Capital Case

Case No. _____

In the Supreme Court of the United States

RICKY RAY MALONE,
Petitioner,
v.
MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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Dated this 15th day of July, 2019

INDEX OF APPENDICES TO PETITION

911 F.3d 1022
United States Court of Appeals, Tenth Circuit.

Ricky Ray MALONE, Petitioner - Appellant,
v.
Mike CARPENTER, Interim Warden, Oklahoma State Penitentiary, Respondent - Appellee.

No. 17-6027
|
FILED December 20, 2018

Synopsis

Background: Following affirmance on direct appeal of his conviction and death penalty sentence for first-degree murder with malice aforethought, 168 P.3d 185, state prisoner petitioned for federal habeas corpus relief. The United States District Court for the Western District of Oklahoma, Timothy D. DeGiusti, J., 2016 WL 6956646, denied the petition. Prisoner appealed.

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

[1] state court's determination that plain error in jury instructions was harmless was not contrary to or an unreasonable application of federal law;

[2] counsel's failure to object to instructions on intoxication defense did not prejudice defendant and, thus, did not amount to ineffective assistance;

[3] counsel's failure to arrange for a meeting between defendant and the defense's expert witness until midway through first-degree murder trial did not prejudice defendant and, thus, did not amount to ineffective assistance; and

[4] habeas relief was not warranted on the basis of cumulative effect of erroneous jury instructions.

Affirmed.

West Headnotes (17)

[1] Habeas Corpus
Federal or constitutional questions

Under Antiterrorism and Effective Death Penalty Act's (AEDPA) "contrary to clearly established federal law" clause, federal court grants habeas 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 Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1).

Cases that cite this headnote

[2] Habeas Corpus
Federal Review of State or Territorial Cases

Relief is provided under Antiterrorism and Effective Death Penalty Act's (AEDPA) "unreasonable application of clearly established federal law" clause only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d)(1).

Cases that cite this headnote

[3] Habeas Corpus
Federal Review of State or Territorial Cases

Under Antiterrorism and Effective Death Penalty Act's (AEDPA) "unreasonable application of clearly established federal law" clause, federal court may not grant habeas relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly; rather, in order for a state court's decision to be an unreasonable application of federal court's case law, the ruling must be objectively

unreasonable, not merely wrong, and even clear error will not suffice. 28 U.S.C.A. § 2254(d)(1).

1 Cases that cite this headnote

[4] **Habeas Corpus**
Federal Review of State or Territorial Cases

To prevail on claim for habeas relief under Antiterrorism and Effective Death Penalty Act's (AEDPA) "unreasonable application of clearly established federal law" clause, a litigant must show that the state court'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. 28 U.S.C.A. § 2254(d)(1).

Cases that cite this headnote

[5] **Habeas Corpus**
Federal or constitutional questions

The test for determining whether a state prisoner is entitled to obtain postconviction relief in federal court is whether constitutional error had substantial and injurious effect or influence in determining the jury's verdict.

1 Cases that cite this headnote

[6] **Habeas Corpus**
Instructions

State court's determination that plain error at trial for first-degree murder with malice aforethought in jury instructions on defense of voluntary intoxication, which did not accurately inform jury that defendant should prevail on defense if he could establish that he was unable to form malice aforethought due to his methamphetamine intoxication at time of offense, was harmless was not contrary to or an unreasonable application of federal law, as would entitle defendant to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), where state court explicitly held that instruction was harmless beyond a reasonable doubt, given that instruction did not affirmatively mislead jury, did not prevent defendant from raising defense, and there was additional compelling evidence of defendant's lucidity and ability to form intent. 28 U.S.C.A. § 2254(d)(1).

Cases that cite this headnote

[7] **Habeas Corpus**
Instructions

State court's instructional error in trial for first-degree murder with malice aforethought in including instruction defining "incapable of forming special mental element" as the state in which one's mental powers have been overcome through intoxication, rendering it impossible to form the special state of mind known as "willfully," was not contrary to or an unreasonable application of federal law, as would entitle defendant to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA); although instruction was superfluous, instructional error did not have a substantial and injurious effect on the trial. 28 U.S.C.A. § 2254(d)(1).

Cases that cite this headnote

[8] **Criminal Law**
Objecting to instructions

Defense counsel's failure to object to instructions on first-degree murder defendant's intoxication defense did not prejudice defendant and, thus, did not amount to ineffective assistance, where, even if counsel had objected to the erroneous instructions, there was no reasonable probability that the jury would have reached a different result, given the overwhelming evidence of defendant's guilt. U.S. Const. Amend. 6.

Cases that cite this headnote

[9] **Criminal Law**
Deficient representation and prejudice in general

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient, that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and that the deficient performance prejudiced his defense. U.S. Const. Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
Presumptions and burden of proof in general
Criminal Law
Strategy and tactics in general

In analyzing claim of ineffective assistance of counsel, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. U.S. Const. Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**
Prejudice in general

To establish that a defendant was prejudiced by counsel's deficient performance, as element of ineffective assistance claim, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

Cases that cite this headnote

[12] **Criminal Law**
Prejudice in general

A reasonable probability that, but for counsel's unprofessional errors, the result of a criminal proceeding would have been different, for purposes of ineffective assistance claim, is a probability sufficient to undermine confidence in the outcome; it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. U.S. Const. Amend. 6.

Cases that cite this headnote

[13] **Criminal Law**
Determination

Failure to make the required showing of either deficient performance or sufficient prejudice defeats a claim for ineffective assistance of counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

[14] **Criminal Law**
Experts;opinion testimony

Defense counsel's failure to arrange for a meeting between defendant and the defense's expert witness until midway through first-degree murder trial did not prejudice defendant and, thus, did not amount to ineffective assistance; although defendant argued that, had a meeting occurred sooner, defense could have avoided presenting inconsistent narratives in support of his intoxication defense, even if expert had been interviewed well before trial and the defense had put on a coherent theory with consistent testimony, the evidence of the crime would have compelled the jury to convict. U.S. Const. Amend. 6.

Cases that cite this headnote

[15] **Habeas Corpus**
Instructions

Habeas relief was not warranted on the basis of cumulative effect of the erroneous jury instructions in defendant's murder trial, where erroneous jury instructions did not have a substantial and injurious effect or influence in determining the jury's verdict, given that evidence against defendant was far too compelling.

Cases that cite this headnote

[16] Habeas Corpus
Grounds in general

A cumulative-error analysis on federal habeas review aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.

1 Cases that cite this headnote

[17] Habeas Corpus
Grounds in general

Claims should be included in a cumulative-error analysis on federal habeas review even if they have been individually denied for insufficient prejudice.

Cases that cite this headnote

***1025 Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:13-CV-01115-D)**

Attorneys and Law Firms

Robert S. Jackson, Oklahoma City, Oklahoma (Sarah M. Jernigan, Assistant Federal Public Defender, Oklahoma City, Oklahoma, with him on the briefs), for Petitioner-Appellant.

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

Before HARTZ, HOLMES, and BACHARACH, Circuit Judges.

Opinion

HARTZ, Circuit Judge.

Defendant Ricky Ray Malone was convicted in Oklahoma state court of first-degree murder and sentenced to death. The Oklahoma Court of Criminal Appeals (OCCA) affirmed Defendant's conviction on direct appeal and denied his petitions for postconviction relief. Defendant then filed an unsuccessful application for relief under 28 U.S.C. § 2254 in the United States District Court for Western District of Oklahoma. He now seeks relief in this court. We granted a certificate of appealability (COA) on the following issues: (1) whether the trial court's giving erroneous jury instructions on his voluntary-intoxication defense was harmless; (2) whether those instructions deprived him of the constitutional right to a fair trial; (3) whether he was deprived of the constitutional right to effective assistance of counsel by (a) his trial counsel's failure to object to those ***1026** instructions or (b) his trial counsel's alleged failure to adequately prepare his expert witness in support of the voluntary-intoxication defense; and (4) whether his conviction must be set aside because of the cumulative effect of the above-mentioned errors.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we affirm the district court's denial of habeas relief, largely because of the overwhelming evidence of Defendant's guilt.

I. BACKGROUND

The OCCA recites the essential facts in its decision on direct appeal, *Malone v. State*, 168 P.3d 185, 189–95 (Okla. Crim. App. 2007), which we summarize. About 6:20 a.m. on December 26, 2003, a woman delivering newspapers in Cotton County, Oklahoma, saw a car parked on the side of the road with a man, later determined to be Defendant, lying in the front seat with his feet hanging out of the vehicle. Thinking the man might be dead, she drove to the nearby home of Oklahoma Highway Patrol (OHP) Trooper Nik Green and alerted him to the situation. Shortly after 6:37 a.m. Green reported to the OHP dispatcher that he had arrived at the scene. When he was not heard from thereafter, other officers were sent to check on him. His body was discovered about 7:15 a.m. What had happened could later be reconstructed by physical evidence, statements by Defendant, and a videotape from a "Dashcam" recorder in Green's vehicle (which shows Defendant and captured much of what Defendant and Green said but does not show Green).

Green found Defendant in the car and saw evidence that the area surrounding the car had been used to cook methamphetamine the previous night. Green roused Defendant, advised him that he was under arrest, and placed a handcuff on his right wrist before he broke from Green's hold. In the subsequent fight Defendant

ultimately gained control over Green and demanded that he lie before him with his hands up. It was during this struggle that the Dashcam was turned on.

Defendant threatened to kill Green if he moved but promised he would not shoot if Green held still. Green begged Defendant not to kill him, pleading "Please! I've got children." *Id.* at 191. Defendant asked Green for the location of the keys to the handcuffs. After Defendant failed to find the keys on Green's person, Green suggested that there might be another set in his vehicle. Defendant responded that he "[didn't] need to know," triggering further pleas from Green to spare his life. *Id.* Defendant shot Green in the back of the head, waited 11 seconds, and then shot him a second time. Defendant cleaned up portions of the makeshift methamphetamine lab and drove away by 6:55 a.m.

At trial the State called as witnesses four of Defendant's methamphetamine-making partners—his sister Tammy Sturdevant, her boyfriend Tyson Anthony, and a married couple, J.C. and Jaime Rosser. The four lived together in a trailer in Lawton, Oklahoma. All testified that they had spent Christmas day preparing for a methamphetamine cook but when Anthony became ill, Defendant ended up conducting the cook on his own. He left in Sturdevant's car.

Sturdevant testified that Defendant took a gun with him when he left, "just in case there was trouble." *Id.* at 193–94 (internal quotation marks omitted). She next saw Defendant about 8:00 a.m. the following morning, when Defendant told her that he "shot a trooper" and asked Sturdevant to report her car as stolen. *Id.* at 194. She described his account to her of what had happened:

> ***1027** [Defendant] woke up to a flashlight in his eyes, and an officer made him get out of the car. [Defendant] was on his stomach, with one arm behind his back, and the officer got one cuff on him, but somehow [Defendant] got up. [Defendant] tried to run, but tripped, and was hit on the head a few times, and he and the officer got into a "scuffle" and went into some barbed wire. [Defendant] saw a gun on the ground and picked it up. The officer begged for his life, saying "Jesus Christ, no." [Defendant] also recounted that he said to the officer, "If I wouldn't have done it to you first, you'd have done it to me."

Id. at 194 n.30.

Anthony similarly testified that Defendant borrowed his gun the night of the cook "in case he got into trouble with the police." 2005 Trial Tr., Vol. 3, at 672. Anthony recalled that about 8:00 a.m. on the morning of the shooting, Defendant came to his bedroom, said he had shot someone, and asked him to hide Sturdevant's car. Anthony moved the vehicle about 100 yards from the trailer. He saw Defendant again that evening. Defendant had shaved his head and requested that Anthony buy bleach for his hair. Defendant showed Anthony the gun he had used, which Defendant said belonged to "the cop." *Malone,* 168 P.3d at 192.

J.C. Rosser testified that he also saw Defendant the morning of the shooting. When Defendant came home, he had a handcuff on his right wrist. Defendant asked Rosser to drive him to Defendant's home in Duncan, Oklahoma. Defendant changed clothes and came out to Rosser's car carrying a white plastic garbage bag. They stopped at Sturdevant's car, from which Defendant retrieved a large black case. Defendant then disposed of the bag—which contained Defendant's bloodied clothes from the shooting—in a wooded area on the way to Duncan. Defendant told Rosser he had killed a policeman and "was real sorry." *Id.* at 193 (internal quotation marks omitted). After arriving at the Duncan home, Defendant retrieved from Rosser's car the gun he said he used to kill Green and the large black case. Defendant showed the gun to Rosser, which Rosser described as having blood, grass, and hair on it. Defendant said he "fucked up" and again said he was "sorry." *Id.* (internal quotation marks omitted).

Jaime Rosser accompanied her husband and Defendant to Duncan. She testified that Defendant told her he shot a "Hi-Po" (highway patrolman) two times in the head and that "on the first shot the bone part of the skull stuck to the gun, and so [I] shot it again to get the gun clean." *Id.* (internal quotation marks omitted). That evening Defendant told her he had "cleaned up" the scene so "there shouldn't be anything left out there to identify [me]." *Id.* (internal quotation marks omitted). But when Mrs. Rosser asked about the police car's video tape, he responded, "Oh, fuck." *Id.* (internal quotation marks omitted).

At trial, Defendant did not deny killing Green. His sole defense was that he did not have the intent necessary for the crime to be first-degree murder. He testified that

by October 2003 he was addicted to methamphetamine, had been fired from his jobs as a firefighter and EMT because of his addiction, and that producing and selling methamphetamine had become his sole source of income. He said that he had not slept from December 4 through December 26 because he was continuously high on methamphetamine. He claimed that on the night of the December 25 cook he was hearing voices and hallucinating. When his back began to hurt during the cook, he took Lortab—an oral narcotic—and passed out. He testified that during the altercation with Green the next morning, he ***1028** heard "voices in [his] head" telling him to shoot Green because he "was going to get me." *Id.* at 195 (internal quotation marks omitted).

Dr. David Smith, a specialist in addiction medicine, testified as an expert witness for the defense. Defendant first met with Dr. Smith midway through trial for a two-hour interview. Dr. Smith acknowledged that Defendant had initially contended that he did not remember the shooting, but upon learning from Dr. Smith that this type of "blackout" was not consistent with methamphetamine use, Defendant told him that he had experienced hallucinations on the morning of the shooting. Dr. Smith testified that when someone is very high on methamphetamine, the person can experience "amphetamine psychosis," which has the same effect as paranoid schizophrenia and can result in audial and visual hallucinations. *Id.* Dr. Smith further testified that Defendant reported smoking methamphetamine "every hour" and experiencing hallucinations on the night of the cook and morning of the shooting. *Id.* He concluded that Defendant was likely in a state of amphetamine psychosis at the time of the shooting and thus could not form the intent to commit first-degree murder. *Id.* Dr. Smith admitted, however, that Defendant's efforts to avoid detection evidenced "logical, goal-oriented behaviors" that "speak against brain impairment." *Id.* at 203.

The trial court did not properly instruct the jury on the defense theory that Defendant was too impaired by methamphetamine to have the intent necessary to commit first-degree murder. The instruction on the intoxication defense stated:

> The crime of murder in the first degree *has [as] an element the specific criminal intent of Mens Rea.* A person i[s] entitled to the defense of intoxication if that person was incapable of forming the specific criminal intent because of his intoxication.

R., Vol. 2 at 524 (emphasis added). Although the instruction on first-degree murder said that the murder must have been committed with *malice aforethought* and defined the term, the instructions never defined *mens rea* and thus did not inform the jury what intent Defendant's intoxication needed to negate for him to prevail on his defense. Defense counsel did not object to the instructions at trial.

Defendant raised this flaw in the instructions with the OCCA on direct appeal. He contended that the flaw denied him a fair trial and that he was denied effective assistance of counsel by his trial attorney's failure to raise the error with the trial judge. The OCCA agreed that there was a flaw, but it held that the error was harmless beyond a reasonable doubt and that Defendant had not shown sufficient prejudice from his attorney's inaction.

Defendant also raised on direct appeal to the OCCA a claim that his trial attorney provided ineffective assistance by failing to meet with Dr. Smith until midway through the guilt phase of his trial. The OCCA agreed that counsel's performance was deficient but held that Defendant had not shown the requisite prejudice to establish a constitutional violation.

In the final matter relevant to this appeal, the OCCA rejected Defendant's cumulative-error claim, ruling that the only errors were those related to the intoxication-defense instructions, and those errors had already been determined to be harmless.

The OCCA did, however, vacate Defendant's death sentence because of improper victim-impact evidence and inflammatory closing arguments by the prosecution and remanded for resentencing. Defendant was again sentenced to death, and the OCCA ***1029** affirmed. Defendant sought postconviction relief, which the OCCA denied.

II. STANDARD OF REVIEW

[1] **[2]** **[3]** **[4]** The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that when a defendant's claim has been adjudicated on the merits in a state court, a federal court can grant habeas relief only if the defendant establishes that 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). As we have explained:

> Under the "contrary to" clause, we 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 [Supreme] Court has on a set of materially indistinguishable facts.

Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir.2004) (brackets and internal quotation marks omitted). Relief is provided under the "unreasonable application" clause only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* (internal quotation marks omitted). Thus, a federal court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *See id.* Rather, "[i]n order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, —— U.S. ——, 137 S.Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (per curiam) (internal quotation marks omitted). To prevail, "a litigant must show that the state court'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." *Id.* (ellipsis and internal quotation marks omitted).

In addition, AEDPA establishes a deferential standard of review for a state court's findings of fact. "AEDPA ... mandates that state court factual findings are presumptively correct and may be rebutted only by 'clear and convincing evidence.' " *Saiz v. Ortiz*, 392 F.3d 1166, 1175 (10th Cir.2004) (quoting 28 U.S.C. § 2254(e)(1)).

[5] The standard of review with respect to harmless error deserves special attention. On direct appeal, reversal is required for constitutional error unless the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). But a higher threshold must be satisfied for a state prisoner to obtain postconviction relief in federal court. The test is whether the error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks omitted). A petitioner prevails under *Brecht* if the court is left with "grave doubt" about whether the error was harmless. *O'Neal v. McAninch*, 513 U.S. 432, 434–35, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Brecht, however, predated AEDPA. Under § 2254(d)(1) a federal court can grant relief only if the state court's application of Supreme Court law was unreasonable. This implies that review of a state court's *Chapman* harmlessness analysis is for unreasonableness. ***1030** So which standard prevails—*Brecht* or § 2254(d)(1)? The Supreme Court has answered the question by saying that both apply. Even after the enactment of AEDPA, *Brecht* must be satisfied for a state prisoner to obtain federal habeas relief, regardless of "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the [*Chapman* standard]." *Fry v. Pliler*, 551 U.S. 112, 121–22, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007). Given the "frequent recognition that AEDPA limited rather than expanded the availability of habeas relief," the Court thought it "implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice' with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." *Id.* at 119–20, 127 S.Ct. 2321 (citations and further internal quotation marks omitted). The Court added that because the AEDPA standard for granting relief is easier to satisfy than the *Brecht* standard (thinking this comparison so obvious as to require no further explanation), "the latter obviously subsumes the former." *Id.* at 120, 127 S.Ct. 2321.

