her testimony was affected by the possibility of her being charged in connection with the victim's death. *Davis v. Alaska,* 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974); *Lankister v. State,* 1956 OK CR 67, if 9, 298 P.2d 1088, 1090. However, this error was harmless beyond a reasonable doubt, because Appellant does not point to any part of Vaughn's testimony that was inconsistent with his own account to police, or Which otherwise prejudiced his theory of defense. *Al-Mosawi v. State,* 1996 OK CR 59, ¶¶ 49-51, 929 P.2d 270, 283. Proposition I is denied.

As to Proposition II, the trial court did not err by denying Appellant's request to split his guilt-stage closing argument between two defense attorneys. Because Appellant was not facing the death penalty, the court's ruling on the matter was within its sound discretion. 22 O.S.2011, §§ 831(6), 835. Proposition II is denied.

As to Proposition III, because Appellant did not object to the prosecutor's closing comments at the time they were made, we review this claim only for plain error. *Wackerly v. State,* 2000 OK CR 15, ¶ 44, 12 P.3d 1, 15. Speculation that Vaughn conspired with Appellant to kill the victim, and make it look like a home invasion, was not unbelievable, given the peculiar circumstances surrounding the shooting. We find all of the prosecutor's comments were reasonable inferences from the evidence presented. *Warner v. State,* 2006 OK CR 40, ¶ 179, 144 P.3d 838, 888. Proposition III is denied.

As to Proposition IV, because we have found the prosecutor's closing arguments to be unobjectionable in Proposition III, timely objections to them by trial counsel would have properly been overruled. Therefore,

Appellant cannot demonstrate prejudice from counsel's failure to object. Trial counsel was not ineffective. *Strickland v. Washington,* 466 U.S. 668, 687-89, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984); *Pavatt v. State,* 2007 OK CR 19, ¶ 66, 159 P.3d 272, 292. Proposition IV is denied.

As to Proposition V, the proper avenue for challenging the denial of bail pending trial is by seeking a writ of *habeas corpus.* Rule 1.2(D)(2), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22 O.S., Ch.18, App. (2015); *Hoover v. State,* 2001 OK CR 16, ¶ 3, 29 P.3d 591, 593. Appellant did not seek such relief when bail was denied. Now that he has been found guilty and sentenced, any challenge to the denial of pre-trial release is moot. *See Perez v. State,* 261 S.W.3d 760, 765 (Tex.App. 2008); *Minniefield v. State,* 569 N.E.2d 734, 735 (Ind. App. 1991). Even assuming error in the trial court's ruling on the matter, Appellant does not explain what remedy would be appropriate at this time. Proposition V is denied.

As to Proposition VI, the magistrate did not err in binding Appellant over for trial. A preliminary hearing is simply a determination that probable cause exists to hold the accused for trial. *Johnson v. State,* 1986 OK CR 187, ¶ 5, 731 P.2d 424, 425-26. By claiming the State presented

insufficient evidence of the "malice" element of First Degree Murder, Appellant misinterprets the legal meaning of that term. The State was simply required to show that Appellant shot the victim with the intent to take a human life. 21 O.S.2011, § 701.7(A); *Davis v. State,* 2004 OK CR 36, ¶ 23, 103 P.3d 70, 78. He admitted this conduct; on these facts, whether it was reasonable under the circumstances was for a jury to decide. Proposition VI is denied.

As to Proposition VII, the State's speculation that Appellant and Vaughn conspired to murder the victim (see Proposition III) was a fair inference from the peculiar circumstances surrounding the homicide. However, the State was not required to prove any such agreement or motive to obtain a murder conviction against Appellant. Appellant admitted the homicidal act. His alleged justification was in the nature of an affirmative defense. The defense maintained that

Appellant did not know the identity of the victim at the time of the shooting, and therefore had no ulterior motive to kill him; the State was entitled to argue otherwise on the evidence presented. *Pierce v. State,* 1961 OK CR 2, ¶ 36, 358 P.2d 647, 653. Proposition VII is denied.

As to Proposition VIII, the evidence supporting the charge of First Degree Murder came from Appellant's own admissions to police, corroborated by the physical evidence. The only remaining issue was whether Appellant acted reasonably in defense of self, others, or property. The jury was properly instructed on these affirmative defenses. Having reviewed the evidence in its entirety, we find it sufficient to support the jury's verdict. *Jackson v. Virginia,* 443 U.S. 307, 319-20, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Brown v. State,* 1994 OK CR 12, ¶ 27, 871 P.2d 56, 66. Proposition VIII is denied.

As to Proposition IX, as we have identified only one error in the preceding propositions, and concluded that the error was harmless beyond a reasonable doubt, there can be no cumulative error. *Hope v. State,* 1987 OK CR 24, iJ 12, 732 P.2d 905, 908. Proposition IX is therefore denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is

AFFIRMED. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,*

Title 22, Ch.18, App. (2015), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

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LUMPKIN,
V.P.J.:
CONCUR IN
RESULTS
JOHNSON, J.:
CONCUR
LEWIS, J.:
CONCUR
HUDSON, J.:
CONCUR

UNITED STATES DISTRICT COURT

FOR THE WESTERD DISTRICT OF OKLAHOMA

PHILLIP ANTONIO DAVIS,	)
	)
Petitioner,	)
	)
v.	) **Case No.**
	) **CIV-16-**
JOE M. ALLBAUGH,	) **866-M**
	)
Respondent.	)**Filed**
	)**05/01/18**

REPORT AND RECOMMENDATION

Petitioner Phillip Antonio Davis, appearing through counsel, has filed an Amended Petition for Writ of Habeas Corpus (Doc. No. 6), challenging through 28 U.S.C. § 2254 the constitutionality of his criminal conviction by the State of Oklahoma. United States District Judge Vicki Miles-LaGrange has referred the matter to the undersigned Magistrate Judge for initial proceedings in accordance with 28 U.S.C. § 636. Respondent

Director Joe M. Allbaugh has filed an Answer (Doc. No. 13), Petitioner has replied (Doc. No. 21), and this matter is now at issue. For the reasons outlined below, it is recommended that the Amended Petition be denied.

I. Relevant Case History

In the early hours of October 20, 2012, Petitioner fired a shotgun one time, killing a man who was outside a window at the apartment of Petitioner's friend Signolia Vaughn. Vol. II Trial Tr. 77, 138, 151-52 (*State v. Davis*, No. CF-2012-6782 (Okla. Cty. Dist. Ct. Nov. 4-6, 2013)) (Doc. No. 15 (conventionally filed)). Following a jury trial in the District Court of Oklahoma County, Oklahoma, Petitioner was convicted of one count of first-degree murder and one count of possession of a firearm after former conviction of a felony. Vol. III Trial Tr. 105, 118, 136. On December 26, 2013, Petitioner was sentenced to life imprisonment on the first-degree murder count and two years imprisonment on the firearm count. Original Record ("OR") at 245-48 (Doc. No. 23 conventionally filed)).

Petitioner appealed to the Oklahoma Court of Criminal Appeals ("OCCA"). *See Davis v. State*, No. F-2014-25 (Okla. Crim. App.). The OCCA affirmed Petitioner's convictions and sentences on April 29, 2015. *See* OCCA Summ.

Op. (Doc. No. 13-4) at 1-7.[1] Petitioner did not seek postconviction relief in the state courts. Am. Pet. at 3.

On July 28, 2016, Petitioner filed this federal habeas action. *See* Doc. Nos. 1, 10.Respondent acknowledges, and the record reflects, that this action was timely filed and that available remedies for the grounds for relief raised by Petitioner have been exhausted, except as noted. *See* Answer at 2; 28 U.S.C. §§ 2244(d)(1), 2254(b)(1)(A).

II. Discussion

A. Ground One: Denial of Right to Present a Complete Defense

1. Background

In Ground One, Petitioner argues that the trial court's exclusion of certain evidence violated his right to present a complete defense. *See* Am. Pet. at 8-12. Specifically, Petitioner argues that he should have been permitted to present evidence regarding the victim's drug use, the victim's relationship with and conduct toward Ms. Vaughn, and whether Ms. Vaughn

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[1] References to documents electronically filed in this Court use the CM/ECF pagination.

had been charged with any crime in connection with the shooting. [2] *See id.*; *see also* Pet'r's Reply at 3-17.[3]

On direct appeal, the OCCA rejected this argument:

> As to Proposition I, evidence of the victim's drug use and threatening conduct

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[2] 1 References to documents electronically filed in this Court use the CM/ECF pagination.

[3] Citing appellate briefing rules, Respondent argues that this argument and most of Petitioner's other grounds are so inadequately raised as to be waived. *See* Answer at 10, 29, 39, 45, 50-51. The undersigned disagrees. Petitioner's pleading, which is submitted through counsel and not entitled to liberal construction, certainly could be more specific and more thorough in presenting its arguments. But the Amended Petition nonetheless adequately identifies "the grounds for relief" and "the facts supporting each ground." R. 2(c)(1), (2), R. Governing § 2254 Cases in U.S. Dist. Cts.

> toward Signolia Vaughn was not relevant to whether [Petitioner's] use of deadly force was reasonable under the circumstances, because both Vaughn and [Petitioner] claimed they had no idea who the would-be intruder was. In any event, the jury did, in fact, hear a fair amount of testimony on these subjects. Because a witness's possible bias is always a proper inquiry, the trial court erred by not allowing defense counsel to ask Vaughn whether her testimony was affected by the possibility of her being charged in connection with the victim's death. *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974); *Lankister v. State*, 1956 OK CR 67, ¶ 9, 298 P.2d 1088, 1090.

> However, this error was harmless beyond a reasonable doubt, because [Petitioner] does not point to any part of Vaughn's testimony that was inconsistent with his own account to police, or which otherwise prejudiced his theory of defense. *Al-Mosawi v. State*, 1996 OK CR 59, ¶¶ 49-51, 929 P.2d 270, 283. Proposition I is denied.

OCCA Summ. Op. at 3 (citations omitted); *see* Pet'r's Appellate Br. (Doc. No. 13-1) at 17-38 (citing *Crane v. Kentucky*, 476 U.S. 683 (1986); U.S. Const. amend. VI).

2. Standard of Review

Where, as here, a claim has been adjudicated on the merits by the state courts, a deferential standard of review applies in a subsequent § 2254 habeas action:

> Under the Antiterrorism and Effective Death Penalty Act of

1996(AEDPA), we must apply a highly deferential standard in § 2254proceedings, one that demand that state-court decisions be given the benefit of the doubt. If a claim has been "adjudicated on the merits in State court proceedings," we may not grant relief under § 2254 unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). The phrase "clearly established Federal law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1), refers to the holdings, as opposed to the dicta, of the Court's decisions as of the time of the relevant state-court decision.