As the Court later explained, however, this does not exclude the application of AEDPA in the harmless-error context. In *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2198, 192 L.Ed.2d 323 (2015), the Court reviewed a decision by the California Supreme Court that a constitutional error was harmless beyond a reasonable doubt under *Chapman*. Although the petitioner needed to "meet the *Brecht* standard" for the Court to grant habeas relief, that "[did] not mean ... that [the] state court's harmlessness determination ha[d] no significance under *Brecht*." *Id.* Rather, because the California "decision undoubtedly constitute[d] an adjudication of [the] constitutional claim 'on the merits,' ... the highly deferential AEDPA standard applie[d] [and the Court could] not overturn the California Supreme Court's decision unless that court applied *Chapman* in an objectively unreasonable manner." *Id.* (further internal quotation marks omitted). The Court thus clarified that *Brecht* did not "abrogate[ ] the limitation on federal habeas relief that [AEDPA] plainly sets out." *Id.* Accordingly, although a federal court reviewing a state conviction need not "formally apply both *Brecht* and AEDPA," AEDPA still "sets forth a precondition to the grant of habeas relief." *Id.* (brackets and internal quotation marks omitted). In other words, as we understand the Court, satisfaction of the AEDPA/*Chapman* standard is a *necessary* condition for relief (that is, failure to satisfy the standard requires denial of relief), but satisfaction of the standard is not a *sufficient* condition for relief because *Brecht* must also be satisfied. *See Jensen v. Clements*, 800 F.3d 892, 901–02 (7th Cir.2015) (describing standard of review when state court holds that error was harmless).

III. DISCUSSION

The issues before us relate to the instructions on the intoxication defense and the preparation of Dr. Smith as an expert witness for the defense. We begin by discussing the pertinent instructions.

A. Intoxication Jury Instructions

[6] As Defendant states in his opening brief, he "does not dispute that he killed Trooper Green, but he argues he did not do so with the specific intent required for first-degree murder." Aplt. Br. at 41. His complaint is that "the jury's ability to consider the intoxication defense and, consequently, its ability to consider the lesser included offense instruction were affected by ... instructional errors." *Id.* at 42.

***1031** The instruction on first-degree murder, which Defendant does not challenge, informed the jury that it could not convict Defendant of that crime absent malice aforethought:

> No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt ... the death was caused with malice aforethought. ... '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.

R., Vol. 2 at 498–99.

The instructions also explained that if the jury found Defendant not guilty of first-degree murder because of his intoxication, it could convict him of second-degree murder:

> It is the burden of the State to prove beyond a reasonable doubt that the defendant formed the *specific criminal intent* of the crime of murder in the first degree. If you find that the State has failed to sustain that burden, by reason of the intoxication of [Defendant] then [Defendant] must be found not guilty of murder in the first degree.

> You may find [Defendant] guilty of murder in the second degree if the State has proved beyond a reasonable doubt each element of the crime of murder in the second degree.

Id. at 526 (emphasis added).

But the instructions failed to clearly connect Defendant's intoxication defense to malice aforethought. Instead, as previously noted, the instruction on the intoxication defense stated:

> The crime of murder in the first degree *has [as] an element the specific criminal intent of Mens Rea*. A person i[s] entitled to the defense of intoxication if that person was incapable of forming the specific criminal intent because of his intoxication.

Id. at 524 (emphasis added). The problem is that *mens rea* is not defined in the instructions, so the instructions did not expressly inform the jury that Defendant would not be guilty of first-degree murder if his intoxication made him incapable of acting with malice aforethought.

Defendant also points to a problematic definitional instruction which read:

> "Incapable of Forming Special Mental Element" is defined as the state in which one's mental powers have been overcome through intoxication, rendering it impossible to form the special state of mind known as *willfully*.

Id. at 527 (emphasis added). The term *Incapable of Forming Special Mental Element* does not appear elsewhere in the instructions, and Defendant contends that the use of "willfully" in that instruction "may very well have misled jurors into believing first-degree murder was merely a general intent crime with the mental state of *willfully*." Aplt. Br. at 28.

The OCCA agreed with Defendant that the *voluntary-intoxication* instruction was "incorrect, confusing, and legally nonsensical" because of its use of the undefined term *mens rea*. *Malone*, 168 P.3d at 198. And it noted that the inclusion of the irrelevant "willfully" instruction was "improper." *Id.* at 199–200 n.63. But it ruled that the errors were harmless.

We hold that the OCCA harmlessness decision was not contrary to or an unreasonable application of Supreme Court ***1032** precedent.[1] *See Ayala*, 135 S.Ct. at 2198–99; 28 U.S.C. § 2254(d)(1). It was not contrary to Supreme Court precedent because it applied the harmless-beyond-a-reasonable-doubt standard of *Chapman*. *See Malone*, 168 P.3d at 201 & n.68 (citing *Chapman v. California*). And it explicitly held that the voluntary-intoxication instruction "was harmless beyond a reasonable doubt." *Id.* at 203. (We will later address the OCCA's holding on the *willfully* instruction.)

Defendant makes an interesting, but wholly unpersuasive, argument that the OCCA actually held that the error in the voluntary-intoxication instruction was not harmless. He points out that the OCCA referred to the error as "plain error" and stated that its review of the issue was for "plain error" because the issue had not been raised at trial. *See id.* at 197, 203. He then notes that under Oklahoma law "a finding of plain error entails as a component that such error resulted in a violation of substantial rights," and concludes that when the OCCA said that giving the instruction was plain error, it was holding that the erroneous instruction violated his substantial rights. Aplt. Br. at 30. But this is wordplay. To be sure, one of the elements that must be proved for a defendant "[t]o be entitled to relief under the plain error doctrine," is "that the error affected [the defendant's] substantial rights." *Hogan v. State*, 139 P.3d 907, 923 (Okla. Crim. App. 2006). But the OCCA was not saying that Defendant had satisfied all the requirements for relief under the plain-error doctrine. After all, it denied relief. One of the elements that must be proved for a defendant to obtain relief under the plain-error doctrine is "that the error is plain or obvious." *Id.* The OCCA was simply noting that this element had been satisfied. It makes no sense to say that when the court declares that this element is satisfied—that is, there has been a determination that an error was "plain"—it is necessarily declaring also that the defendant has satisfied the separate requirement that the error affected his substantial rights.

We add that Defendant's reliance on *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), is misplaced. In that case the Supreme Court held that once a reviewing court has determined that there has been a violation of the constitutional right to government disclosure of favorable evidence under *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), "there is no need for further harmless-error review." *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555. It so held because the *Bagley* issue has a built-in prejudice component—a court cannot determine that there has been a *Bagley* violation without first determining that there is a reasonable probability that the failure to disclose affected the result of the defendant's trial. *See id.* But here, as explained above, the OCCA's statement that there was "plain error" encompassed no determination regarding prejudice.

In any event, it cannot be gainsaid that the OCCA did make a *Chapman* determination. It concluded its discussion of the issue by saying: "Consequently, although we find plain error in the trial court's failure to properly instruct [Defendant's] jury on his voluntary intoxication defense, we do not hesitate to conclude that this error was harmless beyond a reasonable ***1033** doubt in this case." *Malone*, 168 P.3d at 203.

The OCCA's determination that the error in the voluntary-intoxication instruction was harmless was an eminently reasonable application of *Chapman*. That ruling rested on two strong foundations. First, despite the incorrect instruction, the jury could not have had any question about what it had to decide. Second, no reasonable jury could have decided otherwise on the evidence at trial.

The OCCA explained the first point as follows:

> [U]pon a thorough review of the entire record in this case, this Court is convinced that despite the inadequacy of the jury instructions, no juror could possibly have been unaware that [Defendant's] defense was voluntary intoxication and that he should prevail on this defense if he could establish that due to his drug-induced intoxication, he did not deliberately intend to kill Green. A review of the transcripts in this case makes readily apparent that [Defendant's] fundamental defense—from opening statements to closing arguments of the first stage of his trial—was that his methamphetamine use, coupled with his use of Lortab, left him so intoxicated that he was unable to and did not intend to kill Trooper Green. [69]
>
> [69] [Defendant's] attorney noted early in her opening statement that the case would be about "methamphetamine ... what it does to a person, how it affects a person's life, and how it can ruin lives—not only of the person taking it, but of others." Defense counsel concluded her opening statement by telling the jury that Dr. Smith would tell them "that a person who is using methamphetamine as much as these people were using, and particularly [Defendant], cannot form the intent to do anything. They cannot form the intent to commit a crime." In her first-stage closing argument, defense counsel argued that [Defendant] "was a paranoid schizophrenic when he was on that road and he was awakened by Nik Green. He could not form the intent." And she concluded her closing argument as follows: "We would submit to you that [Defendant] was so intoxicated on methamphetamine and Lortab that he did not and could not have physically formed the thought, whether that be a second before, an hour before, or a day before, to kill Trooper Nik Green. He did not have the ability to do that because he was smoking meth every hour on the hour, and taking 40-some Lortab a day. He could not do that. And we would request that you find in our favor."

Id. at 201 & n.69

In support of this analysis we further note that the instructions, although failing to expressly connect Defendant's intoxication defense with the intent of malice aforethought, did not affirmatively mislead the jury. They required the jury to find malice aforethought to convict Defendant of first-degree murder and explained that malice aforethought requires an intent to kill.

The essential point here is that the erroneous instruction on voluntary intoxication did not prevent Defendant from raising his voluntary-intoxication defense. Indeed, that defense was the entire thrust of the defense case. The problem with the instruction is that it was not sufficiently precise. It said that intoxication could establish lack of the requisite "mens rea," but it did not define that term. As the OCCA's discussion shows, however, that definition was supplied by the attorneys, who agreed that the question

before the jury was whether Defendant was so affected ***1034** by methamphetamine that he could not form the requisite malice aforethought. *Cf. Boyde v. California*, 494 U.S. 370, 380–81, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (in assessing whether ambiguous instruction, which was "subject to an erroneous interpretation," was ground for reversal, Court said: "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, *with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting*." (emphasis added)).

The context provided by the presentation of evidence and argument by trial counsel also requires us to reject Defendant's argument that the OCCA engaged in unreasonable fact finding when it ruled both that the instructions were erroneous and that the error was harmless beyond a reasonable doubt. It was not inconsistent or unreasonable for the OCCA to observe that the "jury instructions did not, *by themselves*, adequately or accurately inform the jury that [Defendant] should prevail on his intoxication defense if he could establish that due to methamphetamine intoxication ... he was unable to form the required malice aforethought for first-degree murder," *Malone*, 168 P.3d at 200 (emphasis added and internal quotation marks omitted), but go on to hold that—*in light of the context provided at trial*—"no juror could possibly have been unaware that [Defendant] ... should prevail on [his] defense if he could establish that due to his drug-induced intoxication, he did not deliberately intend to kill Green." *Id.* at 201.

The error here was wholly unlike that in the cases relied upon by Defendant where we held that instructional errors were harmful. In each of those cases the erroneous instruction precluded a defense. In *Taylor v. Workman*, 554 F.3d 879, 886 (10th Cir.2009), the instruction on second-degree murder required the State to prove that the defendant's conduct was "not done with the intention of taking the life of *or harming* any particular individual." As a result, the defendant could not be convicted on the lesser offense of second-degree murder if the jury found that he intended only to harm someone, even if he did not have the intention to take a life—the exact defense on which the defendant was proceeding. Similarly, at the penalty phase of the death-penalty trial in *Baer v. Neal*, 879 F.3d 769, 779 (7th Cir.2018), the trial judge improperly instructed the jury that it could not consider intoxication unless it was involuntary, thus nullifying the defendant's mitigation evidence and argument on voluntary intoxication. In this case, in contrast, defense counsel was fully able to present evidence and argue the intoxication defense.

As for the second foundation of the OCCA's harmless-error ruling—that no reasonable juror could have found that Defendant was too intoxicated by methamphetamine to deliberately intend to kill Green—the court wrote as follows:

> The real problem for [Defendant] was not his jury instructions. The problem was that no reasonable juror who heard all the evidence in the first stage of his trial could possibly have concluded that he was unable to form "malice aforethought" at the time of the shooting or that he did not deliberately intend to kill Trooper Green. ... The evidence in this case, though not uncontested, was overwhelming and clearly established that [Defendant] knew what he was doing and deliberately chose to shoot and kill Green. ...
>
> ***1035** [Defendant's] testimony about what happened and his lack of comprehension at the time of the shooting was thoroughly impeached by the State, mainly by going through the audio contents of the Dashcam video, in addition to the physical evidence at the crime scene. ... The prosecutor focused particularly on the theme that [Defendant's] words and actions, both during his encounter with Green and in the days afterward, were logical and goal-oriented and did not suggest that [Defendant] was experiencing any sort of disconnect from reality. The prosecutor cross examined [Defendant] about the fact that he never mentioned anything to his friends about seeing things or hearing "voices" on the morning of the shooting. [73] [Defendant] acknowledged on cross examination that he was "solely responsible for this trooper's death," and that he shot him "[t]o make sure he don't get up" and "to keep him down." Although [Defendant] would not ultimately admit that he intended to kill Green, his own statements—on tape and afterward—as well as the two close-range shots fired purposefully into the back of Green's head, leave no reasonable doubt about [Defendant's] intent.
>
> [73] In all of [Defendant's] statements to his friends after the shooting, he consistently depicted the incident as one in which he knowingly and

> intentionally killed the highway patrol trooper who was attempting to arrest him. In fact, the allegation of hearing "voices" around the time of the shooting was not even raised by [Defendant] or his counsel until after the State had rested its case—after [Defendant] met with Dr. Smith over the weekend break.

Furthermore, although [Defendant] presented an impressive expert on methamphetamine and its potential effects generally, Dr. Smith's case-specific testimony about [Defendant] and his likely mental state at the time of the shooting was thoroughly and convincingly impeached by the State.[74] The State demonstrated, through cross examination, that Smith had met with [Defendant] for at most two hours, on a single occasion, in the middle of his trial; that Dr. Smith was remarkably unquestioning when it came to accepting the credibility of [Defendant's] statements; that he could not verify [Defendant's] reports regarding the extent of his drug use at the time; that he did not talk to any of [Defendant's] family members; and that Dr. Smith did not seriously consider or take into account evidence that contradicted [Defendant's] account to him.[75]

> [74] Dr. Smith acknowledged that he was neither a psychiatrist nor a psychologist and that he had not administered any tests on [Defendant]. At one point Smith testified, "[M]y only role was to interview him to determine whether he had a methamphetamine addiction problem."

> [75] When cross examined about the fact that [Defendant] talked to four different people about what happened and consistently described the events as him purposefully killing the trooper, with no mention of "voices" or seeing nonexistent threats, Smith simply maintained that "there was a lot of conflict in the record" and that he "really [had] no opinion on that." Smith testified that his evaluation of [Defendant] was based upon the Dashcam video and [Defendant's] statements to him.

In fact, Dr. Smith acknowledged that up until the preceding weekend, [Defendant] had maintained (and Smith's expected testimony had been) that [Defendant] had a "total blackout" about the shooting and did not remember anything, ***1036** but that after meeting with Smith—who informed [Defendant] that such memory loss "didn't make sense" in the methamphetamine context—[Defendant] finally provided what Dr. Smith "perceived was an accurate history," *i.e.*, the story about [Defendant] hearing voices.[76] Smith acknowledged that there was nothing in the Dashcam exchanges between [Defendant] and Green that was illogical or that suggested [Defendant] was delusional. Smith was also forced to acknowledge, when presented with the extensive evidence about [Defendant's] efforts to avoid being caught, that all of these actions were examples of "logical, goal-oriented behaviors," and that all of them "speak against brain impairment."[77]

> [76] Smith acknowledged that [Defendant] lied to him about not remembering what had happened. Smith testified, however, that [Defendant] told him that the reason he had not previously informed his current counsel about what he remembered was that a former attorney had told him not to do so.

> [77] Smith used the phrases "logical, goal-oriented behaviors" that "speak against brain impairment" like a mantra in his testimony on cross examination.

Although [Defendant] presented a bare prima facie case of intoxication and was able to produce an expert who would say that he didn't think [Defendant] "could have formed the intent to commit murder in the first degree," [Defendant's] testimony and that of his expert were thoroughly and convincingly impeached on the issue of whether [Defendant] could have and did deliberately intend to kill Trooper Green. While [Defendant] may well have experienced "methamphetamine psychosis" at some point ... no reasonable juror could have concluded, based upon the entire record in this case, that he was in such a state at the time he shot Green or that he did not deliberately intend to kill Green. Consequently, although we find plain error in the trial court's failure to properly instruct [Defendant's] jury on his voluntary intoxication defense, we do not hesitate to conclude that this error was harmless beyond a reasonable doubt in this case.

Malone, 168 P.3d at 201–03.

The recited evidence of intent is extraordinary. The way Defendant executed the murder is itself powerful evidence.

In *Grissom v. Carpenter*, 902 F.3d 1265, 1290–91 (10th Cir.2018), we said that a second-degree murder instruction would have been inappropriate at the trial of a similar crime; we explained that:

> [N]o juror could have reasonably found that [the defendant] did not intend to take the life of [the victim]. Specifically, the evidence clearly established that [the defendant], after wrestling with [the victim's friend] and shooting and seriously injuring her, chased [the victim] from the living room of [her friend's] house into a bedroom and, despite her pleas for mercy, proceeded to shoot her not once, but twice in the head at close range.

And here there was additional compelling evidence of Defendant's lucidity and ability to form intent: his exchange with Green—including his instruction that Green lie before him with his hands up, his threat to kill Green if he moved, and his demand that Green turn over the keys to the handcuff on his wrist—and his actions soon after the shooting, including his attempts to hide the incriminating evidence and his cogent accounts of the shooting to his friends.

***1037** Defendant argues that the OCCA unreasonably determined that no reasonable juror could have accepted his voluntary-intoxication defense because it also made the contradictory factual determination that Defendant was entitled to an instruction on that defense. The court wrote:

> The evidence presented at [Defendant's] trial—in particular, [Defendant's] own testimony about his drug use and the effects it was having on him at the time of the shooting, as well as the testimony of Dr. Smith that [Defendant] could not have formed the intent of malice aforethought—when looked at simply to determine if, *on its face*, it established a prima case of intoxication, certainly was sufficient to raise a voluntary intoxication defense, such that [Defendant] was entitled to have his jury instructed on this defense.

Malone, 168 P.3d at 197. But whether the determinations are contradictory depends on what standard the OCCA applied to determine whether Defendant was entitled to the instruction. The OCCA held that the instruction should have been given because there was evidence that, if believed, would support the voluntary-intoxication defense—namely the testimony by Defendant and Dr. Smith. *See id.* at 196–97. That holding is not inconsistent with a determination that, given the trial record as a whole, no reasonable jury would credit that testimony, or at least that part of the testimony asserting Defendant's inability to form the requisite intent.

We conclude that the OCCA was not only reasonable, but persuasive, in determining that the error in the voluntary-intoxication instruction was harmless beyond a reasonable doubt.

[7] We now turn to the other instructional error, which can be disposed of with little discussion. We repeat the challenged instruction:

> "Incapable of Forming Special Mental Element" is defined as the state in which one's mental powers have been overcome through intoxication, rendering it impossible to form the special state of mind known as *willfully*.