Under the "contrary to" clause of § 2254(d)(1), we may grant relief only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a

> case differently than the Court has on a set of materially indistinguishable facts. And under the "unreasonable application" clause, we may grant relief only if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. An unreasonable application of federal law is different from an incorrect application of federal law. Indeed, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.

Dodd v. Trammell, 753 F.3d 971, 982 (10th Cir. 2013) (alterations, citations, and internal quotation marks omitted).

With respect to the claimed constitutional violation, "'[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees

criminal defendants a meaningful opportunity to present a complete defense.'" *Id.* at 985 (quoting *Crane*, 476 U.S. at 690). To this end, "[r]estrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Id.* (quoting *Michigan v.Lucas*, 500 U.S. 145, 151 (1991)).

"[T]he Supreme Court has never questioned the traditional reasons for excluding evidence that may have some relevance," however. *Id.* And "'only rarely'" has the Supreme Court held "'that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence.'" *Id.* at 986 (alteration omitted) (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013)). Examples of such a violation include when the state court "provided no rationale for the exclusion, could not defend an absurd rule, or had failed to examine the reliability of the specific evidence in that case." *Id.* at 987 (citations omitted).

3. Discussion

a. Evidence of Victim's Drug Use and Interaction with Ms. Vaughn

Petitioner first argues that he was improperly prohibited from presenting evidence regarding the victim's drug use and the victim's relationship with and conduct toward Ms. Vaughn prior to the shooting. *See* Am. Pet. at 9-10; Pet'r's Reply at 4-15. In this regard, Petitioner cites several evidentiary rulings:

- At trial, the State called Ms. Vaughn to testify. During cross-examination defense counsel attempted several times to ask Ms. Vaughn about her dealings with the victim shortly before the shooting and about Ms. Vaughn's feelings toward the victim. The trial court sustained the State's objections, finding the questions called for hearsay or were irrelevant.
  See Vol. II Trial Tr. 90-92, 95-98, 99.

- The State called Velvet Mustin, the victim's mother, to testify at trial.During cross-examination, defense counsel attempted to ask Ms. Mustin about an incident when Ms. Vaughn had told the victim to leave her apartment and had asked Ms. Mustin for assistance. The trial court initially permitted the

questioning, but when Ms. Mustin testified that the incident had occurred the same week as the shooting—rather than on the same day—the court sustained the prosecution's relevance objection. *See id.* at 33-36.

- Prior to trial, Petitioner's counsel had filed a motion in limine that included a request to admit evidence that the victim was under the influence of PCP at the time of his death. OR 140-42. At a pretrial hearing, the trial court reserved ruling on the request. *See* Second Pretrial Mot. Hr'g Mot. Tr. 16-23 (*State v. Davis*, No. CF-2012-6782 (Okla. Cty. Dist. Ct. Nov. 1, 2013)) (Doc. No. 15). At trial, the trial court permitted Petitioner's counsel to question a Del City Police Department officer about a glass PCP vial found on the ground about ten feet from the shooting victim but advised counsel not to ask whether the vial had belonged to the victim. *See* Vol. II Trial Tr. 201, 202-06, 208-09; *see also id.* at 235-39.

- Defense counsel sought to introduce evidence at trial regarding a toxicology report that

had been conducted on the victim. *See id.* at 229-34. The trial court denied admission of that evidence on the grounds that it was irrelevant and highly prejudicial. *Id.*

Petitioner has not shown that the OCCA improperly applied Oklahoma's rules of evidence "in a per se or mechanistic manner"; rather, the state court "analyzed [the defense's] evidence on the merits" and found it properly excludable. *Dodd*, 753 F.3d at 988 (internal quotation marks omitted); *see* OCCA Summ. Op. at 3. As to each of the evidentiary rulings set forth above, the prosecution advanced a "'rational justification'" for the exclusion of the disputed evidence, and "there were rational grounds for exclusion" by the trial court. *Dodd*, 753 F.3d at 987 (quoting *Crane*, 476 U.S. at 691); *see* Vol. II Trial Tr. 33-36, 90-92, 95-96, 97-98, 99, 202-06, 229-34; OR 166-69. Likewise, the OCCA's conclusion on direct appeal that the disputed evidence was irrelevant is supported by a reasoned discussion and analysis. *See* OCCA Summ. Op. at 2-3 (citing cases).

Nor has Petitioner shown any basis for undermining the OCCA's factual finding that "the jury did, in fact, hear a fair amount of testimony on these subjects." OCCA Summ. Op. at 3; *see, e.g.*, Vol. II Trial Tr. 28-29, 33, 34-35, 37, 38-39, 40-41, 44-46, 57-58, 61,86-90, 92-95,

98-99, 108-12, 122-24, 208-10. And Petitioner does not argue that Oklahoma's relevant statutes and jurisprudence are facially unconstitutional or improper or otherwise attempt to show that Petitioner's right to present a complete defense was violated by an "absurd" state evidentiary rule that "'could not be rationally defended.'" *See Dodd*, 753 F.3d at 986, 987 (quoting *Jackson*, 133 S. Ct. at 1992).

Petitioner therefore cannot show that he was denied the right to present a complete defense or that the OCCA's determination contradicted or unreasonably applied "clear Supreme Court precedent" or "was based on an unreasonable determination of the facts." *Dodd*, 753 F.3d at 987; 28 U.S.C. § 2254(d)(2); *see id.* § 2254(d)(1), (e)(1).

b. Evidence Regarding a Lack of Criminal Charges

During recross-examination of Ms. Vaughn, defense counsel asked whether she been charged with murder or another crime in connection with this case. The trial court sustained the State's objection, noting that the question was irrelevant and outside the scope of the redirect examination. *See* Vol. II Trial Tr. 124.

The OCCA found that the trial court had erred but such error was harmless under the standard articulated by the Supreme Court in

Chapman v. California.[4] *See* OCCA Summ. Op. at 3 (citing *Al-Mosawi*, 929 P.2d at 283, and finding error "harmless beyond a reasonable doubt"). On habeas review, however, the Court applies the standard of review outlined in *Brecht v. Abrahamson*.[5] *See Littlejohn v. Trammell*, 704 F.3d 817, 833 (10th Cir. 2013) (internal quotation marks omitted). Under this standard, Petitioner's entitlement to relief rests upon a showing that the trial court's exclusion of the disputed evidence "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Fry v. Pliler*, 551 U.S. 112, 116 (2007) (quoting *Brecht*, 507 U.S. at 631); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2198-99 (2015). "[A] 'substantial and injurious effect' exists when the court finds itself in 'grave doubt' about the effect of the error on the jury's verdict." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)).

No such prejudicial effect or influence on the jury's verdict has been shown here. Petitioner argues that because Ms. Vaughn was reluctant or claimed a lack of memory as to certain questions regarding the victim during the State's direct examination, it was "vital" for Petitioner to present a lack of any criminal

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[4] 386 U.S. 18 (1967).

[5] 507 U.S. 619 (1993).

charges against Ms. Vaughn as "[t]he most likely reason" for her hesitation and as refutation of the prosecution's suggestion that Petitioner and Ms. Vaughn had planned to murder the victim. Pet'r's Reply at 16-17; *see* Vol. II Trial Tr. 45-49, 57-58. But despite any evasiveness by Ms. Vaughn, there was considerable evidence and testimony, including Petitioner's own admissions, to support the State's essential contention that Petitioner picked up his loaded shotgun, aimed it at a person in the window, and fired a single shot, killing the victim. *See infra* Part II.E. Petitioner was permitted to cross-examine Ms. Vaughn on other matters relevant to her credibility, and there also was evidence before the jury that undermined Petitioner's assertions of self-defense, defense of another, and defense of property. *See, e.g.*, Vol. II I Trial Tr. 19 (police detective testifying that Petitioner initially claimed someone else shot the victim but eventually stated that he was the shooter).

Petitioner therefore has not shown that any error by the trial court in this regard "had substantial and injurious effect or influence in determining the jury's verdict," and the is not entitled to relief on this basis. *Brecht*, 507 U.S. at 637 (internal quotation marks omitted).

B. Ground Two: Prosecutorial Misconduct

Petitioner next argues that the prosecution engaged in misconduct during closing argument by attempting to shift the burden of proof and making inappropriate comments. *See* Am. Pet. at 12-13. This argument was rejected by the OCCA:

> As to Proposition III, because [Petitioner] did not object to the prosecutor's closing comments at the time they were made, we review this claim only for plain error. Speculation that Vaughn conspired with [Petitioner] to kill the victim, and make it look like a home invasion, was not unbelievable, given the peculiar circumstances surrounding the shooting. We find all of the prosecutor's comments were reasonable inferences from the evidence presented. Proposition III is denied.

OCCA Summ. Op. at 4 (citations omitted).[6]

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[6] [5] On direct appeal, Petitioner objected to twelve comments as improper, but he challenges only six comments in this habeas proceeding. *See* Am. Pet. at 12-13; Pet'r's Reply at 17- 20.

The decision of the OCCA was an adjudication of Petitioner's claim on its merits to the extent the denial was based upon application of federal law. *See Douglas v. Workman*, 560 F.3d 1156, 1171 (10th Cir. 2009) ("[W]hen a state court applies plain error review indisposing of a federal claim, the decision is on the merits to the extent that the state court finds the claim lacks merit under federal law."). On habeas review, the Court considers whether the alleged prosecutorial misconduct deprived the Petitioner of a specific constitutional right or rendered the trial fundamentally unfair:

> Ordinarily, a prosecutor's misconduct will require reversal of a state court conviction only where the remark sufficiently infected the trial . . . to make it fundamentally unfair, and, therefore, a denial of due process. Nonetheless, when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair.

Dodd, 753 F.3d at 990 (omission in original) (citation and internal quotation marks omitted).

1. Statements Relating to Self-Defense

Because only Petitioner's contention that the State's comment on self-defense attempted to shift the burden of proof implicates the second category of error outlined in *Dodd*—i.e., a deprivation of a specific constitutional right—the undersigned addresses this argument first. *See id.* at 990-91 (analyzing claim that State improperly characterized its burden of proof to determine if the misconduct "effectively deprived the defendant of a specific constitutional right" (internal quotation marks omitted)); *Morris v. Workman*, 382 F. App'x 693, 696 (10th Cir. 2010) ("Where prosecutorial misconduct directly affects a specific constitutional right such as the presumption of innocence, a petitioner may obtain relief by demonstrating that the constitutional guarantee was so prejudiced that it effectively amounted to a denial of that right." (internal quotation marks omitted)).