R., Vol. 2 at 527 (emphasis added). The OCCA rejected the challenge in a footnote:

> The record contains no explanation of why the "incapable of forming special mental element" definition was included in [Defendant's] instructions, since this term was not otherwise used in the instructions; nor does the record reveal why the "special state of mind" referenced in that definition is "willfully." The record reveals only that it was the trial court who prepared the instructions and that the parties did not object. [Defendant] makes much of the improper inclusion of this definition in his instructions, particularly the reference to "willfully." This Court

> finds, however, that this error was not significant. The phrase "special mental element" was not otherwise used in [Defendant's] instructions; thus a reasonable jury reading its instructions as a whole, as it was directed to do, would have no occasion to apply this definition in [Defendant's] case.

Malone, 168 P.3d at 199 n.63. The footnote makes sense to us. The OCCA did not unreasonably apply Supreme Court precedent in holding that the superfluous instruction and its inclusion of the term "willfully" were harmless. And even if Defendant were to question whether the OCCA applied the correct harmless-error standard, we would hold that on independent review the *Brecht* standard has not been satisfied because the error did not have a substantial and injurious effect on the trial.

*1038 B. Ineffective Assistance of Counsel in Failing to Object to Jury Instructions

[8] [9] [10] [11] [12] [13] Defendant argues that his trial counsel was ineffective in failing to object to the instructions on his intoxication defense. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient—"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"—and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In conducting this analysis, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. 2052 (internal quotation marks omitted). And to establish that a defendant was prejudiced by counsel's deficient performance, he "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, 104 S.Ct. 2052. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. 2052. "Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700, 104 S.Ct. 2052 (emphasis added).

The OCCA rejected Defendant's ineffective-assistance claim on the prejudice prong. After reciting the standard for prejudice set forth in *Strickland*, the court wrote:

> Regarding the voluntary intoxication jury instructions, this Court has thoroughly addressed this issue [earlier in the opinion]; and the failure of defense counsel to ensure that [Defendant's] jury was accurately and comprehensibly instructed on his theory of defense, *i.e.*, drug-induced intoxication, does suggest deficient and unreasonable performance in this regard. Nevertheless, just as we concluded [earlier] that the instructional errors in this regard were harmless beyond a reasonable doubt, we likewise conclude that [Defendant] could not have been prejudiced thereby.

Malone, 168 P.3d at 220–21. The OCCA did not unreasonably apply *Strickland* in holding that Defendant was not prejudiced here. Even had counsel objected to the erroneous instructions, there is no reasonable probability that the jury would have reached a different result, given the overwhelming evidence of Defendant's guilt. We therefore uphold the OCCA ruling.

C. Ineffective Assistance of Counsel in Belated Expert Preparation

[14] Defendant argues that his trial counsel was ineffective in failing to arrange for a meeting between Defendant and the defense's expert witness, Dr. Smith, until midway through trial. He contends that had a meeting occurred sooner, the defense could have avoided presenting inconsistent narratives in support of his intoxication defense.

We briefly review the relevant part of the record. Before meeting with Dr. Smith, Defendant asserted that he had

no recollection of the murder. In a statement to police, he said that he "couldn't remember" the shooting and that it was "like it didn't happen. It's like it was a dream." 2005 Trial Tr., Vol. 3 at 861. In a pretrial report ***1039** submitted by Dr. Smith based on his review of materials provided by counsel, Dr. Smith indicated that Defendant had entirely blacked out the events. Defense counsel argued in her opening statement that "methamphetamine ... causes all kinds of problems. You can't remember what happened; you can't remember what you did. It makes you very forgetful." 2005 Trial Tr., Vol. 2 at 528.

Even upon meeting with Dr. Smith, Defendant at first maintained that he could not remember the shooting. But when Dr. Smith told him that his account did not "make sense because methamphetamine abusers remember delusional memory" and do not have total blackouts, he instead insisted that he was experiencing auditory hallucinations on the morning of the shooting. *Id.*, Vol. 4 at 1121. At trial Dr. Smith adopted the hallucination narrative.

On appeal Defendant argues that his belated interview with Dr. Smith caused significant problems for the defense, both strategic and factual. The defense theory switched from failure to remember the events to hallucinating about the events, and a voluntary-intoxication defense was supplemented by an insanity defense. The switch to the new narrative of events presented multiple opportunities for the prosecution to impeach both Defendant and Dr. Smith. [2]

Again, however, the OCCA did not unreasonably apply Supreme Court precedent in denying relief on this claim. The court did agree with Defendant that counsel's performance was defective:

> This Court does not hesitate to conclude that it is unreasonable and deficient performance for attorneys who are defending a case in which the only plausible defense to first-degree murder involves drug use that impaired the defendant's mental processes—where the fact that the defendant killed the victim is established by overwhelming evidence—to fail to arrange a meeting between the defendant and his chosen expert until the defendant's murder trial is well underway. This certainly does not exemplify diligent trial preparation; and the resulting mid-trial switch of defense theory made the State's task of discrediting [Defendant's] expert witness that much easier.

Malone, 168 P.3d at 220. But it found that there was not the requisite prejudice:

> [Defendant] cannot show prejudice, since he cannot demonstrate a reasonable probability that his jury would have rejected the murder charge against him if he had met with Smith earlier. [Defendant] argues that if his attorneys "had not waited until the middle of trial to have their client evaluated by their expert, the true facts of Appellant's memory of events would have come out much sooner." Yet the "true facts" of [Defendant's] memory did come out at trial—just as [Defendant's] memory of what occurred came out the day of the murder, when he accurately described to his friends what happened and what he did. In the current case, it would not have mattered how defense counsel attempted to "contextualize" [Defendant's] mental state. The State's evidence that [Defendant] willfully, knowingly, and deliberately shot Trooper Green, with the intent to kill him, was simply too compelling. Hence even though counsel's failure to arrange a timely (pre-trial) meeting between [Defendant] and his intended ***1040** expert made impeachment of this witness that much easier for the State, the result of the first stage of [Defendant's] trial was not affected thereby. [Defendant] would still have been convicted of the first-degree murder of Green.

Id. In other words, even if Dr. Smith had been interviewed well before trial and the defense had put on a coherent theory with consistent testimony, the evidence of the crime would have compelled the jury to convict. We would add that extensive impeachment of Defendant and Dr. Smith would likely have occurred even if the interview had been conducted much sooner. Defendant would have been impeached by his statements to the police and his friends, which mentioned no voices or hallucinations. And it is likely that an earlier meeting between Defendant and

Dr. Smith would have transpired in the same manner as the midtrial meeting—with Defendant initially insisting that he blacked out the shooting until learning that account was inconsistent with heavy methamphetamine use. The OCCA's determination that Defendant was not prejudiced by the belated expert meeting was not unreasonable.

D. Cumulative Error

[15] **[16]** **[17]** Defendant's final claim is that the cumulative effect of the erroneous jury instructions, counsel's failure to object to the jury instructions, and counsel's belated expert preparation deprived him of a fair trial. A cumulative-error analysis "aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir.2003) (internal quotation marks omitted). Claims should be included in a cumulative-error analysis even if "they have been individually denied for insufficient prejudice." *Id.* at 1207. We have awarded relief when the errors had an "inherent synergistic effect" on the outcome. *Id.* at 1221.

On direct appeal to the OCCA, Defendant argued that the accumulation of all the errors at his trial merited relief. The OCCA, however, considered only those errors stemming from Defendant's "challenge to the intoxication jury instructions" in ruling on Defendant's cumulative-error claim. *Malone*, 168 P.3d at 233. We therefore choose to apply the *Brecht* harmless-error standard to Defendant's claim.

Under that standard, we hold that the cumulative errors did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710. The evidence against Defendant was far too compelling.

IV. CONCLUSION

We **AFFIRM** the district court's order denying Defendant's § 2254 application. We **DENY** Defendant's motion to grant a certificate of appealability on additional issues except insofar as this court has already done so.

All Citations

911 F.3d 1022

Footnotes

1 The State argues that, as a preliminary matter, habeas relief is not available for the errors in the jury instructions because they were not so fundamentally unfair as to deny Defendant a fair trial and hence did not amount to a constitutional violation. (This relates to the second issue on which we granted a COA.) We assume, without deciding, that the errors Defendant identifies in the jury instructions were of constitutional magnitude.

2 In this court, Defendant also argues that an earlier interview would have enabled counsel to obtain a different expert. But we do not address that argument because it was not raised in state court and is therefore procedurally defaulted. *See Ellis v. Raemisch*, 872 F.3d 1064, 1092–93 (10th Cir.2017)

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

Ricky Ray MALONE, Petitioner,
v.
Terry ROYAL, Warden, Oklahoma State Penitentiary, Respondent. [1]

Case No. CIV-13-1115-D
|
Signed 11/28/2016

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MEMORANDUM OPINION

TIMOTHY D. DeGIUSTI, UNITED STATES DISTRICT JUDGE

***1** Petitioner, a state court prisoner, has filed a petition for writ of habeas corpus seeking relief pursuant to 28 U.S.C. § 2254. Doc. 24. Petitioner challenges the conviction entered against him in Comanche County District Court Case No. CF-05-147. [2] Tried by a jury in 2005, Petitioner was found guilty of first degree murder and sentenced to death. Petitioner's sentence was reversed on appeal, and he was resentenced in 2010 by a judge. The judge also sentenced him to death. In support of the sentence, the judge found two aggravating circumstances, namely, (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (2) the victim of the murder was a peace officer or guard of an institution under the control of the Department of Corrections, and such person was killed in the performance of official duty. Criminal Appeal Original Record (hereinafter "O.R.") 9, at 1643.

Petitioner presents eight grounds for relief. Respondent has responded to the petition and Petitioner has replied. Docs. 24, 43, and 58. In addition to his petition, Petitioner has filed motions for discovery and an evidentiary hearing. Docs. 30 and 52. After a thorough review of the entire state court record (which Respondent has provided), the pleadings filed in this case, and the applicable law, the Court finds that, for the reasons set forth below, Petitioner is not entitled to the requested relief.

I. Procedural History.

Petitioner appealed his conviction and sentence to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). In *Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007), the OCCA affirmed his conviction but reversed his death sentence. Upon remand, Petitioner was again sentenced to death. In *Malone v. State*, 293 P.3d 198 (Okla. Crim. App. 2013), the OCCA affirmed his sentence. Petitioner sought review of the OCCA's decision by the United States Supreme Court, which denied his writ of certiorari on October 7, 2013. *Malone v. Oklahoma*, 134 S. Ct. 172 (2013). Petitioner also filed three post-conviction applications, which the OCCA denied. *Malone v. State*, No. PCD-2014-969 (Okla. Crim. App. Jan. 30, 2015) (unpublished); *Malone v. State*, No. PCD-2011-248 (Okla. Crim. App. Apr. 23, 2013) (unpublished); *Malone v. State*, No. PCD-2005-662 (Okla. Crim. App. Oct. 2, 2007) (unpublished).

II. Facts.

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

> Around 6:20 a.m., on December 26, 2003, Abigail Robles was delivering newspapers in rural Cotton County, just east of Devol, Oklahoma. While driving on Booher Road, she came across a parked white car on the side of the dirt road. [FN4] The white male driver was laying in the front seat, but he was not moving, and his feet were hanging outside the car. Robles thought he might be dead. She drove to the home of Oklahoma Highway Patrol ("OHP") Trooper Nik Green, which

was less than a mile away, to ask for his help. Green had been sleeping, but answered the door, listened to Robles's story, told her not to worry about waking him, and reassured her that he would check out the situation for her.

***2** FN4. Robles testified that the driver's side door was open and there were a lot of boxes and papers sitting around the car.

At 6:28 a.m., Trooper Green telephoned OHP dispatch in Lawton and reported what Robles had seen. Green was not scheduled to be on duty that day until 9:00 a.m., but when he learned that the on-duty Cotton County trooper was not available, he volunteered to go check out the situation himself. He went on duty at 6:37 a.m. and informed dispatch shortly thereafter that he had arrived at the scene and discovered a white four-door vehicle and a white male. Green attempted to provide the vehicle tag number, but dispatch could not understand the number, due to radio interference. This was Green's final contact with OHP dispatch. After approximately ten minutes dispatch tried to contact Green with a welfare check ("10–90"), but got no response. After numerous unanswered welfare checks to Green's badge number (# 198) and an unanswered page, dispatch sent various units to Trooper Green's location and contacted the Cotton County Sheriff's Department.

The first person to arrive at the scene was Deputy Charles Thompson of the Cotton County Sheriff's Department. [FN5] He arrived at 7:15 a.m., wearing pajama bottoms, a t-shirt, and sandals. Trooper Green's patrol car was parked on the right side of the road, with the driver's side door open and the headlights on. Thompson walked around the area until he discovered his friend's dead body, face down in the ditch, with his arms and legs spread, a few feet to the right and front of his patrol car. [FN6] It was obvious from the massive head wound to the back of his head that Green had been shot and that he was dead. Thompson immediately called his dispatch, and the investigation of Green's murder began.

FN5. Thompson testified that he had known Nikky Green since they were in the third grade together.

FN6. Blood evidence presented at trial established that this was the position of Green's body at the time he was shot.

What happened on Booher Road from the time of Green's arrival until his death can be largely pieced together from the physical evidence at the scene, statements made by Ricky Ray Malone, and the contents of a videotape recorded by the "Dashcam" video recorder mounted in Green's vehicle. According to statements made by Malone, Trooper Green arrived at the scene and attempted to rouse Malone by talking to him and shining a flashlight in his face. Officers who investigated testified that it was obvious from evidence left at the scene that someone had been manufacturing methamphetamine outside his or her car that night. It would have been obvious to Green as well. [FN7]

FN7. The area contained substantial evidence of recent methamphetamine production, and Malone admitted at trial that he had been "cooking meth" the previous night.

Green apparently informed Malone that he was under arrest and was able to get a handcuff on his right wrist, before Malone decided that he was not going to go quietly back to jail. [FN8] Malone somehow broke free and a battle ensued between the two men that tore up the grass and dirt in the area and knocked down a barbed wire fence. Malone's John Deere cap ended up in the barbed wire fence, and Green's baton and a Glock 9 mm pistol were left lying in the ditch. [FN9] The fight resulted in numerous scrapes, cuts, and bruises to both men.

***3** FN8. Malone acknowledged at trial that he was out on a $50,000 bond at the time, on a pending charge of attempted manufacture of methamphetamine, as well as other related charges.

FN9. Malone's friend, Tyson Anthony, testified that the pistol left at the scene belonged to him, but that Malone had borrowed it the previous evening before he left to do the cook, saying he needed it "in case he got into trouble with the police."

Trooper Green's Dashcam recorder was switched on sometime during the course of this monumental struggle. [FN10] Because the Dashcam was directed forward, the video shows only the things that appeared immediately in front of Green's vehicle. The video never shows Trooper Green, but the audio on the videotape, though garbled and sometimes hard to understand, contains a poignant and heartbreaking record of the

verbal exchanges between Malone and Green during the six minutes preceding Green's death.

FN10. Testimony at trial established that Dashcam recorders like Green's come on automatically when the overhead lights are activated and can also be turned on manually, either in the car or with a remote control. Trooper Green's Dashcam was switched on via his remote control at 6:45 a.m. that morning. The remote control had a remote microphone on it, which recorded the sounds at the scene from 6:45 a.m. until the recorder was turned off at 7:50 a.m. While it is possible that Green purposefully turned the recorder on, it is also possible that it got knocked on during the struggle. The remote control was found at the scene, not far from Green's right hand.

The initial sounds on the audio are mostly grunting and unintelligible, as the men seemingly struggle for control. Then Malone appears to gain control and tells Green to lay there and not turn over. Green tells Malone that he didn't have a problem with Malone and that he came to help him. He tells Malone, "Hey, run if you want to go, but leave me." Green pleads, "Please! Please! I've got children." Green also tells Malone that he is married and begs Malone not to shoot him. Meanwhile, Malone repeatedly asks Green where "the keys" are, apparently referring to the keys for the handcuff that is on his wrist, and demands that Green stop moving and keep his hands up. Malone threatens to kill Green if he moves, but also promises that he won't shoot him if Green holds still. Malone searches at least one of Green's pockets, but fails to find the keys. [FN11] When Green suggests that he has another set of keys in his vehicle, Malone responds, "I don't need to know." Green apparently recognizes the significance of this statement and after a few seconds begins pleading again, "Please don't. For the name of Jesus Christ. He'll deliver. Lord Jesus!" [FN12] At that moment a shot can be heard, followed by eleven seconds of silence, and then another shot. [FN13]

FN11. DNA evidence presented at trial established that a bloodstain on the inside of Green's left front pants pocket came from Malone.

FN12. The Dashcam videotape appears in the record as State's Exhibit 1. The record also contains a transcript of the audio of this videotape, which is in the record as Court's Exhibit 9. Although the transcript was not entered into evidence, text from the transcript was displayed on demonstrative exhibits used during the cross examination of Malone. (Neither the accuracy of the transcript nor the use of these demonstrative exhibits is challenged on appeal.) We have watched and listened to this videotape numerous times. This Court's interpretation of what was said differs slightly from the transcript in a few places, including within Green's final plea. The transcript records Green's final words as follows: "Please don't. In the name of Jesus Christ. Please remember, Lord Jesus." The summary in the text is based upon this Court's best interpretation of what was said. Any differences compared to the transcript are minor and do not affect overall meaning.

***4** FN13. One 9 mm projectile, consistent with Green's own gun, was recovered from his head, and another was recovered from the ground beneath his head. The medical examiner testified that Green's death was caused by a massive head injury to the back of his head, caused by one or more gunshot wounds, at least one of which was likely a contact wound.

Just after the second shot, Malone appears in the videotape, walking in front of Trooper Green's car and behind the open trunk of his white, four-door vehicle. Malone can be seen hurriedly "cleaning up" his makeshift methamphetamine lab—dumping containers of liquid that are sitting on the ground, loading numerous items into the back seat and trunk, throwing and kicking things off the road, and lowering the front hood. [FN14] Less than two minutes after shooting Green, Malone starts his car to drive away, but the car stalls. After almost thirty seconds, the car starts, and by 6:55 a.m. Malone has left the scene.

FN14. Malone left substantial drug evidence at the scene, including two "eight balls" of methamphetamine, which were left laying in the middle of the dirt road.

During the trial the State presented the testimony of Malone's four meth-making comrades: Tammy Sturdevant (Malone's sister), Tyson Anthony (her boyfriend), and J.C. and Jaime Rosser (who were married). [FN15] In December of 2003, these four people were living together in Sturdevant's trailer in Lawton and were jointly engaged, along with Malone, in a regular process of gathering and preparing the

ingredients, making or "cooking" methamphetamine, and then using and distributing the methamphetamine. They all testified that they spent much of Christmas Day in 2003 preparing for a "cook" that night and that when Anthony got sick, Malone decided to go ahead. Malone left late that night, in Sturdevant's white Geo Spectrum, to complete the cook on his own.

FN15. All four of these witnesses spent time in jail on material witness warrants in this case.

Tyson Anthony testified that Malone appeared in his bedroom about 8:00 a.m. on the morning of December 26 and said that he had shot someone and needed Anthony to hide his sister's car. [FN16] Anthony hid the car behind a day care, about 100 yards from their trailer. Anthony testified that he saw Malone again around 5:00 p.m. that night, that Malone had already partially shaved his head, and that he asked Anthony to go get him some bleach to dye his hair, which Anthony did. Later that night Anthony went with Malone to a hotel in Norman, and Malone told him more about what had happened. [FN17] Malone showed him the gun he had used, which Malone said belonged to "the cop." [FN18] Anthony testified that Malone also referred to the officer as a "Hi–Po," meaning a highway patrolman. Anthony acknowledged that he himself put the gun in a hotel trash can and covered it up with trash. [FN19] Anthony left the hotel and went home, but later called Malone, who was still there, and suggested that he might be able to use the gun to frame someone else. [FN20]

FN16. Anthony was in jail on a material witness warrant until after his preliminary hearing testimony, when his bond was reduced. He acknowledged at trial that he agreed to testify in exchange for the district attorney's agreement not to charge him as an accessory after the fact or on any prior drug-related offenses. At the time of Malone's trial, Anthony was back in jail, charged with a new count of aggravated manufacture of methamphetamine.

***5** FN17. At trial Anthony recounted that Malone told him the following. Malone was asleep and woke up to a gun and a flashlight in his face. The cop told him to get out, and Malone tried to run but tripped and fell. The cop got on his back and got a handcuff on him, but then they were rolling around and fighting, until Malone saw a gun on the ground and was able to get it. The cop prayed, said he had kids, and begged Malone not to shoot him or kill him, but Malone said, "You would have done it to me," and shot him twice in the back of the head. (The audio of the videotape does not contain anything similar to the quoted statement, though the other statements attributed to Malone by Anthony are consistent with the videotape.)

FN18. Malone told Anthony that he lost the gun he had borrowed from Anthony and that he thought he dropped it at the scene of the shooting.

FN19. The murder weapon was never found. Malone testified at trial that Anthony got rid of it.

FN20. During cross examination Anthony testified that at the time of the shooting, he, Sturdevant, the Rossers, and Malone were all "heavy into the use of methamphetamine" and that they were high "constantly," from December 20 until December 26, 2003.

J.C. Rosser testified that when Malone came home on the morning of December 26, 2003, he had a handcuff on his right wrist, bruising on his hands, and some blood on his shirt. [FN21] Malone told Rosser that he had "killed a cop." Malone asked Rosser to give him a ride to his home in Duncan, which Rosser agreed to do. Rosser testified that he and his wife got in the car and that Malone came out wearing different clothes and carrying a white plastic garbage bag. They stopped at Sturdevant's car, and Malone retrieved a big black case from it. They also stopped at a wooded area on Camel Back Road, where Malone got out and disposed of the white bag. [FN22] J.C. Rosser testified that on the way to Duncan, Malone told the Rossers that he had killed a state trooper and that he "was real sorry." [FN23] Rosser testified that he dropped Malone off on the back side of his Duncan home and that he and Jaime went in through the front. They waited in the garage while Malone got the big black case and a gun out of the car and then waited while Malone got his own handcuff key. Malone showed them a "black Glock," saying it was the one he'd used to kill the trooper. Rosser testified that the gun had blood and grass and hair on it. Malone also told Rosser that he "fucked up" and was "sorry." [FN24]

FN21. J.C. Rosser testified that he was in jail in Stephens County on various methamphetamine-

related charges when he first spoke with officers about Malone. Rosser's charges stemmed from a November 2003 raid on his home, which resulted in the Rossers moving in with Sturdevant. Rosser agreed to testify in Malone's case in exchange for having these prior charges dropped and not being charged as an accessory after the fact in Green's murder. Rosser was released on bond after his preliminary hearing testimony in Malone's case.

FN22. With J.C. Rosser's assistance, the white garbage bag was later recovered. Its contents, i.e., Malone's clothing from the morning of the shooting, were entered into evidence at trial.

FN23. J.C. Rosser described Malone's account of what had happened as follows. Malone had been sleeping and was awakened by the officer with a gun and a flashlight. The officer had Malone on the ground, with a knee in his back, when Malone said, "Fuck this," and started fighting and struggling. According to Malone, the officer was hitting him on the head with his baton, and Malone said, "I like it; give me some more." The officer begged for his life, but Malone said, "You would have did it if you were in my shoes. You'd have did the same." Malone then "shot him once and then he shot him again just to make sure," i.e., to "make sure he was dead."

***6** FN24. Rosser testified that in late December of 2003, he, his wife, Anthony, Sturdevant, and Malone were high on methamphetamine together "almost all the time."

Jaime Rosser testified that her husband woke her around 8:30 a.m., on December 26, 2003, and insisted she go with him to Duncan. [FN25] She waited in the car with her husband until Malone came out with a white garbage bag and got in the back seat. Rosser testified that on the way to Duncan, Malone stated, "I killed him. I killed him. I killed a cop." When she turned to look at him, she saw that he had a handcuff on his right wrist. Rosser testified that Malone said he had shot "a Hi–Po" two times in the head and that on the first shot, "the bone part of the skull stuck to the gun, and so [I] shot it again to get the gun clean." [FN26] Jaime Rosser testified consistently with her husband regarding Malone disposing of the white bag and their time in his home that morning. [FN27] She also testified that when she saw Malone back at the trailer that night, he could tell she was upset and told her, "Don't think of it as me killing him; think of him as an animal and I was hunting." Malone also told her that he had gotten everything "cleaned up" and that "there shouldn't be anything left out there to identify [me]." When Rosser asked him, "What about the tape?" referring to the patrol car videotapes often seen on TV, Malone responded, "Oh, fuck." [FN28]

FN25. Jaime Rosser testified that she (like her husband) was in Stephens County Jail (on drug charges stemming from the November raid on their home) when she was first approached about Green's murder, in late December of 2003. Although her husband negotiated the agreement, she got basically the same deal. She was released and her drug charges were dropped after she testified at Malone's preliminary hearing. She acknowledged on cross examination that she could have gotten as much as a life sentence on the attempted manufacturing charge she faced in the other case and that she was guilty of that charge.

FN26. Jaime Rosser testified that Malone said he fell asleep during the cook, and the officer came up and tapped him on the shoulder. They rumbled around and fought, and the officer got one handcuff on him. She remembered that Malone said that the officer had begged for his life and that Malone responded, "If you were in my shoes, you would do the same thing." Rosser did not remember Malone talking about the officer praying or referring to his family.

FN27. She described waiting in the garage while Malone left to get a handcuff key and then came back and took off the handcuff. Rosser testified to being upset by the sight of the gun, which she described as "nasty," because it "was gooey and it had blood and hair on it."

FN28. A clip from Green's Dashcam video, showing Malone in front of Green's car, was shown on local television stations that same night. Officer Keith Stewart, a Duncan police officer who was familiar with Malone, recognized Malone in the video and immediately reported this information.

Tammy Sturdevant, Malone's sister, also testified. [FN29] She recalled that Malone borrowed Anthony's black handgun before leaving to do the cook on Christmas Night, "just in case there was trouble." She

next saw her brother at around 8:00 a.m. the next morning, when he came into her bedroom and said, "I need your help. I need you to call your car in stolen. I —I shot a trooper." Malone then told her and Anthony the details of what had happened. [FN30] Sturdevant testified that Malone had a handcuff hanging from his right wrist, which was bruised and swollen, and his hands were cut. Sturdevant acknowledged that she got Malone the white trash bag for his clothes, and later that day she dyed his hair blond and cut it. [FN31] Sturdevant testified that she, her brother, and all of the occupants of her trailer were heavily into methamphetamine in December of 2003, that methamphetamine distribution was their sole source of income, and that they were all "high all the time," from December 20, 2003, until the morning of the shooting. [FN32]

***7** FN29. Sturdevant acknowledged at trial that she had lied in all of her initial contacts with law enforcement officers, in an attempt to help her brother. She also admitted that although she had agreed to testify truthfully at Malone's preliminary hearing, she had not done so, because she was still trying to help her brother. Consequently, she remained in jail from the time of Malone's June 2004 preliminary hearing until the time of his May 2005 trial. Sturdevant also testified that she was telling the "absolute truth" at trial and that she expected to be released after the trial ended.

FN30. Sturdevant described Malone's account of what happened as follows. Malone woke up to a flashlight in his eyes, and an officer made him get out of the car. Malone was on his stomach, with one arm behind his back, and the officer got one cuff on him, but somehow Malone got up. Malone tried to run, but tripped, and was hit on the head a few times, and he and the officer got into a "scuffle" and went into some barbed wire. Malone saw a gun on the ground and picked it up. The officer begged for his life, saying "Jesus Christ, no." Malone also recounted that he said to the officer, "If I wouldn't have done it to you first, you'd have done it to me."

FN31. Sturdevant also reported her car "stolen" to the Lawton Police Department.

FN32. Sturdevant also acknowledged that she introduced her brother to methamphetamine.

By December 29, 2003, investigators had found the car driven by Malone, recovered his clothes on Camel Back Road, and obtained significant information from J.C. Rosser and Tyson Anthony about Malone's involvement in the killing of Trooper Green. [FN33] In an interview on this date, Malone acknowledged that what Anthony had told investigators—that Malone had killed the trooper, that he shouldn't have done so, and how it happened—was "true" or "probably true." [FN34] When pressed to take responsibility himself, Malone responded, "I can't—I can't say. If I say anything, I'm going to get the death penalty." Later in the interview Malone stated, "Well, maybe it was an accident."

FN33. DNA evidence presented at trial established that Green's blood was found on the driver's seat of the car driven by Malone, on a black container inside the car, and on various items of Malone's clothing recovered on Camel Back Road.

FN34. When Malone was first interviewed, on December 27, he denied any involvement and claimed he was home with his wife on the night of the shooting. Nevertheless, investigators noted marks on his right wrist consistent with a handcuff and that Malone seemed very stiff, as if he was sore.

Malone testified at trial. He provided a history of his involvement with drugs, legal and illegal, beginning with steroids to get bigger when he was a firefighter, including Prozac to combat depression when his marriage was in trouble, and then Lortabs, which began with a football injury but developed into an addiction. Malone testified that he began using methamphetamine in April of 2002, around the time his mother died. He described the effects of the drug and how his usage of methamphetamine, like his usage of pain pills, increased over time. [FN35] He acknowledged that by October of 2003, his methamphetamine addiction had caused him to be fired from his jobs at the fire department and as an EMT with an ambulance service, and that all of his income was coming from making and selling methamphetamine. Malone claimed that he didn't sleep from December 4 through December 26, 2003, due to being continuously "amped up on meth," and that he was hearing voices and seeing things during this time. [FN36]

***8** FN35. Malone described how methamphetamine made him moody and paranoid and that he sometimes heard voices and thought he saw things that weren't there—like when he would "hear" people in his attic and when he "saw Bigfoot" while he was out cooking at the lake.

FN36. Malone acknowledged on cross examination that he was stopped on December 15, 2003, and given a verbal warning for having loaded and concealed weapons in his car. He was stopped again on December 22, 2003, and this time he was charged with attempted manufacturing, possession of precursor ephedrine, and possession of three loaded and accessible firearms.

Regarding the night of December 25, 2003, Malone described hearing voices and seeing "people jumping ... around" as he was stealing and transporting the anhydrous ammonia needed for the cook. He testified that while in the middle of the cook, his back started hurting, so he took some Lortabs and then passed out. He described waking up to a gun and a flashlight in his face and testified that he thought he was about to get robbed or killed. Malone repeatedly denied that he knew Green was connected with law enforcement, until after he had killed him. [FN37] He described finding a gun and the other man begging him not to shoot. Malone testified that the other man kept trying to get up and that the "voices in my head" told him to shoot him, because the man was "going to get me." So he shot him. [FN38]

FN37. Malone testified that he was "fighting for his life" and that he kept "trying to get away from this dude." Malone claimed that he didn't know the person he was fighting was law enforcement until he saw the highway patrol sticker on the man's open car door, after Green was already dead. Malone also testified that it was "too dark" to see that the other man was in uniform and had a badge and that he would have submitted if he'd realized that Green was a highway patrol trooper.

FN38. Malone testified on cross examination that he did not notice the handcuff on his wrist until he was back in his car. He couldn't explain what "keys" he kept asking for on the Dashcam video.

Dr. David Smith, a California physician specializing in addiction medicine, testified as an expert witness on Malone's behalf. He provided extensive testimony on his own expertise, particularly regarding methamphetamine, on genetic predisposition to addiction and depression, and on the science of how methamphetamine affects the brain. In particular, Smith explained how when someone is extremely "intoxicated" on methamphetamine, to the point of "amphetamine psychosis," the effect on the person is comparable to paranoid schizophrenia. He explained that like paranoid schizophrenia, amphetamine psychosis can include auditory and visual hallucinations, where an individual will respond to non-existent environmental stimuli or threats. [FN39] Dr. Smith also described less severe, but still serious methamphetamine effects, including a "rage reaction," where the individual responds to an actual threat, but overreacts.

FN39. Dr. Smith testified that users sometimes refer to this hallucinatory effect as "tweaking."

Dr. Smith testified that he had met with Malone the previous day (a Sunday) and reviewed various materials associated with the case, including the Dashcam video. Smith testified about the substantial history of addiction and depression in Malone's family and the history and extent of Malone's drug abuse, including how much he was using and its effect on his life at the time of the shooting. [FN40] Smith described the time Malone was convinced he had seen Big Foot, whom Malone thought was after him, which Smith indicated was an example of someone experiencing amphetamine psychosis. He also recounted that Malone was smoking methamphetamine "every hour" and was "hearing voices" and "seeing things" on the night before and morning of his encounter with Green. [FN41] Dr. Smith concluded that Malone was most likely in a state of "amphetamine psychosis" on the morning of the shooting, making him likely to engage in "crazy, irrational violence." He further testified that he did not think Malone could have formed the intent to commit first-degree murder.

***9** FN40. Dr. Smith testified that Malone told him that in late December of 2003, he was hardly sleeping and "was using 4 to 5 grams of methamphetamine, smoking it, and using 20 to 40 Lortab."

FN41. Dr. Smith testified, "He thinks he's being attacked by all these people, and then this unfortunate altercation occurs." Dr. Smith also recounted Malone's perception "[t]hat he was under attack and that the dead body was coming after him."

Malone, 168 P.3d at 189–95.

III. Standard of Review.

A. Exhaustion as a Preliminary Consideration.

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

B. Procedural Bar.

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

C. Merits.

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

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

IV. Analysis.

A. Ground One: Faulty Jury Instructions.

Petitioner claims that flawed jury instructions in his first trial violated his right to a fair trial and his right to present a defense. Petitioner further claims that the OCCA

violated his due process rights by misapplying its plain error review to the claim on appeal.

Petitioner raised a voluntary intoxication defense. *Malone*, 168 P.3d at 196. The trial court determined that Petitioner had presented sufficient evidence of voluntary intoxication and instructed the jury as to that defense. *Id.* at 196-97. Defense counsel did not raise any objection to the instructions at trial. *Id.* at 197. On direct appeal, Petitioner claimed that the instructions were flawed and violated his right to a fair trial. *Id.* at 196. Because counsel did not object to the instructions at trial, the OCCA reviewed the claim for plain error. *Id.* at 197. The OCCA found the instructions legally incorrect: "the failure of [Petitioner's] jury instructions to accurately instruct his jury in this regard constitute[d] plain error." *Id.* at 201. The OCCA then evaluated whether the error was harmless beyond a reasonable doubt, applying the standard from *Chapman v. California*, 386 U.S. 18 (1967). *Id.* at 201 & n.68. The OCCA found that while Petitioner had presented evidence to warrant a voluntary intoxication instruction, the evidence as a whole showed no reasonable possibility that the jury would have accepted that defense, regardless of the instructions' accuracy. *Id.* at 201. Accordingly, the OCCA denied Petitioner relief.

Petitioner attacks the OCCA's decision on two fronts. First, he claims that the OCCA *itself* violated his constitutional rights by engaging in both plain error and harmless error reviews. Second, he claims that the error had a substantial and injurious effect on the jury's verdict.

1. *Exhaustion.*

Petitioner claims that since plain error review requires a finding of prejudice under Oklahoma law, any plain error is prejudicial by definition. Petition at 24-27. Petitioner thus argues that the OCCA improperly engaged in two inconsistent prejudice inquiries by determining first that the instructional error was plain error but then finding the error harmless. *Id.* Petitioner claims that the OCCA's contradictory decision violated due process by depriving him of state procedural protections. Petitioner never raised this argument to the OCCA.

It is rare that a habeas petitioner bases an independent claim on an appellate court's actions. Usually petitioners attack the appellate court's treatment of the trial court's actions. But even where petitioners do raise claims against the appellate court, AEDPA's basic requirements —including exhaustion—still apply. Title 28, Section 2254(c) provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." Since Petitioner admits that he did not exhaust his claim against the OCCA in state court, the relevant inquiry is whether Petitioner had a right to raise those claims in state court by any procedure.

***11** Petitioner argues that he could not have raised the issue in state court because he could not have foreseen that the OCCA would resolve his case as it did, and because "federal habeas is the exclusive forum" for him to challenge the OCCA's decision. Reply at 2. But the Court notes at least two paths by which Petitioner could have presented this claim to the OCCA. First, Petitioner could have raised this claim in a petition for rehearing. Rule 3.14 of the Rules of the Court of Criminal Appeals, Tit. 22, Ch. 18, App. allows rehearing when "[t]he decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument." Since Petitioner argues that the OCCA's decision was in direct conflict with its plain error precedent, the claim would have been an appropriate one for rehearing. Second, Petitioner could have raised the claim in one of his three post-conviction proceedings, because it "could not have been raised in a direct appeal" and ostensibly supports a conclusion that the outcome of Petitioner's trial would have been different.[3] OKLA. STAT. tit. 22, § 1089(C). In spite of these available procedures, Petitioner never presented this issue to the OCCA.

Petitioner may have believed that raising the issue would be futile, as he seems to indicate in his reply brief. If that were indeed Petitioner's position, he would still bear the burden of showing that exhaustion would have been futile because of "an absence of available State corrective process" or "circumstances...that render such process ineffective to protect [his] rights ...." *Selsor v. Workman*, 644 F.3d 984, 1026 (10th Cir. 2011) (quoting 28 U.S.C. §§ 2254(b)(1)(B)(i), (ii)). The Court is satisfied that the avenues to address this issue existed, and Petitioner has not presented any substantial argument as to why those avenues were futile. Petitioner could have exhausted this claim, but did not.

The same is true for Petitioner's claim under *Beck v. Alabama*, 447 U.S. 625 (1980). Petitioner claims that the flawed instructions prevented the jury from fully considering his defense, thereby violating his right to have the jury consider the lesser charge of second degree murder. Petition at 31. Respondent argues that Petitioner never raised this claim on direct appeal, while Petitioner claims he did.

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

Petitioner cites his appellate brief to argue that he exhausted this claim. The relevant quote states that "had the jury been properly instructed, it could have found [him] guilty only of the lesser offense based on voluntary intoxication." Appellant's Br. at 23, *Malone v. State*, No. D-2005-600. This passing reference from his appellate brief does not fairly present a discrete *Beck* claim. First, it is uncertain whether the facts even support a *Beck* claim, as *Beck* deals with the specific situation where a trial court refuses to give a second degree murder instruction. *See Taylor v. Workman*, 554 F.3d 879, 893 (10th Cir. 2009) (discussing the difference between a *Beck* claim and a claim that the instructions given were flawed). And even if flawed instructions raise an arguable *Beck* claim, the OCCA could not have reasonably been expected to recognize and pluck that claim from Petitioner's discussion of a completely different claim, especially when Petitioner never cited *Beck*. The claim was not fairly presented and is therefore unexhausted.