During closing argument for the defense, Petitioner's attorney implied that Petitioner did not admit to the shooting until 17 minutes into his police interview because he was unaware of the concept of self-defense. *See* Vol. III Trial Tr. 75-76. The prosecutor in turn noted that Petitioner did not admit to shooting the victim until the interviewing detective mentioned self-defense—at which point Petitioner stated, "In

that case, I shot him." *Id.* at 95. The prosecutor continued:

> Ladies and gentlemen, none of you are lawyers. Think to yourselves: Is it reasonable to believe that he didn't know what self-defense was? He's never heard of self-defense? Not once in all of his years? That's what [defense counsel] wants you to believe, that, well, he's just not a legal scholar.
>
> Well, self-defense is much older than our law. Self-defense is fundamental to who we are as a people. We knew self-defense before we knew anything else. Don't let him fool you. It's not unreasonable to believe that Phillip Davis knows what self-defense is because we all know what self-defense is. That, ladies and gentlemen, is common sense. Okay. In that case, I shot him.

Id.

In the course of closing argument, a prosecutor "possesses reasonable latitude in

drawing inferences from the record" and may properly "comment on the circumstances of the crime made known to the jury during trial." *Hooper v. Mullin*, 314 F.3d 1162, 1172 (10th Cir. 2002). The statements quoted above regarding Petitioner's interview and his awareness of the legal defense of self-defense do not mischaracterize or negate the burden of proof applicable to such defense. Rather, these remarks were each "a fair comment on the evidence" that had been presented during the trial. *Hooper*, 314 F.3d at 1172. Moreover, the prosecutor elsewhere in his closing argument correctly described the applicable burden of proof. *See* Vol. III Trial Tr. 63, 100; *cf. Sanchez v. Bryant*, 652 F. App'x 599, 606-07 (10th Cir. 2016) (rejecting argument that the prosecution improperly attempted to shift the burden of proof when the prosecutor "acknowledged the State's burden of proving every element, but contended that the evidence showed guilt"). And the trial court instructed the jury as to the burden upon the State to establish Petitioner's guilt as to each element of the charged offense, as well as the burden upon the State to prove that Petitioner was not acting in self-defense. *See* OR 203 ("It is the burden of the State to prove beyond a reasonable doubt that the defendant was not acting in self-defense. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty."); Vol. III Trial Tr. 56-57, 63, 100; OR 189, 193. There is an "almost invariable

assumption" in the law "that jurors follow their instructions." *Richardson v. Marsh*, 481U.S. 200, 206 (1987).

Accordingly, Petitioner has not shown that the OCCA's denial of relief on this claim was either contrary to or an unreasonable application of clearly established law. *See* 28U.S.C. § 2254(d)(1); *Morris*, 382 F. App'x at 696 (rejecting contention that burden of proof was shifted where "the prosecutor reiterated the presumption of innocence and the government's burden of proof several times during closing"); *cf. Davis v. Roberts*, 579 F. App'x 662, 666-67, 671 (10th Cir. 2014) (rejecting a prosecutorial misconduct claim where the state court had found that the prosecutor's references to the defendant's subpoena power and failure to produce evidence, even if improper, were not prejudicial "because the jury was repeatedly instructed by the prosecutor, by defense counsel, and by the court" that the state had the burden to prove the defendant's guilt).

2. Additional Statements During Final Closing

During closing argument, defense counsel stated he intended to minimize his anger but asked the jury to excuse him if his anger came out during his remarks. *See* Vol. III Trial Tr. 63-64. Defense counsel also stated that Petitioner was a "protector" and a "hero" for

shooting the person who was breaking into the room where his son was sleeping. *See id.* at 71-74, 79.

In the State's rebuttal, the prosecutor stated:

> [Defense counsel] started out by saying that he was afraid he was going to get angry. I didn't see him get angry, but I want you guys to be angry. I want you to feel that anger. I want you to feel that anger at all the imaginings that [defense counsel] encouraged you to do.
>
> Imagine what would happen if [the victim] hadn't been shot. Imagine what he would have been charged with. Imagine if you know some bad guy.
>
> Well, how about this? Imagine if [one of the prosecutors] were on a grassy knoll in Dallas in 1963, what would we charge him with? Imagine if Detective Abel was in Ford's Theater behind Lincoln, what would we charge him with?
>
> You should be angry that you're encouraged to do those things. Take all those imaginings

and toss them out. We're not here to imagine. We're not going to imagine anything. Because a man's life was taken, don't imagine. Don't guess. Pay attention to what happened. That's what I'm asking you to do and get angry. *Get angry at a man who will hide behind his son.* I love my son. That's what [defense counsel] is telling you. He's a protector of his son. Who took him to that apartment with a gun knowing that Ms. Vaughn is drama? He was so protective of his son that he grabs a shotgun, takes his son by the hand and goes to Ms. Vaughn's, and now he wants to stand behind his son and say I'm a protector. Get angry at that.

Ladies and gentlemen, if he wants to be a protector, maybe he should go stay where he feels at home, where he feels safe . . . .He doesn't grab a shotgun and travel down to where there's drama and then stand here and *hold his son like a shield* and beg you to forgive him for it. You should be angry at that.

You should be angry at Signolia Vaughn. You should hate Signolia Vaughn. You sat here and listened to her. Every single thing she was asked – I don't remember. I can't think of that. Right?

Id. at 88-90 (emphasis added).

Petitioner argues that the comments emphasized above misstated the evidence, improperly inflamed the jury, and adversely affected the fundamental fairness and impartiality of his criminal trial. *See* Am. Pet. at 12-13; Pet'r's Reply at 17-19.

"The relevant question" for such a claim "is whether the prosecutor['s] comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "[I]t is not enough that the prosecutor['s] remarks were undesirable or even universally condemned." *Id.* (internal quotation marks omitted). And in making such judgment the court should consider that a prosecutor's closing arguments "'are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear.'" *Dodd*, 753 F.3d at 992 (quoting *DeChristoforo*, 416 U.S. at 646-47).

The Tenth Circuit has held that "even an improper appeal to societal alarm typically does not amount to a denial of due process." *Duckett v. Mullin*, 306 F.3d 982, 990 (10th Cir.

2002) (alteration and internal quotation marks omitted); *accord Brecheen v. Reynolds*, 41 F.3d 1343, 1356 (10th Cir. 1994) ("While improper appeals to societal alarm and requests for vengeance for the community to set an example are unwarranted, they are also not the type of comments that the Supreme Court has suggested might amount to a due process violation." (internal quotation marks omitted)). Here, the prosecutor's statements, as described above, that certain facts should cause the jury to be "angry" were made in direct response to the closing argument for the defense. Addressing Petitioner's counsel's self-described "anger," the prosecutor argued that Petitioner's and Ms. Vaughn's actions were the appropriate basis for that emotion and more important to the determination of the case. Given their context, the challenged remarks do not present the type of incitement to societal alarm that would cause a trial to be fundamentally unfair. *Cf. Black v. Workman*, 682 F.3d 880, 909 (10th Cir. 2012) (finding that a prosecutor's comments were "not an unreasonable response" to defense counsel's attack (citing *United States v. Young*, 470 U.S.1, 12-13 (1985)).

Further, although Petitioner challenges the State's characterization of him holding his son "like a shield" on the basis that "[t]here was no evidence whatsoever that Petitioner hid behind his son," Am. Pet. at 12, it is obvious

from the context that the prosecutor meant "shield" metaphorically. The prosecutor was permitted to comment on the circumstances of the crime from the standpoint of the State and to draw reasonable inferences from the record. *See Dodd*, 753 F.3d at 992; *Hooper*, 314 F.3d at 1172. The challenged remark was a fair comment upon evidence presented at trial, including Petitioner's son's own testimony, reflecting that Petitioner took both his son and his shotgun to Ms. Vaughn's apartment and then claimed he was acting to defend himself. *See* Vol. II Trial Tr. 131-32. Further, the trial court instructed the jury that their decision should be based solely on the evidence and specifically cautioned that neither the statements nor the arguments of counsel constitute evidence. *See* Vol. II Trial Tr. 5, 7; OR 190, 206-08; *see Darden*, 477 U.S. at 182 (considering trial court's instruction that "arguments of counsel were not evidence" in determining whether prosecutor's closing comments rendered trial fundamentally unfair).

For these reasons, the OCCA's determination did not result in fundamental unfairness and was neither contrary to nor an unreasonable application of clearly established federal law.

3. Statements Regarding Motive

Finally, Petitioner objects that the prosecutor, in the comments excerpted below, "called for the jury to speculate as to motive":

> But what does make sense is that two people, one of them being a guardian angel, decide to take matters into their own hands. And one of those people backs out.
>
> Because there's a point when I was speaking with Signolia Vaughn and we're talking about her phone records and how she spent 17 minutes on the phone with [the victim] and seconds later said don't bring the gun to Phillip Davis.
>
> Somebody else decided he was going through with it. *Maybe it's because he's in love*, who knows. Maybe it's just because he's a guardian angel, but this isn't how you guard people. You can't be a guardian angel and just take someone's life willy-nilly.

Am. Pet. at 13; Vol. III Trial Tr. 99-100 (emphasis added).

The prosecutor's comments were fair commentary on, and a reasonable inference

drawn from, evidence presented at trial—including testimony that Ms. Vaughn thought of Petitioner as her "guardian angel," the two were romantically involved at the time of the shooting, and Ms. Vaughn had asked Petitioner not to bring a gun to her apartment but Petitioner had done so anyway. *See* Vol. II Trial Tr. 28, 39, 43, 65, 75; *Hooper*, 314 F.3d at 1172. The OCCA's rejection of this claim did not deprive Petitioner's trial of fairness and was neither contrary to nor an unreasonable application of clearly established federal law. *See Dodd*, 753 F.3d at 992; *Hooper*, 314 F.3d at 1172.

C. Ground Three: Ineffective Assistance of Trial Counsel

Petitioner argues that his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to object to the prosecutor's statements outlined above. *See* Am. Pet. at 14-15. The OCCA denied relief on this claim:

> As to Proposition IV, because we have found the prosecutor's closing arguments to be unobjectionable in Proposition III, timely objections to them by trial counsel would have properly been overruled. Therefore, [Petitioner] cannot demonstrate prejudice from counsel's failure to object. Trial counsel was not

ineffective. *Strickland* [, 466 U.S. at 687-89]. Proposition IV is denied.

OCCA Summ. Op. at 4 (citation omitted).[7]

1. Strickland Standard

Claims of ineffective assistance of counsel in violation of the Sixth Amendment are analyzed under the two-prong test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, Petitioner "must show that counsel's performance was deficient." *Id.* at 687. To satisfy this prong, Petitioner must show that his attorney's performance "fell below an objective standard of reasonableness" or, in other words, that counsel's performance was "not within the range of competence demanded of attorneys in criminal cases." *Id.* at 687-88 (internal quotation marks omitted). Second, Petitioner must show that but for counsel's unprofessional errors, there is a reasonable

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[7] One of Plaintiff's trial attorneys argued this ineffective-assistance claim in the direct appeal to the OCCA and likewise argues such claim here. There is no suggestion in the record that Petitioner or his attorney raised a conflict-of-interest issue to the OCCA.

probability that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

Because the OCCA applied *Strickland* to deny Petitioner's ineffective-assistance claims on the merits, this Court reviews the OCCA's decision under § 2254(d)(1) "to determine whether or not it applied *Strickland* in an objectively reasonable manner." *Spears v. Mullin*, 343 F.3d 1215, 1248 (10th Cir. 2003); *see* OCCA Summ. Op. at 4. When the "highly deferential" standard of *Strickland* is applied in tandem with the "highly deferential" standard of § 2254(d), the resulting review is "doubly" deferential. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks omitted).