2. *Procedural Bar.*

***12** Generally, federal courts dismiss unexhausted claims without prejudice to allow the petitioner to raise the claim in state court. *Bland*, 459 F.3d at 1012. But when the state court would find the claim barred under an independent and adequate procedural bar, "there is a procedural default for purposes of federal habeas review." *Id.* (quoting *Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir. 1992)). Oklahoma defendants cannot apply for post-conviction relief on issues that could have been raised "previously in a timely original application or in a previously considered application...." OKLA. STAT. tit. 22, § 1089(D)(8). Petitioner could have raised his *Beck* claim and his claim against the OCCA in prior post-conviction applications or in a petition for rehearing, but failed to do so. Therefore, Oklahoma law would now bar those claims.

When a state court applies a state procedural bar, the petitioner must either show that the bar is inadequate or dependent on federal law, or provide a reason to excuse the default. *Cone*, 556 U.S. at 465; *Coleman*, 501 U.S. at 750. A procedural bar is adequate if it is "strictly or regularly followed and applied evenhandedly to all similar claims." *Fairchild v. Workman*, 579 F.3d 1134, 1141 (10th Cir. 2009) (internal quotation marks omitted). The bar is independent if "it relies on state law, rather than federal law, as the basis for the decision." *Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012). A petitioner can still avoid an adequate and independent procedural bar by establishing either cause for the default and actual prejudice from the alleged violation of federal law, or that failure to consider the claims would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

Petitioner generally argues that Oklahoma's procedural bar is not independent of federal law because the OCCA has discretion under *Valdez v. State* to grant relief when "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 46 P.3d 703, 710 (Okla. Crim. App. 2002). Petitioner claims that determining whether the error resulted in a miscarriage of justice or constituted a substantial violation necessarily includes consideration of the claims' merits. The Tenth Circuit has rejected this argument several times in recent years. *See Fairchild v. Trammell*, 784 F.3d 702, 719 (10th Cir. 2015); *Banks v. Workman*, 692 F.3d 1133, 1145-46 (10th Cir. 2012); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012). Oklahoma's bar is adequate and independent of federal law. [4]

Petitioner also argues that appellate counsel ineffectiveness serves as cause to excuse the default. Ineffective assistance of appellate counsel can only serve as cause if the defendant raised that ineffective assistance

claim in state court. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Petitioner did not raise any ineffectiveness claims based on his unexhausted *Beck* claim or his claim against the OCCA in state court. Since Petitioner cannot establish cause to excuse the default of these claims, they are procedurally barred.

3. *Exhausted Claim.*

The only exhausted claim in Petitioner's first ground is his claim that the flawed jury instructions violated his right to a fair trial. Petitioner argues that the instructional errors were harmful and that the OCCA's decision was based on an unreasonable determination of facts. Petitioner's main contention is that the OCCA erred by applying two levels of prejudice analysis to this claim. Petitioner argues that this analysis is contrary to both state and federal law. Regardless of whether that contention is accurate, this argument is not relevant to whether Petitioner is entitled to habeas relief.

***13** Title 28, U.S.C. Section 2254(d)(1) states that habeas relief is warranted where "the adjudication of the [habeas] claim ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law...." The language of the statute focuses on the resulting decision, not the analysis leading to the decision. *See Neal v. Puckett*, 286 F.3d 230, 244-46 (5th Cir. 2002) (discussing the AEDPA standard and concluding that the focus is on the ultimate legal conclusion, not the state court's method of arriving at the conclusion). The Court is therefore concerned only with the OCCA's decision that the instructional error was harmless.

While Petitioner addresses that decision, he primarily focuses on the OCCA's plain error review. But plain error review is merely a state-law avenue for the OCCA to consider alleged errors that were not raised at trial. *Simpson v. State*, 876 P.2d 690, 700 (Okla. Crim. App. 1994). Federal habeas courts do not review how the OCCA decides it can address a waived issue, but rather look to the substantive treatment of that issue. Here, the OCCA determined under its plain error review that the instructional issue was the type of error that the OCCA could address despite the lack of objection at trial. The OCCA then made the substantive determination that the error was harmless beyond a reasonable doubt. The Court's only concern is whether the error was harmless for habeas purposes.

Petitioner's citations to *Kyles v. Whitley* and *Byrd v. Workman* do not alter the analysis. In both cases, the question was whether an error could be harmless where prejudice was a substantive element of the claims. In *Kyles*, the Supreme Court discussed harmless error analysis for errors under *United States v. Bagley*, 473 U.S. 667 (1985). 514 U.S. 419, 435 (1995). *Bagley* dealt with prosecutors' responsibility to produce to the defense evidence favorable to their case. *Id.* at 433. The Supreme Court concluded that because a *Bagley* error required a finding of "a reasonable probability that, had the [favorable] evidence been disclosed to the defense, the result of the proceeding would have been different," any further harmless error analysis would be unnecessary. *Id.* at 433-35 (quoting *Bagley*, 473 U.S. at 682). In *Byrd v. Workman*, the Tenth Circuit followed this same logic in determining that the harmless error analysis was irrelevant when a petitioner established a claim for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), because prejudice is one of the elements of that claim. 645 F.3d 1159, 1167 n.9 (2011). *Kyles* and *Byrd* do not support Petitioner's argument because in both cases, the types of errors involved could not be harmless by definition. The substantive claim in this case, flawed instructions, *is* subject to the harmless error analysis. *See Turrentine v. Mullin*, 390 F.3d 1181, 1191 (10th Cir. 2004) (applying harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) to a claim of erroneous jury instructions). It is not a claim that, by definition, cannot be harmless. That the procedural vehicle for raising the claim in state court includes a prejudice element is irrelevant for habeas purposes, as the OCCA's plain error review simply allows a petitioner's foot in the door; it is not a substantive claim that is impervious to harmless error analysis. [5] The OCCA's procedural findings that enabled its review of the instructional issue are beyond the scope of this Court's authority under AEDPA. Therefore, this Court will only decide whether the error was, in fact, harmless under the prevailing habeas standards.

4. *Harmless Error.*

***14** Habeas courts generally ask whether the state court's decision was contrary to or an unreasonable application of clearly established federal law. 28 U.S.C., § 2254(d)(1). But because the AEDPA is designed to limit habeas review rather than expand it, the Supreme Court has determined that when analyzing whether an error is harmless, federal

courts should apply the more forgiving test set out in *Brecht* rather than the general unreasonableness test under AEDPA. *Fry v. Pliler*, 551 U.S. 112, 119 (2007). Therefore, when a state court finds that an error is harmless under *Chapman*, federal habeas courts must determine if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 116 (quoting *Brecht*, 507 U.S. at 637 (1993)); *Littlejohn v. Trammell*, 704 F.3d 817, 833-34 (10th Cir. 2013). This standard is mandated by the "[i]nterests of comity and federalism, as well as the State's interest in the finality of convictions that have survived direct review within the state court system." *Littlejohn*, 704 F.3d at 834. To grant relief, the reviewing court must have grave doubts as to the error's effect on the verdict, and if the court is in "virtual equipoise as to the harmlessness of the error," the court should "treat the error...as if it affected the verdict." *Selsor*, 644 F.3d at 1027 (quoting *Fry*, 551 U.S. at 121 n.3).

Having reviewed the trial record, the Court concludes that the erroneous instructions in this case did not have a substantial or injurious effect on the jury's verdict. It is true that Petitioner presented evidence that would indicate he was under the influence of methamphetamine and prescription drugs on the night he murdered Trooper Green. It is also true Petitioner testified he was hearing voices at the time he murdered Trooper Green. 2005 Trial Tr. vol. 4 at 908-11. [6] Petitioner's expert testified about the possible psychotic effects of methamphetamine use and opined that Petitioner could not form the intent to commit first degree murder. *Id.* at 1066-67, 1099.

But this evidence pales in comparison to the evidence at trial showing that Petitioner was lucid and calculating. The prosecution established through testimony that other witnesses could not recall Petitioner suffering from hallucinations. The prosecution emphasized that the only evidence of Petitioner's visual and auditory hallucinations came from Petitioner himself. There was also some question as to whether Petitioner had actually taken a significant amount of drugs on the day of the murder. The prosecution presented testimony from officers who encountered Petitioner shortly after the murder and who testified that he appeared normal, showing no signs of methamphetamine intoxication or sleeplessness. 2005 Trial Tr. vol. 5, 1181-82, 1188-90. Petitioner's expert admitted that Petitioner's actions immediately before and after the murder were logical and goal-oriented. 2005 Trial Tr. vol. 4, 1137-42, 1146-50. And the evidence most damning to the voluntary intoxication defense was the Dashcam video depicting the moments leading up to Trooper Green's murder. Although the video does not visually show the murder, it presents audio of Petitioner's and Trooper Green's conversation. Petitioner is heard interrogating Trooper Green about the location of a key, presumably to the handcuff that Trooper Green placed on Petitioner's wrist. 2005 Ct's Ex. 9 at 2-3. Petitioner repeatedly commands Trooper Green to keep his hands out. *Id.* at 3-6. Petitioner even tells Trooper Green he would shoot him if he moved. *Id.* at 5. After unsuccessfully searching Trooper Green for the keys, Petitioner decides he no longer needed them. *Id.* at 6. While Trooper Green prays and begs for his life, Petitioner pulls the trigger twice and flees. *Id.* The video depicts Petitioner's clearheaded discussion with Trooper Green and his eventual decision to shoot him in the head. Petitioner's own testimony confirmed that he purposefully shot Trooper Green in the head to "keep him down" and "[t]o make sure he don't [sic] get up." 2005 Trial Tr. vol. 4, 1002-03.

***15** This evidence shows that the faulty voluntary intoxication instructions did not have a substantial and injurious effect or influence on the verdict. The jury heard that Petitioner engaged in logical, goal-oriented behavior before and after the murder. The jury heard the logical, lucid, and calculating Petitioner searching for the keys to the handcuffs and vigilantly telling Trooper Green to stay still and keep his hands out. The jury heard that Petitioner put the gun to Trooper Green's head and pulled the trigger to make sure he did not get up. The Court has no doubt that the jury would have rejected the voluntary intoxication defense, even with thorough and accurate instructions.

Petitioner contends that the OCCA's decision was based on an unreasonable determination of facts because the OCCA found that Petitioner presented sufficient evidence to be entitled to the instruction but also held that no reasonable jury could accept the defense. This is not inconsistent. A prima facie case is one that is established in the absence of conflicting evidence. *See* BLACK'S LAW DICTIONARY 598 (8th ed. 2004). In other words, assuming everything that Petitioner presented was true, he would be entitled to the voluntary intoxication defense. The OCCA found that Petitioner met that low threshold. But when determining whether the instructional error was harmless, the OCCA did not assume the veracity of Petitioner's evidence but instead considered the entire

record, and found that Petitioner's arguments wilted before the overwhelming evidence to the contrary.

Petitioner also points to *Taylor v. Workman*, 554 F.3d 879 (10th Cir. 2009) to argue that the error was harmful. In *Taylor*, the trial court gave an erroneous second degree murder instruction that precluded the jury from convicting the petitioner of second degree murder if they found that he intended to kill or harm the victim. *Id.* at 893. The erroneous inclusion of the term "harm" was not harmless in that case, because the petitioner's entire defense rested on his claim that he intended only to shoot the victim, not kill him. *Id.* By its very terms, the instruction absolutely precluded the defense based on the petitioner's own evidence, therefore the Tenth Circuit found the error harmful. *Id.* at 893-94.

This case is distinct from *Taylor*, because the erroneous instructions in this case did not preclude Petitioner's defense. Nor did it prevent the jury from finding that Petitioner was intoxicated and therefore unable to commit first degree murder. Instead, it injected confusion into the instructions and created potential for misunderstanding. But the potential misunderstanding was dwarfed by the reality that even with proper instructions, the evidence presented firmly established that Petitioner was not intoxicated to the point of negating criminal intent. The faulty jury instructions did not have a substantial and injurious effect or influence on the jury's verdict. Relief is denied as to Ground One.

B. Ground Two: Ineffective Assistance of Resentencing Trial Counsel.

Petitioner claims that his resentencing trial counsel was ineffective for (1) advising him to waive jury sentencing, (2) failing to argue that his mitigating circumstances outweighed the aggravating circumstances during closing argument, and (3) failing to investigate and present evidence that Petitioner was sexually abused as a child. Petition at 38-39. Petitioner raised the waiver and closing argument issues on direct appeal. *Malone*, 293 P.3d at 207, 209. Petitioner claimed that the decision to waive a jury trial was unreasonable because a community survey showed that the jury pool in the county where he was tried was open to a sentence less than death. *Id.* at 208. Petitioner also alleged that the judge was under political pressure to return a death sentence and had heard the inadmissible and prejudicial evidence from Petitioner's first trial. *Id.* at 209. Petitioner argued that these factors rendered the decision to waive a jury trial objectively unreasonable. *Id.* at 208-09. Petitioner claimed that counsel's closing argument was deficient because counsel did not argue that the mitigating factors outweighed the aggravating factors and he did not advocate for life in prison. *Id.* at 209. The OCCA denied relief on both the waiver and closing argument claims. *Id.*

***16** Petitioner raised the jury trial issue again in his third application for post-conviction relief. *Malone*, No. PCD-2014-969, slip op. at 8. Petitioner added the argument that counsel's advice was unreasonable due to Petitioner's fragile mental state. *Id.* at 9. It was in this third application that Petitioner also raised the sexual abuse claims for the first time. *Id.* at 4. The OCCA held that the new competency argument and sexual abuse claims were waived. *Id.* at 4, 9-10.

1. *Procedural Bar.*

The OCCA applied a state procedural bar to Petitioner's sexual abuse and competency claims, although it provided a related merits analysis on each. "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). But state courts can "look to federal law ... as an alternative holding while still relying on an independent and adequate state ground" for denial of a claim. *Coleman*, 501 U.S. at 733. In those situations, federal courts "must acknowledge and apply the [state court's] procedural bar ruling, even though the [state court], on an alternative basis, briefly addressed and rejected the merits of [the petitioner's] claim." *Thacker v. Workman*, 678 F.3d 820, 834 n.5 (10th Cir. 2012).

While Petitioner argues that the OCCA did not clearly and expressly apply the procedural bar to his sexual abuse and competency arguments, he is simply injecting ambiguity where none exists. The OCCA specifically addressed Petitioner's trial and appellate counsel ineffectiveness claims related to the alleged sexual abuse and noted that he had "not shown that these claims were not available or ascertainable through the exercise of reasonable diligence on or before the filing of his original application for post-conviction relief." *Malone*, No. PCD-2014-969, slip op. at 4. The OCCA observed that Petitioner raised an ineffective assistance of post-conviction counsel

claim to excuse the fact that "he has waived these claims." In discussing the waived trial and appellate ineffectiveness claims, the OCCA cited Okla. Stat. 22, § 1089(C)(1), (D)(8), which details the OCCA waiver rule. *Id.* The OCCA did address the merits of the post-conviction ineffectiveness claim to determine whether post-conviction counsel's ineffectiveness could excuse the default of the underlying trial and appellate counsel claims.

The OCCA also clearly and expressly relied on the procedural bar with regarding Petitioner's competency argument. The OCCA noted that the jury trial claim was raised previously, but pointed out that Petitioner "further assert[ed] that counsels' advice was unreasonable in light of the issues surrounding his competency." *Id.* at 8-9. One paragraph later, the OCCA barred the jury trial claim under *res judicata*, but specifically noted that "we find the portion of his argument which he had not heretofore presented is waived." *Id.* at 9-10. Petitioner claims that the OCCA was unclear as to which portion of the claim was procedurally barred. But the OCCA clearly identifies what portion of the claim was new and specifically applied the procedural bar to that portion. The OCCA clearly and expressly barred both claims under a state procedural rule.

***17** The Court has already considered and rejected Petitioner's general argument that Oklahoma's procedural bar is not independent. *Supra* p. 21. But Petitioner also challenges the adequacy of the procedural bar regarding the ability to raise ineffective assistance of counsel claims on direct appeal. Petitioner argues that Oklahoma's ineffectiveness standard is more demanding than the *Strickland* standard and therefore does not provide an adequate opportunity to raise those issues on direct appeal. Petition at 95-96. This argument is irrelevant, however, because the OCCA barred these claims based on Petitioner's failure to raise them in a previous post-conviction application, not direct appeal. *Malone*, No. PCD-2014-969, slip op. at 4, 9-10.[7] Petitioner fails to show that the procedural bar is dependent on federal law or is inadequate regarding these claims.

Petitioner's remaining argument is that appellate and post-conviction counsel ineffectiveness can excuse the procedural default. This argument also fails. Regarding his competency argument related to his waiver claim, Petitioner never raised an ineffective assistance of appellate or post-conviction counsel claim in state court on that issue. An unexhausted ineffectiveness claim cannot excuse a procedural default. *Edwards*, 529 U.S. at 451-52.

Petitioner's sexual abuse claim fares no better. While Petitioner did raise an appellate ineffectiveness claim in his third post-conviction proceeding, the OCCA considered that claim waived. *Malone*, No. PCD-2014-969 slip op. at 4. *Edwards v. Carpenter* clearly states that procedurally defaulted claims cannot themselves excuse other defaulted claims, absent an independent showing of cause and actual prejudice. 529 U.S. at 452-53.

Petitioner tries to salvage his defaulted trial and appellate ineffectiveness claims through an ineffective-assistance-of-post-conviction-counsel claim. However, ineffective assistance of post-conviction counsel cannot serve as cause since there is no constitutional right to counsel in state post-conviction proceedings. *Coleman*, 501 U.S. at 752. And although Petitioner cites *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to argue that sometimes post-conviction counsel ineffectiveness can serve as cause, *Martinez* is not applicable to Petitioner. *Martinez* allowed a narrow exception for post-conviction ineffectiveness to serve as cause *only* when a defendant's first opportunity to raise an ineffective-assistance-of-trial-counsel claim is in an initial collateral proceeding. *Id.* at 1319-20. *Martinez* does not apply to attorney errors "in any proceeding beyond the first occasion the State allows a prisoner raise a claim of ineffective assistance at trial ...." *Id.* at 1320. *Martinez* does not allow Petitioner to claim ineffective assistance of post-conviction counsel, because Oklahoma law allows defendants a meaningful opportunity to raise ineffective-assistance-of-trial-counsel claims on direct appeal under OCCA Rule 3.11. *See Fairchild*, 784 F.3d at 723; *Banks*, 692 F.3d at 1148. Therefore post-conviction counsel's errors are beyond *Martinez's* reach.

Petitioner also states, without much legal support, that post-conviction ineffectiveness can serve as cause because he has a state law right to post-conviction counsel. Since the Supreme Court has explicitly stated that the errors of post-conviction counsel "cannot be constitutionally ineffective" and that defendants must bear the risk of post-conviction errors that result in a procedural default, the Court does not credit this argument. *Coleman*, 501 U.S. at 752-53.

***18** Petitioner cannot establish any reason for this Court to excuse the default of these claims. Therefore, Petitioner's ineffectiveness claims regarding sexual abuse and competency related to his waiver of jury resentencing are denied as procedurally barred.

2. *Clearly Established Law.*

The remaining claims are subject to the standard set out in *Strickland v. Washington*, which states that counsel is constitutionally ineffective when counsel's deficient performance prejudices the defense. 466 U.S. at 687. On habeas review, courts must apply the *Strickland* and AEDPA standards to the facts of the case and decide whether "there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 101, 105. Federal courts cannot disturb a state court's ruling unless the petitioner demonstrates that the state court applied the highly deferential *Strickland* test in a way that every fairminded jurist would agree was incorrect. *Id.*

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

Even if a petitioner shows deficient performance, he must also show prejudice by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

3. *Analysis.*

a. *Advising Petitioner to waive jury sentencing.*

After the OCCA reversed Petitioner's first death sentence and remanded the case to Comanche County, Petitioner's resentencing counsel set about to determine whether Petitioner could receive a fair trial in that county. Counsel was especially concerned with the ongoing media coverage in the area. To determine the effect of the coverage on the jury pool, counsel commissioned a survey of the jury pool in Comanche County. O.R. 6 at 1118-19. Citing the survey and media coverage, counsel requested transfer of the case to a different county. *Id.* at 1106. The trial court denied the request. Mot. Hr'g Tr. 12-13, Sep. 24, 2010.

After the trial court denied the motion, a local newspaper published a prejudicial article that led the trial court to seal the court file. Mot. Hr'g. Tr. 2-4, Oct. 8, 2010. Counsel then decided to ask for a continuance because of the negative pretrial publicity. *Id.* at 2. But at the hearing on the motion for a continuance, defense counsel informed the trial court that rather than seeking a continuance, Petitioner had decided to proceed with a bench trial. *Id.* at 5-6. Counsel explained that they had discussed the issue with Petitioner and had given him a day to consider the options. *Id.* at 5. Petitioner testified that counsel did not try to influence him one way or the other, and he had the benefit of hearing different viewpoints from his attorneys and investigators. *Id.* at 19, 29. The trial court and defense counsel questioned Petitioner at length, and the trial court even indicated that it would likely grant a continuance if Petitioner desired to proceed with a jury trial. *Id.* at 18. Petitioner still opted to be sentenced by a judge rather than a jury.

***19** Petitioner now claims that his resentencing trial counsel was ineffective for advising him to waive jury sentencing. Petitioner argues that because the trial court judge was the same judge that presided over his first trial, he was tainted by the inadmissible and prejudicial evidence that caused Petitioner's first death sentence to be reversed. Petitioner also contends that the survey conducted in Comanche County showed that a jury would be open to voting for a sentence less than death. Petitioner claims that these facts render counsel's strategic decision to waive jury sentencing objectively unreasonable.

"An attorney's decision to waive his client's right to a jury is a classic example of a strategic trial judgment, 'the type of act for which *Strickland* requires that judicial scrutiny be highly deferential.' " *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995) (quoting *Green v. Lynbaugh*, 868

F.2d 176, 178 (5th Cir. 1989)) *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001). It is not enough for a petitioner to show that the decision was wrong, instead the decision to waive a jury must be "objectively unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." *Id.*

Petitioner's arguments fail to satisfy this highly deferential standard. As an initial matter, it is not apparent that Petitioner's counsel actually advised him to waive jury sentencing. The trial record supports the OCCA's observation that "[t]he defense team did not try to influence [Petitioner] one way or the other." *Malone*, 293 P.3d at 207. But even if Petitioner's attorneys did advise him to waive jury sentencing, he still fails to show that the OCCA's determination that his attorneys acted reasonably was itself unreasonable.

Petitioner's non-barred arguments focus on the trial judge's previous exposure to improper evidence, and the results of the jury survey. Neither argument establishes that counsel's decision was objectively unreasonable. Petitioner's counsel had serious concerns about selecting a jury in Comanche County. Having failed to have the case transferred, they faced the reality of going to trial with a jury that had likely been exposed to a great deal of publicity about the crime and Petitioner. Because the jury would also be one that had not seen the evidence in the previous trial, they would likely be enthralled by the horrifying and emotional aspects of the case. The judge, already familiar with the crime, would likely be less distracted by those aspects than a jury that was hearing the evidence for the first time. And even though the judge previously heard improper victim impact evidence, "judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346 (1981). Counsel could reasonably believe that although the judge had heard the improper evidence, he could still put it aside and focus on the evidence presented. Even if counsel's belief was wrong, the Court cannot say that counsel's view was objectively unreasonable.

Petitioner's argument about the survey is likewise unconvincing. Petitioner highlights the results from two questions in a twenty-two question survey. One question asked about the likelihood that Petitioner could receive a sentence less than death in Comanche County. O.R. 6 at 1152. The responders, at a rate of 23.4%, said it was very likely that Petitioner would receive a lesser sentence; 33.8% said somewhat likely; 16.7% said somewhat unlikely; 17.4 % said very unlikely, and the rest did not know or did not answer. *Id.* Petitioner claims that since 57.2% of responders thought it was very likely or somewhat likely that a jury would recommend a sentence less than death, counsel should not have opted for a bench trial.

***20** This question and the responses to it fail to establish that counsel acted unreasonably. While the "very likely" answers may have indicated an ability to seat an impartial and fair jury, the "somewhat likely" responses seem less persuasive, as they indicate that the responder is not actually sure that Petitioner could get a sentence less than death. Read as a whole, the responses indicate that 67.9% of responders harbored at least some doubt that Petitioner could have a jury that would *possibly* return a sentence less than death. The ambiguity of the responses is magnified when considered with the vagueness of the question itself. The Court is not convinced that this question and the responses to it undermine the reasonableness of counsel's decision.

The second question asked what punishment responders thought was appropriate for Petitioner. O.R. 6 at 1150. Petitioner points out that 42% of the responders opted for either a life sentence or life without the possibility of parole. While those responses have a slight edge over those that preferred death (40%), this comparison does not support Petitioner's argument. The results show that without having heard a shred of evidence, 40% of the responders thought death was the appropriate sentence. The prosecution bears the burden in sentencing to prove aggravating factors beyond a reasonable doubt, and a criminal defendant is not even eligible for death in Oklahoma unless the prosecution meets that burden and shows that the aggravating circumstances outweigh the mitigating circumstances. Yet the survey revealed that a large swath of the jury pool preferred the sentence of death before the trial even began. Counsel could reasonably be underwhelmed by the number of responses for a lesser sentence and rightly concerned with the responses that showed nearly half of the responders had formed an opinion favoring a death sentence. Based on counsels' information regarding the jury pool and the judge, the Court cannot say that counsel was unreasonable for

advising Petitioner that a bench trial would be a better option.

Even if counsel's strategy was unreasonable, Petitioner fails to show prejudice. Petitioner makes a general argument that his extensive mitigation case could have swayed one juror to reject a death sentence. But the "reasonable probability" that one juror would have struck a different balance must be "substantial, not just conceivable." *Grant v. Trammell*, 727 F.3d 1006, 1018-19 (10th Cir. 2013). Petitioner's general argument does not meet that standard. Petitioner also argues that during formal sentencing, the trial judge must have been considering the fact that a previous jury had sentenced Petitioner to death because the judge said "[t]he Court, having previously sentenced you to death upon a conviction of first degree murder by a prior jury, Mr. Malone, hereby sentences you to death by lethal injection." Petition at 44. But this cherry-picked statement does not mean what Petitioner thinks it means. The trial judge had pronounced the verdict earlier in the hearing, stating that "the defendant having been convicted of first degree murder, is hereby sentenced to death." Sentencing Hr'g Tr. 3, Nov. 1, 2010. The trial court then went into formal sentencing, at which point the judge made the statement above. *Id.* at 4. The structure of the statement and the context suggests that the judge meant that the *trial court* had previously sentenced Petitioner to death, not the prior jury. The reference to the prior jury went to the conviction, not the sentence. The plain reading shows that the judge was not sentencing Petitioner while considering the prior jury's sentence, but was rather giving an accurate procedural summary. That statement does not give any indication that Petitioner suffered prejudice from the waiver of jury sentencing.

***21** Counsel did not act unreasonably, and Petitioner did not suffer any prejudice from the waiver of jury sentencing. The OCCA's decision was therefore reasonable and relief is denied on that issue.

b. *Closing argument.*

Petitioner's counsel delivered a closing argument that focused on Petitioner's past, his good character, his mental illness, and his addictions. 2010 Trial Tr. vol. 10, 22-24. Counsel listed out the seventeen mitigating factors, but said that he would not go through every piece of evidence supporting those factors. *Id.* at 25-27. Counsel then discussed justice and what it would mean in Petitioner's case. *Id.* at 27-28. Counsel ended his argument by claiming that death would be the merciful sentence because Petitioner would no longer suffer, and rather than bringing back the victim, a death sentence would only create more victims. *Id.* at 28-30. Petitioner claims that counsel's closing argument was deficient because he did not argue that the mitigating circumstances outweighed the aggravating circumstances or advocate for life. The OCCA found that although counsel's strategy was ultimately unsuccessful, it was not unreasonable.

An attorney's handling of closing arguments is considered a strategic decision, and is therefore afforded great deference. *See Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (decision to waive closing argument is a commonly adopted strategy); *Moore v. Gibson*, 195 F.3d 1152, 1179-80 (10th Cir. 1999) (counsel's concessions during closing were presumed sound trial strategy). Affording counsel's strategic decisions the proper deference under *Strickland* and reviewing the OCCA's decision under AEDPA, the Court cannot say that the OCCA was unreasonable in finding that Petitioner's counsel acted reasonably.

As opposed to an argument before a jury, counsel had the benefit of a fact-finder who thoroughly understood the sentencing process. Counsel could have reasonably assumed that the trial court knew what to do with the mitigating and aggravating circumstances and that it was unnecessary to waste time pointing out that the latter outweighed the former. And counsel also did not leave the record silent on the mitigating factors. Counsel listed the seventeen factors set out in the instructions. 2010 Trial Tr. vol. 10, 24-27. These factors were not general and nonspecific, but were instead a detailed list of persuasive reasons for the judge to reject a death sentence. Counsel likely decided not to go into the details of the evidence because the summary was so comprehensive.

Also, counsel's decision to portray death as the merciful option is not unreasonable. Counsel faced a situation where two aggravators were clearly supported. And the mitigation case, while thorough, was not likely to outweigh the overwhelming evidence in aggravation. Counsel therefore sought to save his client's life by arguing that justice demanded life in prison. Counsel characterized death as the easy way out for Petitioner, suggesting that

life imprisonment would actually be the more punitive sentence. Counsel's framing of the issue may not have been typical, but it was not objectively unreasonable. Petitioner has failed to rebut the presumption that counsel's closing argument was the result of sound trial strategy, therefore the OCCA's decision that counsel acted reasonably is also reasonable.

***22** Petitioner also cannot show that any deficiency in the closing argument prejudiced his defense. The judge knew that Petitioner sought to avoid the death penalty. The judge knew that death was off of the table if the mitigating factors outweighed the aggravating factors. There is no reasonable probability that a different approach by counsel would have swayed the judge's decision.

4. ***Conclusion.***

Petitioner's argument that counsel should not have advised him to waive his jury sentencing while he was in a fragile mental state is denied as procedurally barred. The Court also denies Petitioner's claim that counsel should have uncovered and presented evidence of sexual abuse, as that claim is barred as well. Regarding the jury trial waiver and closing argument claims, Petitioner fails to show that counsel acted unreasonably or that he suffered prejudice due to counsel's actions. Therefore, the Court concludes that the OCCA's handling of those claims was reasonable. Relief is denied on Ground Two.

C. Ground Three: Ineffective Assistance of Guilt-Stage Counsel.

Petitioner claims that trial counsel was ineffective during the guilt stage of his first trial. First, Petitioner claims that counsel inadequately prepared for the case, particularly by failing to arrange for Petitioner to meet with the mental health expert until midway through the trial. Second, Petitioner claims that counsel failed to object to the faulty voluntary intoxication instructions. The OCCA denied these claims on direct appeal, finding that although counsel acted unreasonably in both instances, neither mistake prejudiced the defense. *Malone*, 168 P.3d at 219-21.

1. ***Clearly Established Law.***

Counsel is constitutionally ineffective if their deficient performance prejudices the defense. *Strickland*, 466 U.S. at 687. When it is easier to dispose of an ineffectiveness claim for lack of prejudice without addressing the reasonableness of counsel's performance, that is the course that federal courts should, and often do, take. *See McGee v. Higgins*, 568 F.3d 832, 839 (10th Cir. 2009) (quoting *Strickland*, 466 U.S. at 697). For that reason, the Court does not need to evaluate the OCCA's analysis on whether counsel acted unreasonably, because Petitioner fails to show prejudice.

2. ***Analysis.***

Petitioner's counsel approached the trial laboring under a key misconception: they believed that Petitioner did not remember anything about the murder. 2005 Trial Tr. vol. 4, 882. But when Petitioner met with the defense expert for the first time midway through the trial, Petitioner revealed that he did remember the murder, but his previous attorney told him never to tell anyone. *Id.* at 883. Based on that revelation, counsel asked to add an insanity defense, a request that the trial court denied. *Id.* at 891.[8] When the defense expert testified, the prosecution called much of his testimony into question, including his ultimate opinion that Petitioner did not possess the necessary mental state to be guilty of first degree murder. Before closing arguments, the judge instructed the jury on voluntary intoxication, using the faulty instructions discussed in Ground One. The jury found Petitioner guilty of first degree murder.

Petitioner argues that the late revelations from the interview undermined Petitioner's voluntary intoxication defense and made the defense expert vulnerable to a devastating cross examination. Doubtless counsel had to scramble to salvage their defense, and the expert did struggle to explain how Petitioner's intoxication affected his mental processes. But these facts alone do not establish that the OCCA's finding of no prejudice was unreasonable. Petitioner does not claim that he could have presented any other defense besides voluntary intoxication. It appears that voluntary intoxication was Petitioner's only viable defense to first degree murder. As noted in Ground One, that lone defense was soundly and comprehensively overwhelmed by the prosecution's evidence. The jury heard that Petitioner engaged in logical behavior before, during, and after the murder. The jury watched the Dashcam video that captured Petitioner's words and conversation leading up to the fatal gunshots. Petitioner does not point to any new or different facts or theories that, had the expert met with Petitioner earlier,

could have been presented to counter the avalanche of damning evidence. While Petitioner's case may have been stronger, more coherent, or less susceptible to impeachment, there is no reasonable probability a single juror would have been swayed away from the guilty verdict if counsel had invested more preparation and investigation.

***23** Petitioner's ineffectiveness claim regarding counsel's failure to object to the faulty voluntary intoxication instructions fails for the same reasons. The Court has already determined that the faulty instructions amounted to harmless error due to the significant evidence undermining the voluntary intoxication defense. There is no reasonable probability that, had counsel objected and proper instructions been given, one juror would have accepted Petitioner's voluntary intoxication defense. Because Petitioner fails to show that the OCCA's finding of a lack of prejudice is unreasonable, the Court denies relief on Ground Three.

D. Ground Four: Duplicative Aggravating Circumstances.

After his resentencing trial, the trial court found that the prosecution had proved two aggravating circumstances: "[t]hat the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution ... and that the victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes and that such a person was killed while performing official duties." Sentencing Tr. 2, Nov. 1, 2010. Petitioner claims that these two aggravating circumstances are unconstitutionally duplicative because the prosecution was able to use the fact that Petitioner killed Trooper Green to prove both aggravators. Petition at 75. Petitioner argues that these circumstances show that the aggravators impermissibly subsume each other. Petitioner raised this claim in his original direct appeal and his direct appeal from resentencing. The OCCA rejected the claim in both appeals. *Malone*, 293 P.3d at 216; *Malone*, 168 P.3d at 215-16.

1. *Clearly Established Law.*

Invalid sentencing factors can skew the sentencing analysis in states like Oklahoma, where the aggravating circumstances are weighed against the mitigating circumstances. *Stringer v. Black*, 503 U.S. 222, 231-32 (1992). Invalid factors have the potential to improperly place a thumb on the death side of the scale. *Id.* at 232. The Tenth Circuit found improper skewing in *United States v. McCullah*, where some of the aggravating factors subsumed the others, resulting in essentially the double-counting of the same aggravator. 76 F.3d 1087, 1111-12 (10th Cir. 1996). But the Supreme Court later addressed this theory in *Jones v. United States* and stated that it had "never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in *McCullah*...." 527 U.S. 373, 398 (1999). The Supreme Court emphasized that while *Stringer* said that "the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor," *McCullah's* reasoning "would have us reach a quite different proposition—that if two aggravating factors are 'duplicative,' then the weighing process necessarily is skewed, and the factors are therefore invalid." *Id.* The Supreme Court did not adopt the duplicative aggravator theory. *Id.*

2. *Analysis.*

Petitioner's claim fails at the outset because he cannot show that the OCCA's rejection of this claim is contrary to or an unreasonable application of clearly established federal law. *Jones* does not mince words: the Supreme Court has not addressed this question. And circuit precedent does not suffice to clearly establish a legal principle for habeas purposes. *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012). That leaves Petitioner's claim bereft of supporting authority.

Assuming that Petitioner's claim did relate to a legal theory supported by Supreme Court precedent, it still fails. The relevant test for duplicative aggravators under Tenth Circuit precedent is whether one factor "necessarily subsumes" the other. *Patton v. Mullin*, 425 F.3d 788, 809 (10th Cir. 2005) (quoting *Fields v. Gibson*, 277 F.3d 1203, 1218-19 (10th Cir. 2002)). Factors are not duplicative simply because they rely on some of the same evidence. *Id.* However, the Tenth Circuit has observed that the use of different evidence for different aggravators can show that the aggravators do not subsume each other. *See Fields*, 277 F.3d at 1219.

***24** Neither of these aggravating factors subsumes the other. First, viewing the aggravators generally without reference to the facts in this case, each of the aggravators can be established independently without establishing the

other.[9] For instance, it is entirely possible for a criminal to kill a peace officer while not trying to avoid arrest. In fact, senseless blitz attacks on patrolling officers are a tragic reality. In those cases, the attacker is in no danger of being arrested or prosecuted prior to the murder. They apparently kill the officers solely to kill an officer. Thus, murder of a peace officer is not an aggravating factor that encompasses or subsumes the avoid arrest aggravator.

The avoid arrest aggravator likewise does not subsume the factor of murdering a peace officer. A murder to avoid arrest can target victims other than an actual police officer making an arrest. That aggravator is often applied to criminals who murder eyewitnesses, as killing an eyewitness certainly aids in avoiding arrest or prosecution. These aggravators are separate and distinct in their structure and the conduct they seek to address, and therefore do not necessarily subsume each other.

Second, the Court finds persuasive the fact that the evidence proving one aggravator in this case does not necessarily prove the other. Petitioner argued in his first trial that he did not know that Trooper Green was law enforcement. 2005 Trial Tr. vol. 4, 909. While the prosecution could prove that Petitioner murdered a peace officer just from the facts of the murder itself, Petitioner's claim of ignorance that Trooper Green was law enforcement would cut against the avoid arrest aggravator.[10] The prosecution therefore had to advance other facts to establish that Petitioner killed Green to avoid arrest, such as Petitioner's earlier statements that he would kill an officer before he went back to prison. The prosecution clearly could not prove the avoid arrest aggravator just by showing that Petitioner murdered Trooper Green. The divergence of the facts necessary to prove the aggravators shows that the aggravators are not duplicative in the manner that Petitioner claims.

Petitioner cannot show that the OCCA's decision is contrary to or an unreasonable application of clearly established law, primarily because the Supreme Court itself has declined to adopt the duplicative aggravator theory. And even under that theory, it is clear that neither of the aggravators necessarily subsumes the other. Therefore, the OCCA was reasonable in denying this claim. Relief is denied as to Ground Four.