2. Discussion

The undersigned found above that Petitioner was not entitled to habeas relief on his prosecutorial-misconduct claims. *See supra* Part II.B. Thus, Petitioner "is likewise not entitled to relief on" the related "claim of ineffective assistance of trial counsel." *Glossip v. Trammell*, 530 F. App'x 708, 739 (10th Cir. 2013); *accord Hanson v. Sherrod*, 797 F.3d 810, 837 (10th Cir. 2015) ("[B]efore Hanson can succeed on his counsel's failure-to-object claims, he must show that the underlying prosecutorial-misconduct claims themselves have merit."); *Willingham v. Mullin*, 296 F.3d

917, 934 n.6 (10th Cir. 2002) (noting that where substantive claims have been rejected on the merits, "separate consideration of the associated ineffective assistance claims is unnecessary"). Petitioner therefore cannot show that the OCCA unreasonably applied *Strickland* and cannot obtain relief under this Court's doubly deferential review of the OCCA's adjudication of this claim. *See Richter*, 562 U.S. at 105; 28 U.S.C. § 2254(d)(1).

D. Ground Four: Notice of Prosecution's Theory and Alleged Variance

In Ground Four, Petitioner argues that he was deprived "of adequate notice of what he had to defend against" when the State suggested at trial that Petitioner and Ms. Vaughn planned the shooting together. Am. Pet. at 15-16 (citing *Cole v. Arkansas*, 333 U.S. 196(1948)). The OCCA rejected this claim:

> As to Proposition VII, the State's speculation that [Petitioner] and Vaughn conspired to murder the victim was a fair inference from the peculiar circumstances surrounding the homicide. However, the State was not required to prove any such agreement or motive to obtain a murder conviction against [Petitioner]. [Petitioner] admitted the homicidal act. His alleged

> justification was in the nature of an affirmative defense. The defense maintained that [Petitioner] did not know the identity of the victim at the time of the shooting, and therefore had no ulterior motive to kill him; the State was entitled to argue otherwise on the evidence presented. Proposition VII is denied.

OCCA Summ. Op. at 5-6 (citations omitted).

1. Notice

The undersigned first considers Petitioner's suggestion that he was not properly notified of the charge on which he was convicted. In *Cole v. Arkansas*, the defendants were tried and convicted of violating a state criminal statute and, on appeal, the state appellate court—rather than addressing the defendants' challenges relating to that statute— affirmed the conviction under a separate statutory provision. *See Cole*, 333 U.S. at 200-01. The Supreme Court held that the defendants were denied their federal constitutional right to due process of law, stating that "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the

constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Id.* at 201; *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.").

Here, Petitioner was charged via an Amended Information with the felony crime of first-degree murder, committed "willfully, unlawfully, and with malice aforethought" by Petitioner shooting the victim "with a shotgun, inflicting mortal wounds, which caused his death." OR 71. In direct contrast to *Cole*, Petitioner was tried and convicted upon the charged felony crime of first-degree murder, and that same conviction was affirmed by the OCCA. *See* Vol. III Trial Tr. 105; OR 233, 245; OCCA Summ. Op. at 1. Petitioner was not "convicted of a crime for which he was neither charged nor tried." *Jackson v. Whetsel*, 388 F. App'x 795, 801 (10th Cir. 2010) (finding the OCCA's affirmance, which relied upon a crime other than the crime of conviction, was contrary to or involved an unreasonable application of *Cole*).

Petitioner's cited cases do not hold that a criminal defendant is entitled to a preview of every inference that the prosecution may draw from the evidence presented at trial. *Cf. Russell v. United States*, 369 U.S. 749, 765 (1962) (noting that the charging document must set

forth "a statement of the facts and circumstances as will inform the accused of the specific offense" "with which he is charged"); *Sallahdin v. Gibson*, 275 F.3d 1211, 1227 (10th Cir. 2002) (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974), as holding that an indictment is sufficient if it contains elements of the charged offense, fairly informs defendant of charge against which he must defend and allows the defendant to bar future prosecutions for the same offense)); *Twobabies v. Patton*, 662 F. App'x 574, 577 (10th Cir. 2016) (rejecting argument that state prosecutor was not permitted to decline to present evidence as the defendant had anticipated). Petitioner cannot show that he was denied sufficient notice of the charge levied against him or that the OCCA's rejection of this claim unreasonably applied or was contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *Sallahdin*, 275 F.3d at 1227.

2. Variance and Unfair Surprise

Petitioner additionally argues that a variance between the charge levied against him and the evidence adduced at trial resulted in unfair surprise that affected his substantial rights. *See* Pet'r's Reply at 21-22 (citing *Dunn v. United States*, 442 U.S. 100 (1979)).

As an initial matter, to the extent this variance argument differs from the notice argument previously addressed, it is unclear that such argument was raised to the OCCA as required for proper exhaustion and the potential granting of habeas relief. *See* Pet'r's Appellate Br. at 49-52. However, the likely procedural default of Petitioner's variance argument need not be resolved because this claim is "clearly without merit" and can be denied "without regard to procedural bar." *Cannon v. Mullin*, 383 F.3d 1152, 1159 (10th Cir. 2004) ("When questions of procedural bar are problematic . . . and the substantive claim can be disposed of readily, a federal court may exercise its discretion to bypass the procedural issues and reject a habeas claim on the merits."); *see* 28 U.S.C. § 2254(b)(2).

In *Dunn*, the Supreme Court noted, "A variance arises when the evidence adduced at trial establishes facts different from those alleged in an [information]." *Dunn*, 442 U.S. at 105. Such a variance does not by itself constitute a denial of due process. Rather, habeas relief is only warranted "'if the defendant is prejudiced in his defense because he cannot anticipate from the information what evidence will be presented against him." *Bibbee v. Scott*, No. 98-6445, 1999 WL 1079597, at *4 (10th Cir. Nov. 29, 1999) (alteration omitted) (quoting *Rogers v. Gibson*, 173 F.3d 1278, 1287 (10th Cir. 1999)); *see Berger v. United States*,

295 U.S. 78, 82 (1935) ("The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused." (internal quotation marks omitted)); *see, e.g.*, *Jump v. Gibson*, No. CIV-99-1499-WEA, ECF No. 21, at 7-9 (W.D. Okla. May 25, 2000) (R. & R.), *adopted*, ECF No. 28 (W.D. Okla. Aug. 17, 2000) (Order).

The evidence and argument presented by the State at trial (and in the preliminary hearing) indicate a single, essential theory of the State's case: that Petitioner committed first-degree murder by bringing a shotgun to Ms. Vaughn's apartment and then willfully raising the shotgun and shooting the victim through a window. *See, e.g.*, Vol. II Trial Tr. 13-16; Vol. III Trial Tr. 56-57; Prelim. Hr'g Tr. 14, 33, 44-45, 67-71 (*State v. Davis*, No. CF-2012-6782 (Okla. Cty. Dist. Ct. Feb. 22, 2013)); First Pretrial Mot. Hr'g Tr. 7, 10-11 (*State v. Davis*, No. CF-2012-6782 (Okla. Cty. Dist. Ct. Sept. 6, 2013)) (Doc. No. 15). This evidence and argument directly corresponds to Count I of the Amended Information, which sets forth the charge of first-degree murder. OR 71. And the trial court's instructions to the jury "were consistent in defining and presenting" the first-degree murder offense set forth in Count 1 of the charging document. *Jump*, No. CIV-99-1499-WEA, R. & R. at 9; *see* OR 193; *cf.* OR 195 (jury instruction prescribing that the "external

circumstances surrounding the commission of a homicidal act may be considered in finding whether or not deliberate intent existed in the mind of the defendant to take a human life"). There was no material variance here between the proof at trial and the charge on which Petitioner was convicted.

To the extent Petitioner suggests that such a variance arose as a result of his assertion of the legal defense that he was acting in lawful defense of himself, other persons, or property, Petitioner overstates the holding in *Dunn*. The State's assertion that this defense did not apply to Petitioner is plainly encompassed within the charge of first-degree murder. Moreover, Petitioner was apprised of the State's intent to call Ms. Vaughn to testify, and his counsel was permitted to cross-examine Ms. Vaughn as to her relationship with Petitioner and her apparent attempt to mislead police as to events on the night in question. *See* OR 51-52; Vol. II Trial Tr. 114-20, 124-25. And the trial court instructed the jury that the State was obligated to prove that Petitioner was not acting in lawful defense of persons or property. *See* OR 198, 200, 203.

Petitioner therefore has not shown that there was an unlawful variance between the proof at trial and the charge on which Petitioner was convicted, or that such a

variance affected his substantial rights and denied him due process of law.

E. Sufficiency of the Evidence

Petitioner contends that the evidence admitted at trial was insufficient for a jury to have found beyond a reasonable doubt that he committed the offense of which he was convicted in Count 1—i.e., first-degree murder in violation of title 21, section 701.7 of the Oklahoma Statutes. *See* Am. Pet. at 16-17. Petitioner raised this argument on direct appeal, and the OCCA denied relief:

> As to Proposition VIII, the evidence supporting the charge of First Degree Murder came from [Petitioner's] own admissions to police, corroborated by the physical evidence. The only remaining issue was whether [Petitioner] acted reasonably in defense of self, others, or property. The jury was properly instructed on these affirmative defenses. Having reviewed the evidence in its entirety, we find it sufficient to support the jury's verdict. *Jackson v. Virginia*, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 2789, 61 L.Ed.2d
>
> 560 (1979). Proposition VIII is denied.

OCCA Summ. Op. at 6 (citation omitted).

The Supreme Court's decision in *Jackson v. Virginia* establishes "the minimum amount of evidence that the Due Process Clause requires to prove the offense" of conviction; under *Jackson*, the relevant question is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Coleman v. Johnson*, 566 U.S. 650, 654-55 (2012); *Jackson*, 443 U.S. at 319; *see also Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("[T]he *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to

convict or acquit.").

As relevant here, the Court's task "is limited by AEDPA to inquiring whether the OCCA's application of *Jackson* was unreasonable." *Matthews v. Workman*, 577 F.3d 1175, 1183 (10th Cir. 2009). The sufficiency of the evidence inquiry is based on the substantive elements of the crime as defined by state law. *See Jackson*, 443 U.S. at 309, 324 n.16. The elements of first-degree murder applicable here are: (1) the death of a human; (2) that was unlawful; (3) caused by the

defendant; and (4) caused with malice aforethought. *See* Okla. Unif. Crim. Jury Instr. No. 4-61 (2d ed. 1996 & Supps.); Okla. Stat. tit. 21, § 701.7(A); OR 193. The jury was specifically instructed:

> "Malice aforethought" means a deliberate intention to take away the life of a human being. As used in these instructions, "malice aforethought" does not mean hatred, spite or ill-will. The deliberate intent to take a human life must be formed before the act and must exist at the time a homicidal act is committed. No particular length of time is required for formation of this deliberate intent. The intent may have been formed instantly before commission of the act.

Petitioner challenges the evidence as to the second and fourth elements of the charged offense—i.e., Petitioner disputes that there was sufficient evidence to find that the victim's death was "unlawful" and that there was sufficient evidence to find "malice aforethought." *See* Am. Pet. at 16-17; Pet'r's Reply at 25-27.

Further evidence and testimony reflected that as Petitioner backed up towards the bedroom, he saw a shadow outside the window. Petitioner grabbed his loaded shotgun and went back into the living room. When Petitioner saw the blinds from the window get pushed into the living room from the outside, he aimed the loaded shotgun at the window and fired one shot, killing the victim. *See* Vol. II Trial Tr. 138, 220; Vol. III Trial Tr. 19; State's Ex. 42. After Petitioner shot the victim, he took the shotgun back into Ms. Vaughn's bedroom, placed it into a bag, and set the bag next to or under the bed. *See* Vol. II Trial Tr. 77, 142-43; Vol. III Trial Tr. 20; State's Exhibit 42. When police officers arrived at her apartment, neither Ms. Vaughn nor Petitioner told the officers about Petitioner's shotgun or that Petitioner had fired a gun. *See* Vol. II Trial Tr. 74-76. During his interview with a police detective, Petitioner first claimed he was told by Ms. Vaughn that someone was breaking into the apartment and that when Petitioner entered the living room, he heard a "boom" so he got all of the kids and hid in Ms. Vaughn's closet until the police arrived. *See* Vol. III Trial Tr. 18, 30; State's Ex. 42. Petitioner then claimed Ms. Vaughn had woken him up and told him someone was breaking into the apartment, so Petitioner went into the living room and heard a "scratch scratch" and saw a shadow outside the window. Petitioner backed up slowly and heard a

"boom." *See* Vol. III Trial Tr. 18; State's Ex. 42. Finally, after the detective informed Petitioner that testing would prove who fired the gun and mentioned self-defense, Petitioner admitted that he had fired the gun and told the detective exactly where the gun was hidden in the apartment. *See* Vol. III Trial Tr. 18-20; State's Ex. 42.

In support of his insufficient-evidence claim, Petitioner points to alleged inadequacies in the prosecution's suggestion that Petitioner and Ms. Vaughn worked together to plan the shooting. *See* Pet'r's Reply at 25-26. Although Petitioner disagrees with the jury's apparent conclusions that Petitioner acted "with malice aforethought" and was not acting in lawful defense of persons or property, the evidence described above, including Petitioner's own admissions, was sufficient for a reasonable juror to find beyond a reasonable doubt that Petitioner had picked up a loaded shotgun, aimed it at a person at the window, and fired a single shot, unlawfully killing that person with the deliberate intent to take his life. The jury was "free to determine" between competing or inconsistent narratives and opinions. *Id.* at 1184-85. The jury, not this Court, must "weigh conflicting evidence" and "consider the credibility of witnesses." *Lucero v. Kerby*, 133 F.3d 1299, 1312 (10th Cir. 1998) (internal quotation marks omitted). "[W]hen faced with a record of historical facts that supports

conflicting inferences the court must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution." *Matthews*, 577 F.3d at 1184 (alteration and internal quotation marks omitted).

More to the point, Petitioner's focus on evidence that supports his version of events or contradicts that of the State misapprehends the nature of this Court's review under *Jackson* and § 2254(d). The question is not whether Petitioner presented evidence that could have supported an acquittal but whether it was objectively unreasonable for the OCCA to conclude that the State presented sufficient evidence at Petitioner's trial that the jury could have found Petitioner guilty of "unlawful[ly]" causing the victim's death "with malice aforethought." *See Matthews*, 577 F.3d at 1185 (explaining that the fact that a rational juror *might* not accept a witness's testimony does not show that a rational juror *could* not accept the testimony and that the second inquiry "is the question on which a sufficiency challenge necessarily must focus"). Petitioner has not shown that the OCCA's conclusion was objectively unreasonable.[8]

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[8] To the extent Petitioner argues that he disagrees with the state courts' interpretation of "malice aforethought," *see* Am. Pet. at 17, a habeas petitioner

For these reasons, the OCCA's conclusion that the evidence was sufficient for conviction on Count 1 was not an unreasonable application of *Jackson*. *See* OCCA Summ. Op. at 6; 28 U.S.C. § 2254(d)(1); *Parker v. Matthews*, 567 U.S. 37, 43 (2012) (discussing the "twice-deferential standard" that a federal habeas court must apply to a *Jackson* claim that a state court has rejected on the merits); *Hooks v. Workman*, 689 F.3d 1148, 1166 (10th Cir. 2012) (describing this standard of review as "deference squared"). Petitioner is not entitled to relief on Ground Five.

F. Ground Six: Cumulative Error

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may not "challenge a state court's interpretation of state law by recasting his arguments as challenges to a state court's application of *Jackson*." *Anderson-Bey v. Zavaras*, 641 F.3d 445, 451 (10th Cir. 2011) (alteration and internal quotation marks omitted). In a federal habeas challenge, "state law determines the parameters of the offense and its elements and a federal court may not reinterpret state law." *Tillman v. Cook*, 215 F.3d 1116, 1131-32 (10th Cir. 2006) (alteration and internal quotation marks omitted).

Petitioner additionally asserts cumulative error based upon Grounds One through Five. *See* Am. Pet. at 17. The OCCA rejected this claim on the merits. *See* OCCA Summ. Op. at 6.

"In the federal habeas context, the only otherwise harmless errors that can be aggregated are federal constitutional errors, and such errors will suffice to permit relief under cumulative error doctrine only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness." *Littlejohn*, 704 F.3d at 868 (internal quotation marks omitted). As that language suggests, "[c]umulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors." *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998); *accord Ellis v. Raemisch*, 872 F.3d 1064, 1090 (10th Cir. 2017); *cf. Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003) (noting that a cumulative-error analysis performed when there has been no adjudication on the merits of the cumulative- error claim "aggregates all errors found to be harmless," including with respect to claims that "have been individually denied for insufficient prejudice").

The Tenth Circuit has recognized that a circuit split exists regarding whether therequirement to conduct cumulative-error

analysis is clearly established federal law under 28 U.S.C. § 2254(d)(1). *See Cole v. Trammell*, 755 F.3d 1142, 1177 n.14 (10th Cir. 2014). The Tenth Circuit has also has stated that its precedent "may very well signal where our court has come down on the issue—*viz.*, that cumulative-error analysis is clearly established law." *Id.* (internal quotation marks omitted); *cf. Hanson*, 797 F.3d at 852 ("Because the OCCA considered the merits of the cumulative error claim, we review its decision through the deferential lens of AEDPA."); *Bland v. Sirmons*, 459 F.3d 999, 1029 (10th Cir. 2006) ("Because the OCCA concluded that the cumulative errors did not deprive [the defendant] of a fair trial, we must defer to its ruling unless it constitutes an unreasonable application of the cumulative-error doctrine.").

Having considered *Cole*'s forecast, the undersigned concludes that the OCCA's decision rejecting Petitioner's cumulative-error claim was not unreasonable or contrary to clearly established federal law. As only one instance of harmless error was recognized above, Petitioner lacks "two or more actual errors" to accumulate, and Petitioner cannotshow a violation of fundamental fairness under § 2254(d) or otherwise. *Moore*, 153 F.3dat 1113; *see Littlejohn*, 704 F.3d at 868. Relief on this basis should be denied.

RECOMMENDATION

Accordingly, it is recommended that the Amended Petition for Writ of Habeas Corpus (Doc. No. 6) be DENIED.

NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to file an objection to the Report and Recommendation with the Clerk of this Court by May 15, 2018, in accordance with 28U.S.C. § 636 and Federal Rule of Civil Procedure 72. The parties are further advised that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the present case.

ENTERED this 1st day of May, 2018.

s/Charles B. Goodwin

CHARLES B.GOODWIN

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE WESTERD DISTRICT OF OKLAHOMA

PHILLIP ANTONIO DAVIS,	)
	)
Petitioner,	)
	)
v.	) **Case No.**
	) **CIV-16-**
JOE M. ALLBAUGH,	) **866-M**
	)
Respondent.	)**Filed**
	)**06/15/18**

ORDER

On May 1, 2018, United States Magistrate Judge Charles B. Goodwin issued a Report and Recommendation in this action brought pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. The Magistrate Judge recommended that the Amended Petition for

Writ of Habeas Corpus be denied. The parties were advised of their right to object to the Report and Recommendation by May 15, 2018. Petitioner filed his objections on May 15, 2018. In his objections, petitioner objects to the Report and Recommendation in its entirety.

The Court has carefully reviewed this matter de novo. Upon review, the Court:

(1) ADOPTS the Report and Recommendation [docket no. 24] issued by the Magistrate Judge on May 1, 2018, and

(2) DENIES the Amended Petition for Writ of Habeas Corpus.

IT IS SO ORDERED this 15th day of June, 2018.

S/VICKI MILES-LaGRANGE
VICKI MILES-LaGrange
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE WESTERD DISTRICT OF OKLAHOMA

PHILLIP ANTONIO DAVIS,	)
	)
Petitioner,	)
	)
v.	) **Case No.**
	) **CIV-16-**
JOE M. ALLBAUGH,	) **866-M**
	)
Respondent.	)**Filed**
	)**06/15/18**

JUDGMENT

Having denied petitioner's amended petition for a writ of habeas corpus in a separate order entered this date, the Court hereby enters judgment I favor of respondent, Joe M. Allbaugh, and against petitioner, Phillip Antonio Davis.

ENTERED at Oklahoma City, Oklahoma this 15th day of June, 2018.

S/VICKI MILES-LaGRANGE
VICKI MILES-LaGrange
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PHILLIP ANTONIO DAVIS,

Petitioner – Appellant,

v.

JOE M. ALLBAUGH,

Respondent – Appellee.

No. 18-6131
(D.C. No. 5:16-CV-00866-M)
(W.D. Okla.)

Filed: 10-24-19

ORDER AND JUDGMENT

Before HARTZ, MURPHY, and CARSON, Circuit Judges.