E. Ground Five: Execution of the Mentally Ill.

Petitioner claims that his death sentence violates the Eighth Amendment because he is severely mentally ill. Petition at 76. The OCCA denied this claim on direct appeal. *Malone*, 293 P.3d at 216.

1. *Clearly Established Law.*

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

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

2. *Analysis.*

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

where multiple death penalty states ended executions for juveniles and the mentally retarded.

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

F. Ground Six: Biased Juror.

Petitioner claims that his first trial was unfair due to a biased juror. During jury selection, Juror KNA revealed that her cousin was murdered during a bank robbery in 1983. 2005 Trial Tr. vol. 2, 428. Juror KNA told the trial court that she was only a year old at the time, therefore that murder would not affect her opinion in Petitioner's case. *Id.* at 428-29. Juror KNA also told the trial court that she never attended any of the proceedings. *Id.* at 429. Defense counsel questioned Juror KNA at length about her ability to consider all of the evidence and all the potential punishments, after which he declined to challenge her for cause. *Id.* at 431-33. Petitioner did not challenge Juror KNA as biased in his direct appeal, but instead raised the issue in his second post-conviction proceeding. *Malone*, No. PCD-2011-248, slip op. at 8. Petitioner raised the issue as a stand-alone claim and as a claim for ineffective assistance of trial and appellate counsel. *Id.* at 4-5, 8. The OCCA found that the biased juror claim and the ineffective assistance of trial counsel claim were both procedurally barred. *Id.* at 4-5. The OCCA then addressed the merits of the appellate counsel claim and found that counsel did not perform deficiently nor did the omission of the biased juror claim affect Petitioner's appeal. *Id.* at 8-9.

1. *Procedural Bar.*

Petitioner's framing of this issue is somewhat ambiguous, as he begins by raising a biased juror claim but ends by asserting a claim for ineffective assistance of appellate counsel. Petition at 80, 85. Perhaps Petitioner is raising both, but that is far from clear. The simplest approach is to view the substantive claim as one alleging a biased juror, and treating the ineffectiveness claims as reasons to excuse the OCCA's procedural bar of the underlying claim. In any event, the mechanism is irrelevant, because the outcome is the same under any approach: Petitioner's biased juror claim and ineffective assistance of trial counsel claim are barred, and the meritless appellate counsel ineffectiveness claim cannot excuse the bar.

a. *The OCCA applied an independent and adequate procedural bar.*

***26** Petitioner argues that the procedural bar analysis is irrelevant because the OCCA addressed the claim on its merits. As noted previously, the Court applies the state bar even if the state court also provided an alternate merits analysis. *Supra* p. 30. Here, the OCCA clearly and expressly barred the biased juror claim and the ineffective assistance of trial counsel claim. *Malone*, No. PCD-2011-248, slip op. at 4-5. As discussed before, the bar is both independent and adequate. *Supra* pp. 21, 32. Therefore these claims are barred unless Petitioner can establish cause and prejudice to excuse the default.

b. *Appellate counsel was not ineffective for omitting this claim.*

Petitioner claims that appellate counsel ineffectiveness excuses the default. The *Strickland* standard applies to ineffective assistance of appellate counsel claims. *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014). To establish deficient performance, the petitioner must show that appellate counsel "unreasonably failed to discover [a] nonfrivolous issue[ ] and to file a merits brief raising [it]." *Id.* (quoting *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). Attorneys are not required to "raise every nonfrivolous issue on appeal," especially since weak claims tend to detract from stronger issues in the appeal. *United States v. Cook*, 45 F.3d 388, 394-95 (10th Cir. 1995) *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001). While a petitioner can bring a *Strickland* claim "based on counsel's failure to raise a particular claim ... it is difficult to demonstrate that counsel was incompetent" in that situation. *Smith*, 528 U.S. at 288. Even if a petitioner succeeds in that difficult task, he must still demonstrate that, absent the appellate counsel's deficient performance, there is a reasonable probability that the petitioner would have prevailed on appeal. *Id.* at 285. Because the OCCA addressed and denied Petitioner's

appellate counsel claim on its merits, AEDPA deference applies and Petitioner must show that the OCCA's determination was unreasonable. *Harrington*, 562 U.S. at 101, 105.

Petitioner must first show that the OCCA acted unreasonably in determining that appellate counsel reasonably opted not to raise the biased juror claim or challenge trial counsel's decision not to raise the issue during voir dire. The OCCA concluded that Petitioner failed to overcome the presumption that counsel rendered effective assistance, relying on the fact that appellate counsel filed an appellate brief that actually succeeded in winning a reversal of Petitioner's sentence. *Malone*, No. PCD-2011-284, slip op. at 9. The Court agrees that appellate counsel's success weighs in favor of a finding that appellate counsel's omission of the biased juror claim was reasonable. Appellate counsel clearly exercised professional judgment in raising some claims and omitting others, and counsel's efforts resulted in a reversal of Petitioner's sentence. It is not apparent that counsel's omission of the juror claim was unreasonable, and therefore the OCCA's decision was not unreasonable.

Even if appellate counsel's omission of the biased juror claim was unreasonable, there is no reasonable probability that the outcome of Petitioner's appeal would have been different had counsel included that claim because Petitioner's biased juror claim is meritless.

The "right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Implied bias is a valid ground for challenging a juror's impartiality. *See Gonzales v. Thomas*, 99 F.3d 978, 985-86 (10th Cir. 1996). Whether a juror is impliedly biased is a legal determination "that turns on an objective evaluation of the challenged juror's experiences and their relation to the case being tried." *Id.* at 987. The implied bias doctrine is "reserved for those 'extreme' and 'exceptional' circumstances that 'leave serious question whether the trial court ... subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.' " *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 222 & n* (1982) (O'Connor, J., concurring)).

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

In this case, Petitioner lists four reasons why Juror KNA was impliedly biased: (1) she had a family member who was murdered; (2) she grew up around Lawton where both crimes occurred; (3) both cases were prosecuted by the same prosecutor; (4) and both crimes involved innocent bystanders and tragic deaths. Petition at 84. These superficial similarities are simply not enough to establish implied bias.

The fact that Juror KNA had a family member who was murdered is not enough to show bias. While Petitioner advances a general proposition that courts have found implied bias where a prospective juror has been the victim of a crime, the actual inquiry is whether the prospective juror's experiences are so similar in nature that they would "inherently create in a juror a 'substantial emotional involvement, adversely affecting impartiality.' " *Id.* at 989 (quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977)). Merely being part of a murder victim's family is insufficient.

Nor does the location of the crimes increase the risk of bias. Petitioner mistakenly argues that both crimes occurred in Lawton. Trooper Green was murdered near the town of Devol. *Malone*, 168 P.3d at 189-90. The case was tried in Lawton due to a change of venue. The city of Lawton and the town of Devol sit in different counties. While both communities are located in southwest Oklahoma, that is hardly a similarity that would trigger implied bias. [11] That the same prosecutor tried both crimes is also not persuasive, as Juror KNA never attended a single court proceeding related to her cousin's murder. The Court cannot say that the prosecutor's role in the two cases would inherently create in Juror KNA a substantial emotional involvement when she had no recollection of the previous proceedings. This is especially true since Juror KNA was a toddler at the time of her cousin's murder and trial. And finally, the

fact that both murders involved "innocent bystanders and tragic deaths" does not establish significant similarities between the two murders. First, while Trooper Green was certainly innocent, he was hardly a bystander. Trooper Green was actively fighting and struggling to arrest Petitioner before being shot in the back of the head. The deaths during the bank robbery were apparently quite different. *See* Petition at 80 n.20. Second, most murders involve innocent bystanders and tragic deaths. Following Petitioner's logic, no person with a connection to a murder victim could ever serve as a juror. This proposition is much more expansive than the clearly established precedent regarding implied bias. Considered as a whole, Juror KNA's personal experiences are not so similar to the events of Trooper Green's murder that she would be impermissibly biased. The OCCA's similar finding was not unreasonable.

2. *Conclusion.*

The OCCA determined that appellate counsel's omission of the biased juror claim did not cause prejudice to Petitioner's appeal. That decision is not unreasonable, because appellate counsel acted reasonably in selecting claims for appeal, and the biased juror claim is without merit. As such, the appellate counsel claim fails and cannot serve as cause to excuse either the barred biased juror claim or the related ineffective assistance of trial counsel claim. Ground Six is denied as procedurally barred.

G. Ground Seven: Cumulative Error.

***28** Petitioner claims that even if individual errors in his trial were harmless, these errors were not harmless in the aggregate. Petition at 86. Petitioner raised this claim on both direct appeals. *Malone*, 293 P.3d at 218; *Malone*, 168 P.3d at 233. The OCCA found one error for faulty voluntary intoxication instructions in Petitioner's first trial. *Malone*, 168 P.3d at 233. The OCCA did not find any error in Petitioner's resentencing trial. *Malone*, 293 P.3d at 218.

The cumulative-error analysis addresses the possibility that two or more individually harmless errors might "prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). This analysis "aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Id.* at 1470. Cumulative error only warrants reversal if the many errors "collectively 'had a substantial and injurious effect or influence in determining the jury's verdict.' " *Cargle v. Mullin*, 317 F.3d 1196, 1220 (10th Cir. 2003) (quoting *Brecht*, 507 U.S. at 638). Instances where courts find deficient performance by counsel must also be aggregated, even if the ineffectiveness claim was ultimately denied for insufficient prejudice. *Id.* at 1207.

The OCCA found that the jury instructions on voluntary intoxication were in error. *Malone*, 168 P.3d at 201. The OCCA also found that trial counsel acted unreasonably by not objecting to the jury instructions and by not arranging a meeting between Petitioner and his expert prior to trial. *Id.* at 220-21. This Court has not found any additional errors. The Court is confident that these errors did not collectively have a substantial and injurious effect or influence on Petitioner's conviction. All three errors relate to Petitioner's voluntary intoxication defense. As already discussed at length, the evidence against that defense was overwhelming. Even if the jury instructions were proper, and even if Petitioner's voluntary intoxication defense were more thoroughly prepared, the Court is not persuaded that the jury would have accepted that defense. Therefore, Ground Seven is denied.

H. Ground Eight: Competency for Execution.

Petitioner claims that he is currently not competent to be executed, as he is insane under *Ford v. Wainwright*, 477 U.S. 399 (1986). Petition at 90. Petitioner concedes that this claim may not be ripe, and Respondent agrees. Petitioner raises this claim to preserve the issue if his execution becomes imminent. *Id.* The Supreme Court has held that the question of whether a defendant is competent to be executed is one that is "properly considered in proximity to the execution." *Herrera v. Collins*, 506 U.S. 390, 406 (1993). And Petitioner can, under Supreme Court precedent, raise this claim again if his execution becomes imminent. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). Since Petitioner's execution is not imminent, his competency claim under *Ford* is premature and will be denied as such. Petitioner can raise this claim if his execution becomes imminent, should the same concerns still exist.

V. Motions for Discovery and Evidentiary Hearing.

Petitioner has filed a motion for discovery (Doc. 30) as well as a motion for an evidentiary hearing (Doc. 52). The Court initially denied Petitioner's motion for discovery (Doc. 61). After further review, the Court sees no reason to change that decision. Petitioner's discovery request is based on generalized suspicions that the prosecutors withheld exculpatory evidence. Petitioner's claims amount to a fishing expedition, searching for materials to support a claim that he has not raised. Petitioner's requested discovery would not likely affect this Court's conclusion on any of Petitioner's claims. Therefore, Petitioner has not shown good cause for discovery. *See* Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (requiring good cause to obtain discovery authorization).

***29** In addition to his discovery request, Petitioner requests an evidentiary hearing with respect to his Grounds Two (ineffective assistance of trial counsel), Six, (biased juror claim) and Eight (competency). Mot. for Evid. Hr'g at 3-6. "The purpose of an evidentiary hearing is to resolve conflicting evidence." *Anderson v. Attorney Gen. of Kan.*, 425 F.3d 853, 860 (10th Cir. 2005). If there is no conflict, or if the claim can be resolved on the record before the Court, then an evidentiary hearing is unnecessary. *Id.* at 859. An evidentiary hearing is unwarranted on Grounds Two and Six to resolve the legal issues. No information gained from an evidentiary hearing would affect the legal findings on those grounds. Regarding Ground Eight, the claim has been dismissed as premature. It would likewise be premature to conduct an evidentiary hearing on this issue. Therefore, the requests for discovery and evidentiary hearing are denied.

VI. Conclusion.

After a thorough review of the entire state court record, the pleadings filed herein, and the applicable law, the Court finds that Petitioner is not entitled to the requested relief. Accordingly, Petitioner's Petition (Doc. 24), motion for discovery (Doc. 30), and motion for an evidentiary hearing (Doc. 52) are hereby **DENIED**. A judgment will be entered accordingly.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 6956646

Footnotes

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

2 Petitioner was initially charged in Cotton County, where the murder occurred, but the case was transferred to Comanche County.

3 The presumed argument would be that if the OCCA had not misconstrued the analysis, it would have found the error prejudicial, which would in turn support the conclusion that the outcome at trial would be different but for that error.

4 The Petitioner's general attack on the procedural bar also claims that it is inadequate regarding to procedures for raising extra-record ineffectiveness claims on direct appeal. That argument has no relevance in relation to these unexhausted claims.

5 While the OCCA's handling of plain error review is irrelevant to the underlying substantive claim, the Court still notes that Petitioner's argument on that subject appears shaky. The OCCA has explained in two other cases that plain error does not mean reversible error, indicating that plain error can, in fact, be harmless under Oklahoma law. *See Primeaux v. State*, 88 P.3d 893, 907 (Okla. Crim. App. 2004); *Simpson*, 876 P.2d at 700-01.

6 Because Petitioner had two trials, the trial transcripts are distinguished by the year of the trial.

7 Even if this argument were relevant, it is precluded by Tenth Circuit precedent. *See Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013) (the OCCA has made it clear that its standard for ineffectiveness on direct appeal is intended to be less demanding than *Strickland*).

8 The trial court still instructed the jury on the insanity defense. O.R. 3 at 519.

9 Petitioner seems to concede this point, but argues that the specific facts in this case caused the aggravators to subsume each other. Reply at 17 ("While it may not be true in all circumstances, here, as shown, the two factors are subsumed by one another.").

10 Petitioner did not advance that argument in his resentencing trial, but it nevertheless illustrates that more evidence was needed to prove the avoid arrest aggravator than simply that Petitioner murdered Trooper Green.

11 The Court doubts that even if the crimes had both occurred in Lawton, it would be enough to show that Juror KNA was inherently biased.

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FILED
United States Court of Appeals
Tenth Circuit

February 14, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICKY RAY MALONE,

Petitioner - Appellant,

v.

MIKE CARPENTER, Interim Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 17-6027

ORDER

Before **HARTZ**, **HOLMES**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

2007 OK CR 34

Ricky Ray MALONE, Appellant

v.

The STATE of Oklahoma, Appellee.

No. D–2005–600.

Court of Criminal Appeals of Oklahoma.

Aug. 31, 2007.

Background: Defendant was convicted in the District Court, Comanche County, Mark R. Smith, J., of first-degree murder with malice aforethought, and he was sentenced to death. Defendant perfected his direct appeal.

Holdings: The Court of Criminal Appeals, Chapel, J., held that:

(1) defendant was entitled to jury instructions on his defense of voluntary intoxication;

(2) jury instructions on the defense of voluntary intoxication should be given when evidence has been introduced at trial that is adequate to raise that defense, i.e., to establish a prima facie case of voluntary intoxication, abrogating *Taylor v. State*, 998 P.2d 1225, and *Crawford v. State*, 840 P.2d 627;

(3) portion of jury instructions on defense of voluntary intoxication that stated that first-degree murder had as an element "the specific criminal intent of Mens Rea" was incorrect, confusing, and legally nonsensical;

(4) plain error in jury instructions on defense of voluntary intoxication was harmless;

(5) trial court committed plain error at sentencing phase in allowing victim's wife to present extended sentencing recommendation of death;

(6) errors related to victim-impact evidence were not harmless;

(7) defense counsel rendered ineffective assistance at sentencing phase;

(8) certain remarks by prosecutor during closing argument at sentencing phase were egregiously improper and unfairly prejudicial to defendant and clearly invited passion, prejudice, and arbitrariness into jury's sentencing determination.

Affirmed in part, reversed in part, and remanded for resentencing.

Lumpkin, P.J., concurred in part and dissented in part and filed opinion.

Lewis, J., concurred in part and dissented in part and filed opinion.

1. Homicide ⚿1506

Defendant was entitled at trial for first-degree murder with malice aforethought to jury instructions on his defense of voluntary intoxication, given defendant's testimony about his drug use and effects that it was having on him at time of shooting, as well as physician's testimony that defendant could not have formed intent of malice aforethought.

2. Criminal Law ⚿774

Jury instructions on the defense of voluntary intoxication should be given when evidence has been introduced at trial that is adequate to raise that defense, i.e., to establish a prima facie case of voluntary intoxication; abrogating *Taylor v. State*, 998 P.2d 1225, and *Crawford v. State*, 840 P.2d 627..

3. Criminal Law ⚿355, 739(5)

Evidence of the defense of voluntary intoxication may come from any source and should not be weighed by the trial court; the trial court should leave the weighing of the evidence to the finders of fact, in whose judgment the system of trial by jury is based.

4. Homicide ⚿1506

Portion of jury instructions on defense of voluntary intoxication that stated that first-degree murder had as an element "the specific criminal intent of Mens Rea" was incorrect, confusing, and legally nonsensical; specific criminal intent at issue was malice aforethought. 21 Okl.St.Ann. § 701.7(A).

5. Criminal Law ⚿805(1)

When it is obvious that a uniform jury instruction contains a typographical error, grammatical error, or other similar mistake, a trial court should correct the error in the instruction provided to the jury.

6. Criminal Law ⚿1038.1(4)

Failure of instructions at trial for first-degree murder with malice aforethought to accurately inform jury that defendant should prevail on his defense of voluntary intoxication if he could establish that, due to his methamphetamine intoxication at time of offense, he was unable to form malice aforethought was plain error; this was the critical question in determining whether defendant could prevail on his defense. 21 Okl.St.Ann. § 701.7(A).

7. Criminal Law ⚿1038.1(4)

Plain error at trial for first-degree murder with malice aforethought in jury instructions on defense of voluntary intoxication, which did not accurately inform jury that defendant should prevail on defense if he could establish that he was unable to form malice aforethought due to his methamphetamine intoxication at time of offense, was harmless; no juror could possibly have been unaware that defendant's defense was voluntary intoxication or unaware of what he needed to establish to prevail on it, and there was no reasonable possibility that jury would have accepted defense, given overwhelming evidence that defendant knew what he was doing and deliberately chose to kill victim. 21 Okl.St.Ann. § 701.7(A).

8. Criminal Law ⚿706(3)

Necessity of a prosecutor's questions on cross examination is not, standing alone, the measure of prosecutorial misconduct.

9. Criminal Law ⚿1030(2)

Court of Criminal Appeals always retains the obligation to evaluate the constitutionality of statutes when they are properly challenged in a criminal case.