I. INTRODUCTION

An Oklahoma state jury found Phillip Davis guilty of first-degree murder, Okla. Stat. tit. 21, § 701.7, and possession of a firearm after a felony conviction, *id.* § 1283. The Oklahoma Court of Criminal Appeals ("OCCA") summarily affirmed Davis's convictions. *Davis v. State*, No. F-2014-25, at 6 (Okla. Crim. App. April 29, 2015). Thereafter, Davis filed a timely 28 U.S.C. § 2254 petition raising many of the claims he raised on direct appeal. Davis's petition was referred to a magistrate judge for initial proceedings, 28 U.S.C. § 636(b)(1)(B); the magistrate judge recommended that the petition be denied. Upon de novo review, *id.*, the district court adopted the recommendation and denied Davis's petition. The district court granted Davis a certificate of appealability ("COA"), 28 U.S.C. § 2253(c)(1)(A), allowing him to raise on appeal all issues set out in his § 2254 petition.[9] On

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[9] "[B]lanket COAs," like the one entered by the district court, are at odds with the statutory provisions governing appeals in § 2254 proceedings. *Thomas v.*

appeal, Davis asserts (1) he was denied the right to present a complete defense at trial, (2) he was denied the effective assistance of counsel, (3) his conviction for first degree murder was not supported by sufficient evidence, and (4) the accumulation of errors denied him a fundamentally fair trial. None of these contentions is meritorious. Exercising jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c), we **affirm** the order denying Davis's § 2254 petition.

II. BACKGROUND

The OCCA outlined the facts underlying Davis's convictions. This court "presume[s] that the factual findings of the state court are correct unless [a habeas petitioner] presents clear and convincing evidence otherwise." *Lockett v. Trammell*, 711 F.3d 1218, 1222

Gibson, 218 F.3d 1213, 1219 n.1 (10th Cir. 2000) (quotation omitted); 28 U.S.C.

§ 2253(c)(2) (providing that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right"); *id.* § 2253(c)(3) (providing that any COA "shall indicate which specific issue or issues satisfy the showing required by [§ 2253(c)(2)]"). Nevertheless, in light of the district court's grant of a blanket COA, we must review the merits of each claim raised on appeal. *Thomas*, 218 F.3d at 1219 n.1.

(10th Cir. 2013) (quotation omitted); *see also* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). The OCCA set out the following brief factual summary:

> [Davis] was convicted of using a shotgun (which he was prohibited from possessing) to kill Keaunce Mustin at the apartment home of Signolia Vaughn. Mustin had been in a relationship with Vaughn, and had been living at her apartment. Vaughn also had an intimate relationship with [Davis] during this time. Vaughn testified that in the days before the shooting, she asked Mustin to move out and changed the lock on the front door. She also purchased a pistol with [Davis's] advice, and asked [Davis] to stay the night at her apartment. [Davis] agreed, and brought his own shotgun with him. When Mustin got off work around

> 2:00 a.m., he went to Vaughn's apartment. Hearing a commotion outside, Vaughn called 911 to report an intruder. While Vaughn was talking to the dispatcher, [Davis] retrieved his shotgun and fired a single shot through the living-room window at Mustin, who was standing in front of the window, killing him. After initially claiming he did not know who fired the shot, [Davis] admitted to police that he was the shooter, and claimed the person was trying to open the living-room window when he ([Davis]) fired the gun. However, he maintained to police, and Vaughn herself maintained at trial, that they had no idea who the person was. The jury rejected [Davis's] claim that the shooting was justified in self-defense, defense of another, and/or defense of habitation.

Davis, No. F-2014-25, at 2–3. Additional facts, both historical and procedural,

are set out below in this court's discussion of the issues Davis raises on appeal.

III. ANALYSIS

A. The AEDPA Standard

Our review of the claims set out in Davis's § 2254 petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 2006 ("AEDPA").

> AEDPA requires that we apply a "difficult to meet" and "highly deferential standard" in federal habeas proceedings . . . ; it "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citations omitted). When a petitioner includes in his habeas application a "claim that was adjudicated on the merits in State court proceedings," a federal court shall not grant relief on that claim unless the state-court decision:
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable

> application of, clearly established Federal law, as de ermined 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 o the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

> Section 2254(d)(1)'s reference to "clearly established Federal law, as determined by the Supreme Court of the United States," "refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "Federal courts may not extract clearly established law from the general legal principles developed in factually distinct contexts, and Supreme Court holdings must be construed narrowly and consist only of something akin to on-point holdings." *Fairchild v. Trammell*

("Fairchild I"), 784 F.3d 702, 710 10th Cir. 2015) (internal quotation marks and citation omitted).

Under § 2254(d)(1), a state-court decision is "contrary to" the

Supreme Court's clearly established precedent if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [that] precedent." *Williams*, 529

U.S. at 405–06. A state court need not cite, or even be aware of, applicable Supreme Court decisions, "so long as neither the reasoning nor the result of the state-court decision contradicts them."

Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

A state-court decision is an "unreasonable application" of Supreme Court law if the decision "correctly identifies the

governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams*, 529 U.S. at 407–08. "The more general the rule, the more leeway courts have in reaching outcomes in case- by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Conversely, "[i]f a legal rule is specific, the range may be narrow," and "[a]pplications of the rule may be plainly correct or incorrect." *Id.* And "an *unreasonable* application of federal law is different from an *incorrect* application f federal law." *Williams*, 529 U.S. at 410 (emphases in original).

If we determine that a state-court decision is either contrary to clearly established Supreme Court law or an unreasonable application of that law, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding, we then apply de novo review and may only grant habeas relief if the petitioner is entitled to relief under that standard.

Harmon v. Sharp, 936 F.3d 1044, 1056 (10th Cir. 2019).

B. Discussion

1. Right to Present Complete Defense

a. Clearly Established Law

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quotations omitted). Thus, state courts cannot exclude evidence by "rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (alteration and quotations omitted). The "essential purpose" of the Confrontation Clause "is *to secure for the opponent the opportunity of cross-examination*." *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (quotations

omitted). Nevertheless, "trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679; *see also Nevada v. Jackson*, 569 U.S. 505, 509 (2013).

The Confrontation Clause grants the "*opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Van Arsdall*, 475 U.S. at 679 (quotation omitted); *see also United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir. 2005) (recognizing that "the right to present defense witnesses is not absolute," as the accused "must abide [by] the rules of evidence and procedure, including standards of relevance and materiality" (quotations omitted)). For that reason, the Supreme Court has "rarely . . . held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Jackson*, 569 U.S. at 509 (collecting cases).

b. Background

In his habeas petition, Davis asserted the exclusion of certain evidence violated his right to present a complete defense. He argued he should have been permitted to present at trial

evidence regarding Mustin's drug use and conduct toward Vaughn.[10] He also asserted he

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[10] The magistrate judge helpfully summarized the excluded evidence: At trial, the State called [Vaughn] to testify. During cross-examination defense counsel attempted several times to ask [Vaughn] about her dealings with [Mustin] shortly before the shooting and about [Vaughn's] feelings toward [Mustin]. The trial court sustained the State's objections, finding the questions called for hearsay or were irrelevant. The State called Velvet Mustin, the victim's mother, to testify at trial. During cross-examination, defense counsel attempted to ask [Velvet] about an incident when [Vaughn] had told the victim to leave her apartment and had asked [Velvet] for assistance. The trial court initially permitted the questioning, but when [Velvet] testified that the incident had occurred the same week as the shooting—rather than on the same day—the court sustained the prosecution's relevance objection.

Prior to trial, [Davis's] counsel had filed a motion in limine that included a request to admit evidence that [Mustin] was under the influence of PCP at the time of his death. At a pretrial hearing, the trial court reserved ruling on the request. At trial, the trial court permitted [Davis's] counsel to question a [police] officer about a glass PCP vial found on the ground about ten feet from the shooting victim but advised

should have been allowed to question Vaughn about why she was not charged with a crime in connection with the shooting. The OCCA concluded Davis was not entitled to relief based on any of these contentions:

> As to Proposition I, evidence of the victim's drug use and threatening conduct toward Signolia Vaughn was not relevant to whether [Davis's] use of deadly force was reasonable under the circumstances, because both Vaughn and [Davis] claimed they had no idea who the would-be intruder was. In any event, the jury did, in fact, hear a fair amount of testimony on these subjects. Because a witness's possible bias is always a proper

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counsel not to ask whether the vial had belonged to the victim.

Defense counsel sought to introduce evidence at trial regarding a toxicology report that had been conducted on the victim. The trial court denied admission of that evidence on the grounds that it was irrelevant and highly prejudicial.

> inquiry, the trial court erred by not allowing defense counsel to ask Vaughn whether her testimony was affected by the possibility of her being charged in connection with the victim's death. However, this error was harmless beyond a reasonable doubt, because [Davis] does not point to any part of Vaughn's testimony that was inconsistent with his own account to police, or which otherwise prejudiced his theory of defense. Proposition I is denied.

Davis, No. F-2014-25, at 3 (citation omitted). The district court concluded Davis was not, given the governing AEDPA standards, entitled to habeas relief on any aspect of this claim. As to evidence regarding Mustin's drug use and interactions with Vaughn, the district court concluded the OCCA did not apply Oklahoma's evidentiary rules in a per se fashion but, instead, reviewed the admissability of such evidence on the merits and excluded it on a rational basis. *Cf. Dodd v. Trammell*, 753 F.3d 971, 987–88 (10th Cir. 2013) (noting the Supreme Court has only granted relief on denial of the right to present a complete defense when

"the state court either had provided no rationale for the exclusion, could not defend an absurd rule, or had failed to examine the reliability of the specific evidence in that case" (citation omitted)). In addition, the district court noted the OCCA was correct in concluding the jury did, in fact, hear a "fair amount of testimony on these subjects." *Davis*, No. F-2014-25, at 6–7. As to evidence indicating Vaughn was not charged in Mustin's murder, the district court concluded the trial court error did not have substantial and injurious effect on the jury's verdict under the standard for habeas review set out in *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

c. Analysis

***i.* Mustin's Drug Use and Threatening Conduct**

Dodd forecloses Davis's assertion that he is entitled to relief on this aspect of his habeas claim. 753 F.3d at 985–89. Davis has not shown the OCCA applied Oklahoma's rules of evidence "in a per se or mechanistic manner"; instead, the OCCA "analyzed [Davis's] evidence on the merits" and found it properly excluded. *Id.* at 988 (quotation omitted). The prosecution advanced at trial a "rational justification" for exclusion of the disputed evidence and "there were rational grounds for exclusion" by the trial court. *Id.* at 987

(quotation omitted)[11]; *see also* Mag. J. Report and Recommendation, May 1, 2018, at 6 (collecting trial transcript citations). Furthermore, the trial court's evidentiary rulings did not result in wholesale exclusion of this type of evidence.[12] Even if this court

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[11] "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." Okla. Stat. tit. 12, § 2401. For evidence of Mustin's past behavior to be relevant to whether Davis had a reasonable belief his use of deadly force was necessary to protect himself or others, it would have to show Davis knew he was shooting Mustin. *Cf. Davis v. State*, 268 P.3d 86, 125 (Okla. Crim. App. 2011). Davis's defense at trial was that he had no knowledge of the identity of the would-be intruder. Moreover, Davis does not argue Oklahoma law is unconstitutional on its face or amounts to an "absurd" evidentiary rule that cannot "be rationally defended." *Dodd v. Trammell*, 753 F.3d 971, 986–87 (10th Cir. 2013).

[12] Through Velvet, defense counsel elicited that there was an incident when Vaughn called Velvet because she needed help with Mustin. Vaughn herself testified she asked Davis to spend the night with her because she "was scared of(...continued) [Mustin] because of some things

that had happened earlier that week and before." Vaughn testified she asked Mustin to leave her apartment because he smoked in her bathroom and she and her children had asthma. She stated "there were some instances where [she] was scared of [Mustin] and [she] asked him to leave and he said he wouldn't leave." Mustin's refusal to leave, she testified, placed her in fear for herself and her children. Vaughn testified she changed the locks on her apartment a few days before the shooting without giving Mustin a new key. She testified it was understood Mustin was to find somewhere else to live and she had been taking him to look at new places. Vaughn testified she twice told Velvet that Mustin was no longer allowed in her home. Over the prosecution's relevance objection, the trial court allowed defense counsel to ask Vaughn why she went to Velvet's home seeking her help; Vaughn testified it was because she was afraid of Mustin. She also testified part of the reason she bought a gun shortly before Mustin was killed was due to her fear of Mustin. Vaughn testified that on the night of the shooting, Mustin was not welcome in her home and he, as well as his family, knew that fact. Vaughn was also permitted to testify regarding the last time Mustin was at her home, which was either the night or early morning before the shooting. Vaughn was asleep when Mustin began "wailing and banging his head on the wall outside." Vaughn was awakened by a crash that

might have made different rulings on the admissibility of the evidence, the OCCA's decision was not contrary to or an unreasonable application of Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *Id.* Because Davis cannot demonstrate the OCCA's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," habeas relief must be denied. *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

ii. Cross-Examination of Vaughn About Lack of Charges

Like the district court, we have no difficulty concluding the trial court error did not have a substantial and injurious effect on

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turned out to be Mustin throwing Vaughn's patio table. Mustin's behavior scared Vaughn, so she and Velvet took Mustin to the hospital. That was the last time Vaughn saw Mustin alive, though she later learned Mustin had been released from the hospital. Vaughn testified that although she had been in an intimate relationship with Mustin she ended it due to his behavior and threats toward her.

the jury's verdict. Davis asserts Vaughn was reluctant to present evidence that would fully exonerate him because it would have potentially led to her prosecution. In contrast to this assertion, however, Vaughn's testimony was consistent with and lent credibility to Davis's theory of the case: he fired in defense against an unknown intruder.[13] Furthermore, the trial court allowed Davis to cross-examine Vaughn on other matters relevant to her credibility. And, as cataloged at length in the magistrate judge's Report and Recommendation, there was considerable evidence and testimony, including Davis's own

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[13] Vaughn testified she was awakened in the night to the sounds of someone trying to come in to her apartment through the window; she woke Davis, prompting him to get up and hear the same sounds; no one had ever entered, or would be welcome to enter, her home through a window; on the night of the shooting, she was not expecting any visitors other than Davis and his son, who were already present; when she heard the sounds of someone breaking in, she would not have expected Mustin to be at her window; the "whole ordeal was scary," as she did not know who or how many people were trying to come in through her window; she called 911 because someone was breaking in and she feared for her and her children's safety; and there was no reason for Davis to believe it was Mustin outside her window that night.

admissions, to support the prosecution's essential contention that Davis picked up his loaded shotgun, aimed it at a person in the window, and fired a single shot, killing Mustin. Moreover, there was evidence before the jury that undermined Davis's assertions of self-defense, defense of another, and defense of property. In particular, there was evidence Davis initially claimed Vaughn shot Mustin but eventually confessed that he was the shooter after officers noted a test would determine who actually fired the weapon. This court has no doubt, let alone grave doubt, that the trial court's improper limitations on Davis's cross-examination of Vaughn did not have a substantial and injurious effect or influence on the jury's verdict. Thus, the district court correctly denied Davis's claim for habeas relief.

2. Ineffective Assistance of Counsel

a. Clearly Established Law

Strickland v. Washington, 466 U.S. 668 (1984), established the two-prong test used to determine whether a defendant received ineffective assistance of counsel. Under the first prong, a petitioner must show counsel's performance was deficient to the point "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. A strong presumption exists that counsel provided adequate assistance. *Id.* at 689–90.

Under *Strickland*'s second prong, a petitioner must show counsel's errors and omissions resulted in actual prejudice. *Id.* That is, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Failure to make the requisite showing under either of these prongs defeats a claim of ineffective assistance. *Id.* at 697. When a *Strickland* claim is raised in a § 2254 proceeding, the petitioner faces an even greater burden because this court's review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see also Harrington*, 562 U.S. at 105 ("The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." (citations and quotations omitted)). "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles*, 556 U.S. at 123 (quotations omitted). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a

defendant has not satisfied that standard." *Id.*

b. Background

On direct appeal, Davis argued the prosecution engaged in twelve instances of misconduct during closing argument. He also asserted his trial counsel was ineffective based on the failure to object to the alleged instances of prosecutorial misconduct. The OCCA rejected on the merits Davis's assertion of misconduct: "[B]ecause [Davis] did not object to the prosecutor's closing comments at the time they were made, we review this claim only for plain error. . . . We find all of the prosecutor's comments were reasonable inferences from the evidence presented." *Davis*, No. F-2014-25, at 4 (citations omitted); *see also Douglas v. Workman*, 560 F.3d 1156, 1171 (10th Cir. 2009) ("[W]hen a state court applies plain error review in disposing of a federal claim, the decision is on the merits to the extent that the state court finds the claim lacks merit under federal law.").Having held the prosecutor's comments did not amount to misconduct, the OCCA further concluded Davis's *Strickland* claim necessarily failed. *Davis*, No. F-2014- 25, at 4 ("[B]ecause we have found the prosecutor's closing arguments to be unobjectionable . . . , timely objections to them by trial counsel would have properly

been overruled. Therefore, [Davis] cannot demonstrate prejudice from counsel's failure to object. Trial counsel was not ineffective.").

In his habeas petition, Davis challenged six comments made by the prosecutor during closing arguments, asserting those comments amounted to remediable misconduct. The district court analyzed each of the alleged instances of misconduct at length under the appropriate standard[14] and concluded Davis had not established a constitutional violation. Having so concluded, the district court ruled that Davis was, likewise, not entitled to relief on his claim of ineffective assistance.

c. Analysis

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[14] Under this court's precedent, a prosecutor's misconduct will [ordinarily] require reversal of a state court conviction only where the remark sufficiently infected the trial . . . to make it fundamentally unfair, and, therefore, a denial of due process. Nonetheless, when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair. *Dodd*, 753 F.3d at 990 (citation and quotation omitted omitted)).

Davis's appellate briefing of his claim of ineffective assistance is extraordinarily limited. He merely asserts, without citation to relevant authority, that the district court erred in concluding his claim of ineffective assistance failed because he had not stated a viable claim of prosecutorial misconduct. *But see Hanson v. Sherrod*, 797 F.3d 810, 837 (10th Cir. 2015) ("[B]efore [petitioner] can succeed on his counsel's failure-to-object claims, he must show that the underlying prosecutorial-misconduct claims themselves have merit."); *Willingham v. Mullin*, 296 F.3d 917, 934 n.6 (10th Cir. 2002) (noting that where substantive claims have been rejected on the merits, "separate consideration of the associated ineffective assistance claims is unnecessary"). Davis then sets out a bullet-point list of alleged instances of misconduct and asserts it is clear the prosecutor's comments were improper under this court's decision in *United States v. Anaya*, 727 F.3d 1043, 1059 (10th Cir. 2013) (holding, on direct appeal from a federal criminal conviction and without referencing any Supreme Court precedent, that it is impermissible for a prosecutor to appeal to societal alarm or ask the jury to be angry at a defendant).[15] *But see* 28 U.S.C. § 2254(d)(1)

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[15] Davis's failure to cite even a single relevant authority to support his allegations of misconduct that are not related to appeals to societal alarm means those aspects of his claim are waived. *See* Fed. R. App.

(precluding the grant of habeas relief unless the state court decision was contrary to, or an unreasonable application of, Supreme Court precedent); *Parker v. Scott*, 394 F.3d 1302, 1308(10th Cir. 2005) ("[U]nder § 2254(d)(1), the only federal law we consider is clearly established federal law as determined by decisions, not dicta, of the Supreme Court." (quotations omitted)). This court need not linger on these problems, however, because the prosecutor's relevant statements did not deprive Davis of a fundamentally fair trial *and* Davis has not demonstrated a reasonable probability that if counsel had objected and the comments had been struck the outcome of the trial would have resulted in a not guilty verdict. Or, more importantly, Davis has not

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P. 28(a)(9)(A) (requiring that an opening brief contain an argument, with the reasons for the argument, and citations to authorities and the record); *see also Herrera–Castillo v. Holder*, 573 F.3d 1004, 1010 (10th Cir. 2009) (holding that an issue that is not sufficiently raised in an opening brief is waived). Alternatively, Davis's failure to set forth a reasoned argument as to those other aspects of his claim of misconduct, especially given the extensive analysis set out in the district court order, leaves entirely intact the district court's conclusion that the OCCA reasonably held that each of these alleged instances of misconduct was, in fact, a proper commentary on the evidence presented at trial.

demonstrated the OCCA's decisions in that regard are ("[U]nder § 2254(d)(1), the only federal law we consider is clearly established federal law as determined by decisions, not dicta, of the Supreme Court." (quotations omitted)). This court need not linger on these problems, however, because the prosecutor's relevant statements did not deprive so wrong as to be unreasonable under the highly deferential AEDPA standard.

During closing argument, defense counsel stated he intended to minimize his anger but asked the jury to excuse him if he failed to do so. Defense counsel asserted Davis was a "protector" and a "hero" for shooting the person who was breaking into the room where his son was sleeping. In rebuttal, the prosecutor stated the jury's anger should, instead, be directed at Davis and Vaughn.[16]

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[16] [Defense counsel] started out by saying that he was afraid he was going to get angry. I didn't see him get angry, but I want you guys to be angry. I want you to feel that anger. I want you to feel that anger at all the imaginings that [defense counsel] encouraged you to do.

Imagine what would happen if [Mustin] hadn't been shot. Imagine what he would have been

charged with. Imagine if you know some bad guy. Well, how about this? Imagine if [one of the prosecutors] were on a grassy knoll in Dallas in 1963, what would we charge him with? Imagine if Detective Abel was in Ford's Theater behind Lincoln, what would we charge him with?

You should be angry that you're encouraged to do those things. Take all those imaginings and toss them out. We're not here to imagine. We're not going to imagine anything. Because a man's life was taken, don't imagine. Don't guess. Pay attention to what happened. That's what I'm asking you to do and get angry.

Get angry at a man who will hide behind his son. I love my son. That's what [defense counsel] is telling you. He's a protector of his son. Who took him to that apartment with a gun knowing that Ms. Vaughn is drama? He was so protective of his son that he grabs a shotgun, takes his son by the hand and goes to Ms. Vaughn's, and now he wants to stand behind his son and say I'm a protector. Get angry at that.

"The relevant question is whether the prosecutor['s] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quotation omitted). "[I]t is not enough that the prosecutor['s] remarks were undesirable or even universally condemned." *Id.* (quotation omitted). A prosecutor's closing arguments "are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." *Dodd*,

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> Ladies and gentlemen, if he wants to be a protector, maybe he should go stay where he feels at home, where he feels safe . . . .
>
> He doesn't grab a shotgun and travel down to where there's drama and then stand here and hold his son like a shield and beg you to forgive him for it. You should be angry at that.
>
> You should be angry at Signolia Vaughn. You should hate Signolia Vaughn. You sat here and listened to her. Every single thing she was asked—I don't remember. I can't think of that. Right?

753 F.3d at 992 (quotation omitted). Moreover, "an improper appeal to societal alarm typically does not amount to a denial of due process." *Duckett v. Mullin*, 306 F.3d 982, 990 (10th Cir. 2002) (alteration and quotation omitted); *accord Brecheen v. Reynolds*, 41 F.3d 1343, 1356 (10th Cir. 1994) ("While improper appeals to societal alarm . . . are unwarranted, they are also not the type of comments that the Supreme Court has suggested might amount to a due process violation." (quotation omitted)).

The prosecutor's statements were made in direct response to Davis's closing argument. *See United States v. Young*, 470 U.S. 1, 12–13 (1985) ("In order to make an appropriate assessment [of a prosecutorial error claim], the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. . . . [I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction."). Addressing defense counsel's self-described "anger," the prosecutor argued Davis's and Vaughn's actions were the appropriate target of that emotion and more important to the determination of the case. Given their context, the challenged remarks do not present the type of

incitement to societal alarm that would cause a trial to be fundamentally unfair. *See Black v. Workman*, 682 F.3d 880, 909 (10th Cir. 2012). Furthermore, the trial court instructed the jurors that their decision should be based solely on the evidence and specifically cautioned that neither the statements nor the arguments of counsel constitute evidence. *See Anaya*, 727 F.3d at 1059 (holding that this court assumes jurors follow the trial court's instructions and denying relief on an appeal-to-societal- alarm misconduct claim on that basis); *see also Darden*, 477 U.S. at 182(considering similar trial court instruction in determining whether prosecutor's closing comments rendered trial fundamentally unfair).

Davis has not demonstrated the prosecutor's arguments rendered his trial fundamentally unfair and has not demonstrated trial counsel's failure to object prejudiced him. The district court correctly denied Davis habeas relief on his claim of ineffective assistance of trial counsel.

3. Sufficiency of the Evidence

a. Clearly Established Law

Jackson v. Virginia, 443 U.S. 307, 319 (1979), sets forth the minimum quantum of evidence the Due Process Clause requires to support a criminal conviction: the relevant question is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Importantly, "this inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Id.* at 318–19 (quotation omitted); *see also Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("[T]he *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit."). "[W]hen a record allows for conflicting findings, we must presume that the trier of fact resolved any such conflicts in favor of the prosecution." *Wingfield v. Massie*, 122 F.3d 1329, 1333 (10th Cir. 1997) (quotation and alterations omitted). This exacting standard recognizes the great deference owed to jury determinations and this court's concomitant duty to uphold such determinations if the evidence, when viewed most favorably to

the state, could be interpreted to support the determination.

As should be clear from the above recitation, this standard is difficult to satisfy even on direct appeal. When, however, this court is reviewing a state court's application of the *Jackson* standard, our "task is limited by AEDPA to inquiring whether the OCCA's application of *Jackson* was unreasonable." *Matthews v. Workman*, 577 F.3d 1175, 1183 (10th Cir. 2009). The Supreme Court discussed the "deferential review that *Jackson* and § 2254(d)(1) demand" in *McDaniel v. Brown*, 558 U.S. 120, 132 (2010). *McDaniel* reasoned as follows:

> A federal habeas court can only set aside a state-court decision as an unreasonable application of clearly established Federal law if the state court's application of that law is objectively unreasonable. And *Jackson* requires a reviewing court to review the evidence in the light most favorable to the prosecution. Expressed more fully, this means a reviewing court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not

> affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

Id. at 132–33 (quotation, citations, and alteration omitted). "*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012).

> First, on direct appeal, it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. And second, on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.

Id. (quotations and citation omitted).

b. Background

On direct appeal, Davis asserted his first-degree murder conviction was not supported by sufficient evidence. The OCCA rejected this claim:

> [T]he evidence supporting the charge of First Degree Murder came from [Davis's] own admissions to police, corroborated by the physical evidence. The only remaining issue was whether [Davis] acted reasonably in defense of self, others, or property. The jury was properly instructed on these affirmative defenses. Having reviewed the evidence in its entirety, we find it sufficient to support the jury's verdict. *Jackson v. Virginia*, 443 U.S. 307, 319–20 (1979).

Davis, No. F-2014-25, at 6. The district court concluded the OCCA's decision was not an unreasonable application of *Jackson*, especially given the doubly deferential

standard applicable to such claims when they have been rejected by a state court on the merits. In so doing, the district court also set out the following summary of the evidence adduced at trial:

> As referenced in the OCCA's Summary Opinion, there was detailed testimony and evidence at trial as to the events of October 19-20, 2012. [Vaughn] testified that [Davis] agreed to spend the night at her apartment but insisted upon bringing a gun, despite her request that he leave it behind. *See* Vol. II Trial Tr. 65; Vol. III Trial Tr. 21-22. [Vaughn] further testified that she woke [Davis] in the middle of the night and told him that someone was trying to get in through the window. *See* Vol. II Trial Tr. 70-71. While [Vaughn] called 911, [Davis] went into the living room and heard noises that sounded like

a "scratch scratch" on the window. *See id.* at 71-72, 77; State's Ex. 42 (Doc. No. 15).

Further evidence and testimony reflected that as [Davis] backed up towards the bedroom, he saw a shadow outside the window. [Davis] grabbed his loaded shotgun and went back into the living room. When [Davis] saw the blinds from the window get pushed into the living room from the outside, he aimed the loaded shotgun at the window and fired one shot, killing [Mustin]. *See* Vol. II Trial Tr. 138, 220; Vol. III Trial Tr. 19; State's Ex. 42. After [Davis] shot the victim, he took the shotgun back into [Vaughn's] bedroom, placed it into a bag, and set the bag next to or under the bed. *See* Vol. II Trial Tr. 77, 142–43; Vol. III Trial Tr. 20; State's

Exhibit 42. When police officers arrived at her apartment, neither [Vaughn] nor [Davis] told the officers about [Davis's] shotgun or that [Davis] had fired a gun. *See* Vol. II Trial Tr. 74–76. During his interview with a police detective, [Davis] first claimed he was told by [Vaughn] that someone was breaking into the apartment and that when [Davis] entered the living room, he heard a "boom" so he got all of the kids and hid in [Vaughn's] closet until the police arrived. *See* Vol. III Trial Tr. 18, 30; State's Ex. 42. [Davis] then claimed [Vaughn] had woken him up and told him someone was breaking into the apartment, so [Davis] went into the living room and heard a "scratch scratch" and saw a shadow outside the window. [Davis] backed

> up slowly and heard a "boom." *See* Vol. III Trial Tr. 18; State's Ex. 42. Finally, after the detective informed [Davis] that testing would prove who fired the gun and mentioned self-defense, [Davis] admitted that he had fired the gun and told the detective exactly where the gun was hidden in the apartment. *See* Vol. III Trial Tr. 18–20; State's Ex. 42.

c. Analysis

The OCCA did not act unreasonably in concluding the evidence adduced at trial was constitutionally sufficient to allow a rational trier of fact to find Davis guilty of first degree murder. *Jackson*, 443 U.S. at 319. Davis argues, however, that the prosecution failed to prove he and Vaughn planned the crime together. This argument is entirely beside the point. Neither motive nor conspiracy are elements of the crime of first degree murder and, as determined by the OCCA in resolving an asserted variance claim on direct appeal, the

prosecution was not "required to prove any such agreement or motive to obtain a murder conviction against [Davis]." *Davis*, No. F-2014-25, at 5; *See Jackson*, 443 U.S. at 324 n.16 (noting the *Jackson* standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law").

Davis also claims his initial denial that he was the shooter does not support the jury's guilty verdict as there were "numerous reasons why a person in [his] situation would have denied being involved in the shooting." Pet'r's Opening Br. at 29. Davis is simply incorrect, however, in asserting the jury was obligated to attribute his consciousness of guilt to the possession of the weapon, rather than to Mustin's murder. This court's review under *Jackson* is "sharply limited and a court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Messer v. Roberts*, 74 F.3d 1009, 1013 (10th Cir. 1996) (quotations and citation omitted). The evidence presented at trial, especially when considered in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find Davis guilty of first degree murder beyond a reasonable doubt.

Thus, the OCCA's decision to deny Davis relief on this claim on direct appeal is not an unreasonable application of *Jackson*.

4. Cumulative Error

In § 2254 proceedings, "the only otherwise harmless errors that can be aggregated are federal constitutional errors, and such errors will suffice to permit relief under cumulative error doctrine only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness." *Littlejohn v. Trammell*, 704 F.3d 817, 868 (10th Cir. 2013) (quotations omitted). To be clear, "[c]umulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors." *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998). As noted above, Davis has only demonstrated the existence of a single error: improper limitation on his ability to cross-examine Vaughn about whether she had been charged with a crime in relation to Davis's death. This court has already concluded the OCCA acted reasonably in determining that lone error was harmless beyond a reasonable doubt. Thus, Davis lacks "two or more actual errors" to accumulate and is

not entitled to relief on the basis of a claim of cumulative error.[17]

IV. CONCLUSION

For those reasons set out above, the order of the United States District Court for the Western District of Oklahoma denying Davis's § 2254 habeas petition is hereby **AFFIRMED**.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

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[17] This court has recognized that a circuit split exists regarding "whether the need to conduct a cumulative-error analysis is clearly established federal law under 28 U.S.C. § 2254(d)(1)." *Cole v. Trammell*, 755 F.3d 1142, 1177 n.14 (10th Cir. 2014). We have indicated, however, that the concept is probably viewed as clearly established in Tenth Circuit precedent. *Id.* Given this court's conclusion that Davis has only established the existence of a single error of constitutional magnitude, it is unnecessary to consider that matter further.