10. Sentencing and Punishment ⚿1763, 1789(3)

Trial court committed plain error at sentencing phase of capital-murder trial in allowing victim's wife to present extended sentencing recommendation of death; wife focused on idea of mercy, noted that victim begged for mercy but was given none, and implored jury to show "no mercy" to defendant and to "leave the business of mercy for [defendant] in the hands of the Heavenly Father, where it belongs," wife suggested that jurors had a religious obligation in a way that seemed to suggest that giving a death sentence might be part of jury's "divine undertaking in upholding and enforcing the laws," and such an invocation of religious belief and obligation was totally inappropriate.

11. Sentencing and Punishment ⚿1767

Contents of birthday cards sent by victim to his mother and sister were inadmissible as victim-impact evidence at sentencing phase of capital-murder trial.

12. Sentencing and Punishment ⚿1767

Contents of birthday cards sent by victim to his mother and sister were inadmissible at sentencing phase of capital-murder trial as evidence of victim's state of mind.

13. Sentencing and Punishment ⚿1789(3)

Error in trial court's admission of contents of birthday cards sent by victim to his mother and sister, which were inadmissible as victim-impact evidence at sentencing phase of capital-murder trial, was plain error; applicability of precedent that similar evidence was inadmissible was clear.

14. Sentencing and Punishment ⚿1763

Determination of how much victim-impact testimony to allow at the sentencing phase of a trial for capital murder and when that testimony is "too emotional" is a subjective determination, which necessarily rests, in the first instance, with the sound discretion of the trial court.

15. Sentencing and Punishment ⚿1789(7)

Admission of victim-impact testimony at the sentencing phase of a trial for capital murder, both what is admitted and how much is admitted, is reviewed by the Court of Criminal Appeals only for an abuse of discretion; the review is less deferential, however, when the record suggests that a trial court

failed to exercise its discretion over the admission of victim-impact evidence by failing to review and evaluate it prior to its presentation.

16. Sentencing and Punishment ⚿1782, 1789(3)

Trial court's failure to hold a hearing on admissibility of the state's victim-impact evidence at sentencing phase of capital-murder trial was plain error.

17. Sentencing and Punishment ⚿1780(3), 1789(3)

Failure of the state, defense counsel, and trial court to ensure that jury at sentencing phase of capital-murder trial was given required uniform instruction on how jury was to evaluate and consider victim-impact evidence within context of its overall sentencing decision was plain error; required uniform instruction was well established and clear.

18. Sentencing and Punishment ⚿1789(9)

Errors related to victim-impact evidence, including extended sentencing recommendation of death presented by victim's wife and lack of jury instruction on how to evaluate and consider victim-impact evidence, were not harmless at sentencing phase of capital-murder trial, even though defendant might have had only a slim chance of avoiding a death sentence; religious and duty-based plea of victim's wife that defendant be shown "no mercy" squelched whatever slim chance that defendant had, and prosecutor's closing argument that, inter alia, anything less than a death sentence would be a "travesty" further enhanced potential prejudice from improper victim-impact evidence.

19. Sentencing and Punishment ⚿1784(1), 1786

Although a defendant's crime may make him eligible to receive the death penalty, a jury is never obligated to sentence a defendant to death, and a single juror has the power to prevent a death sentence in a given case. 21 Okl.St.Ann. § 701.11.

20. Sentencing and Punishment ⚿1784(1)

It is the province of the jury, not the Court of Criminal Appeals, to determine whether a death-eligible defendant should actually be sentenced to death.

21. Sentencing and Punishment ⚿1625, 1660

Capital aggravators that murder was committed to avoid arrest and that the victim of murder was a peace officer are not unconstitutionally duplicative and do not skew the capital weighing process; those aggravators are based upon different aspects of a defendant's crime, in that the avoid-arrest aggravator focuses upon the reason why the victim was killed, based upon the idea that it is particularly wrongful to kill another person in an attempt to avoid being arrested or prosecuted for some other crime, while the peace-officer-victim aggravator focuses upon who was killed, based upon the idea that it is particularly wrongful to kill an on-duty law enforcement officer.

22. Sentencing and Punishment ⚿1769

Testimonies of two law enforcement officers that defendant was a high or very high security risk were admissible as expert opinion testimonies at sentencing phase of capital-murder trial; evaluations were based on specialized knowledge and extensive experience that officers had in the field of jail administration and security, and officers' testimonies were helpful and relevant to jury's determination on continuing-threat capital aggravator. 12 Okl.St.Ann. § 2702.

23. Sentencing and Punishment ⚿1769

Expert opinion testimonies of two law enforcement officers that defendant was a high or very high security risk were not unduly prejudicial to defendant at sentencing phase of capital-murder trial. 12 Okl.St.Ann. § 2702.

24. Sentencing and Punishment ⚿1767

In capital cases, it is constitutional to allow the sentencing jury an actual quick glimpse of the person who later became the victim in the case, i.e., before he or she was reduced to the corpse shown in crime-scene photographs, through the admission of an appropriate photograph of the victim while still alive, as permitted by statute. 12 Okl. St.Ann. § 2403.

25. Criminal Law ⚿641.13(6)

Defendant was not prejudiced at guilt-innocence phase of capital-murder trial by defense counsel's alleged act of opening door to otherwise inadmissible testimony about domestic incident between defendant and his wife and a fight that he had at a party, and thus defendant did not show that he was denied effective assistance of counsel; evidence of defendant's guilt was overwhelming. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⚿641.13(6)

Defendant was not prejudiced at guilt-innocence phase of capital-murder trial by defense counsel's failure to meet with defendant's expert witness until midway through phase, and thus defendant did not show that he was denied effective assistance of counsel, even though defendant argued that true facts of his memory of events would have come out much sooner; it would not have mattered how defense counsel attempted to "contextualize" defendant's mental state, as the state's evidence that defendant willfully, knowingly, and deliberately shot victim with intent to kill him was simply too compelling. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⚿641.13(7)

Defendant could not show that he was prejudiced at sentencing phase of capital-murder trial by defense counsel's failure to present psychologist's risk assessment regarding defendant's future dangerousness, and thus defendant was not entitled to an evidentiary hearing on his ineffective-assistance claim; given the state's presentation of substantial and frightening evidence about defendant's behavior while incarcerated, indicating a determination to escape through whatever means necessary, jury would not have been swayed or moved by statistical analysis of psychologist's report. U.S.C.A. Const.Amend. 6; Court of Criminal Appeals Rule 3.11(B)(3)(b), 22 O.S.A. Ch. 18, App.

28. Criminal Law ⚿641.13(7)

Crucial importance of mitigating evidence during the sentencing phase of a capital trial imposes upon capital defense counsel a corresponding duty to investigate a defendant's background and develop potential mitigating evidence; although this obligation is not unlimited, and an attorney is entitled to make reasonable strategic decisions about which leads to investigate and how far to pursue them, strategic decisions made after an incomplete investigation are evaluated according to the reasonableness of the attorney's decision to limit the investigation, under all the circumstances of the case. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⚿641.13(7)

Although defense counsel is entitled to make strategic decisions about what mitigating evidence to focus upon at the sentencing phase of a capital trial, decisions made without adequate investigation of potential mitigating evidence cannot be justified by merely invoking the mantra of strategy. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⚿641.13(7)

Claims of ineffective assistance for failure to adequately investigate and present mitigating evidence in a death-penalty case are treated in essentially the same manner as other ineffective-assistance claims, requiring a showing of both deficient attorney performance and prejudice; the main difference is in the prejudice analysis, where the reviewing court must determine whether there is a reasonable probability that if trial counsel had presented the omitted mitigating evidence, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

31. Criminal Law ⚿641.13(7)

In determining whether a defendant was prejudiced by trial counsel's failure to adequately investigate and present mitigating evidence in a death-penalty case, the newly proffered mitigating evidence must be considered along with the mitigating evidence that was presented and then weighed against the aggravating evidence that was presented; a reviewing court also considers whether there is a reasonable probability that inclusion of the omitted mitigating evidence could have altered the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. U.S.C.A. Const.Amend. 6.

32. Criminal Law ⇨641.13(7)

Defense counsel rendered ineffective assistance at sentencing phase of capital-murder trial by failing to argue vigorously that defendant's life should be spared and by failing to discover and present to jury available and emotionally significant evidence that defendant's life was worth sparing because of the kind of person he once was, if for no other reason. U.S.C.A. Const.Amend. 6.

33. Sentencing and Punishment ⇨1780(2)

Certain remarks by prosecutor during closing argument at sentencing phase of capital-murder trial, including a suggestion that jurors should sentence defendant to death because members of victim's family were counting on them to do so, were egregiously improper and unfairly prejudicial to defendant and clearly invited passion, prejudice, and arbitrariness into jury's sentencing determination.

An Appeal from the District Court of Comanche County; the Honorable Mark R. Smith, District Judge.

Don. J. Gutteridge, Oklahoma City, OK, Cheryl A. Ramsey, Stillwater, OK, attorneys for defendant at trial.

Robert Schulte, District Attorney for Comanche County, Lawton, OK, Mark Clark, Assistant District Attorney, Walters, OK, attorneys for the State at trial.

James H. Lockard, Deputy Division Chief, Kathleen Smith, Capital Direct Appeals Division, Oklahoma Indigent Defense System, Norman, OK, attorneys for appellant on appeal.

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

OPINION

CHAPEL, Judge.

¶ 1 Ricky Ray Malone, Appellant, was tried by jury and convicted of First–Degree Malice Aforethought Murder, in violation of 21 O.S.2001, § 701.7(A), in the District Court of Comanche County, Case No. CF–2005–147.[1] In the sentencing phase, the jury recommended a death sentence for the murder, after finding three aggravating circumstances: 1) that the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; 2) that there was a "probability" that Malone would "commit criminal acts of violence that would constitute a continuing threat to society"; and 3) that the "victim of the murder was a peace officer . . ., and such person was killed while in performance of official duty." [2] In accordance with the jury's recommendation, the trial court, the Honorable Mark R. Smith, sentenced Malone to death. Malone has properly perfected this direct appeal of his conviction and sentence.[3]

FACTS

¶ 2 Around 6:20 a.m., on December 26, 2003, Abigail Robles was delivering newspapers in rural Cotton County, just east of Devol, Oklahoma. While driving on Booher

1. The killing of Oklahoma Highway Patrol Trooper Nikky J. Green was committed in Cotton County. Malone was originally charged in Cotton County District Court, Case No. CF–2004–1. Although defense counsel sought a change of venue in August of 2004, based upon the extensive publicity and notoriety of the case in Cotton County, this motion was denied. Defense counsel filed a second change of venue motion in February of 2005. At this time the parties agreed that a delay in the completion of the defense expert witness's report had made it impossible to try the case during Cotton County's spring jury term. Because the State did not want to wait for the next Cotton County jury term in the fall, the prosecutor agreed to confess Malone's change of venue motion and have the case transferred to Comanche County, to be tried in May of 2005.

2. *See* 21 O.S.2001, § 701.12(5), (7) and (8), respectively.

3. Malone's Petition in Error was timely filed on November 14, 2005. On July 10, 2006, Malone filed his Brief and an Application for an Evidentiary Hearing on Sixth Amendment Claims. On November 13, 2006, the State filed its Brief and a Response to Defendant's Application for Evidentiary Hearing. Malone filed a Reply Brief on December 4, 2006. Oral argument before this Court was held on April 24, 2007.

Road, she came across a parked white car on the side of the dirt road.[4] The white male driver was laying in the front seat, but he was not moving, and his feet were hanging outside the car. Robles thought he might be dead. She drove to the home of Oklahoma Highway Patrol ("OHP") Trooper Nik Green, which was less than a mile away, to ask for his help. Green had been sleeping, but answered the door, listened to Robles's story, told her not to worry about waking him, and reassured her that he would check out the situation for her.

¶ 3 At 6:28 a.m., Trooper Green telephoned OHP dispatch in Lawton and reported what Robles had seen. Green was not scheduled to be on duty that day until 9:00 a.m., but when he learned that the on-duty Cotton County trooper was not available, he volunteered to go check out the situation himself. He went on duty at 6:37 a.m. and informed dispatch shortly thereafter that he had arrived at the scene and discovered a white four-door vehicle and a white male. Green attempted to provide the vehicle tag number, but dispatch could not understand the number, due to radio interference. This was Green's final contact with OHP dispatch. After approximately ten minutes dispatch tried to contact Green with a welfare check ("10–90"), but got no response. After numerous unanswered welfare checks to Green's badge number (# 198) and an unanswered page, dispatch sent various units to Trooper Green's location and contacted the Cotton County Sheriff's Department.

¶ 4 The first person to arrive at the scene was Deputy Charles Thompson of the Cotton County Sheriff's Department.[5] He arrived at 7:15 a.m., wearing pajama bottoms, a t-shirt, and sandals. Trooper Green's patrol car was parked on the right side of the road, with the driver's side door open and the headlights on. Thompson walked around the area until he discovered his friend's dead body, face down in the ditch, with his arms and legs spread, a few feet to the right and front of his patrol car.[6] It was obvious from the massive head wound to the back of his head that Green had been shot and that he was dead. Thompson immediately called his dispatch, and the investigation of Green's murder began.

¶ 5 What happened on Booher Road from the time of Green's arrival until his death can be largely pieced together from the physical evidence at the scene, statements made by Ricky Ray Malone, and the contents of a videotape recorded by the "Dashcam" video recorder mounted in Green's vehicle. According to statements made by Malone, Trooper Green arrived at the scene and attempted to rouse Malone by talking to him and shining a flashlight in his face. Officers who investigated testified that it was obvious from evidence left at the scene that someone had been manufacturing methamphetamine outside his or her car that night. It would have been obvious to Green as well.[7]

¶ 6 Green apparently informed Malone that he was under arrest and was able to get a handcuff on his right wrist, before Malone decided that he was not going to go quietly back to jail.[8] Malone somehow broke free and a battle ensued between the two men that tore up the grass and dirt in the area and knocked down a barbed wire fence. Malone's John Deere cap ended up in the barbed wire fence, and Green's baton and a Glock 9 mm pistol were left lying in the ditch.[9] The fight resulted in numerous scrapes, cuts, and bruises to both men.

4. Robles testified that the driver's side door was open and there were a lot of boxes and papers sitting around the car.

5. Thompson testified that he had known Nikky Green since they were in the third grade together.

6. Blood evidence presented at trial established that this was the position of Green's body at the time he was shot.

7. The area contained substantial evidence of recent methamphetamine production, and Malone admitted at trial that he had been "cooking meth" the previous night.

8. Malone acknowledged at trial that he was out on a $50,000 bond at the time, on a pending charge of attempted manufacture of methamphetamine, as well as other related charges.

9. Malone's friend, Tyson Anthony, testified that the pistol left at the scene belonged to him, but that Malone had borrowed it the previous evening before he left to do the cook, saying he needed it "in case he got into trouble with the police."

¶ 7 Trooper Green's Dashcam recorder was switched on sometime during the course of this monumental struggle.[10] Because the Dashcam was directed forward, the video shows only the things that appeared immediately in front of Green's vehicle. The video never shows Trooper Green, but the audio on the videotape, though garbled and sometimes hard to understand, contains a poignant and heartbreaking record of the verbal exchanges between Malone and Green during the six minutes preceding Green's death.

¶ 8 The initial sounds on the audio are mostly grunting and unintelligible, as the men seemingly struggle for control. Then Malone appears to gain control and tells Green to lay there and not turn over. Green tells Malone that he didn't have a problem with Malone and that he came to help him. He tells Malone, "Hey, run if you want to go, but leave me." Green pleads, "Please! Please! I've got children." Green also tells Malone that he is married and begs Malone not to shoot him. Meanwhile, Malone repeatedly asks Green where "the keys" are, apparently referring to the keys for the handcuff that is on his wrist, and demands that Green stop moving and keep his hands up. Malone threatens to kill Green if he moves, but also promises that he won't shoot him if Green holds still. Malone searches at least one of Green's pockets, but fails to find the keys.[11] When Green suggests that he has another set of keys in his vehicle, Malone responds, "I don't need to know." Green apparently recognizes the significance of this statement and after a few seconds begins pleading again, "Please don't. For the name of Jesus Christ. He'll deliver. Lord Jesus!" [12] At that moment a shot can be heard, followed by eleven seconds of silence, and then another shot.[13]

¶ 9 Just after the second shot, Malone appears in the videotape, walking in front of Trooper Green's car and behind the open trunk of his white, four-door vehicle. Malone can be seen hurriedly "cleaning up" his makeshift methamphetamine lab—dumping containers of liquid that are sitting on the ground, loading numerous items into the back seat and trunk, throwing and kicking things off the road, and lowering the front hood.[14] Less than two minutes after shooting Green, Malone starts his car to drive away, but the car stalls. After almost thirty seconds, the car starts, and by 6:55 a.m. Malone has left the scene.

¶ 10 During the trial the State presented the testimony of Malone's four meth-making

10. Testimony at trial established that Dashcam recorders like Green's come on automatically when the overhead lights are activated and can also be turned on manually, either in the car or with a remote control. Trooper Green's Dashcam was switched on via his remote control at 6:45 a.m. that morning. The remote control had a remote microphone on it, which recorded the sounds at the scene from 6:45 a.m. until the recorder was turned off at 7:50 a.m. While it is possible that Green purposefully turned the recorder on, it is also possible that it got knocked on during the struggle. The remote control was found at the scene, not far from Green's right hand.

11. DNA evidence presented at trial established that a bloodstain on the inside of Green's left front pants pocket came from Malone.

12. The Dashcam videotape appears in the record as State's Exhibit 1. The record also contains a transcript of the audio of this videotape, which is in the record as Court's Exhibit 9. Although the transcript was not entered into evidence, text from the transcript was displayed on demonstrative exhibits used during the cross examination of Malone. (Neither the accuracy of the transcript nor the use of these demonstrative exhibits is challenged on appeal.) We have watched and listened to this videotape numerous times. This Court's interpretation of what was said differs slightly from the transcript in a few places, including within Green's final plea. The transcript records Green's final words as follows: "Please don't. In the name of Jesus Christ. Please remember, Lord Jesus." The summary in the text is based upon this Court's best interpretation of what was said. Any differences compared to the transcript are minor and do not affect overall meaning.

13. One 9 mm projectile, consistent with Green's own gun, was recovered from his head, and another was recovered from the ground beneath his head. The medical examiner testified that Green's death was caused by a massive head injury to the back of his head, caused by one or more gunshot wounds, at least one of which was likely a contact wound.

14. Malone left substantial drug evidence at the scene, including two "eight balls" of methamphetamine, which were left laying in the middle of the dirt road.

comrades: Tammy Sturdevant (Malone's sister), Tyson Anthony (her boyfriend), and J.C. and Jaime Rosser (who were married).[15] In December of 2003, these four people were living together in Sturdevant's trailer in Lawton and were jointly engaged, along with Malone, in a regular process of gathering and preparing the ingredients, making or "cooking" methamphetamine, and then using and distributing the methamphetamine. They all testified that they spent much of Christmas Day in 2003 preparing for a "cook" that night and that when Anthony got sick, Malone decided to go ahead. Malone left late that night, in Sturdevant's white Geo Spectrum, to complete the cook on his own.

¶ 11 Tyson Anthony testified that Malone appeared in his bedroom about 8:00 a.m. on the morning of December 26 and said that he had shot someone and needed Anthony to hide his sister's car.[16] Anthony hid the car behind a day care, about 100 yards from their trailer. Anthony testified that he saw Malone again around 5:00 p.m. that night, that Malone had already partially shaved his head, and that he asked Anthony to go get him some bleach to dye his hair, which Anthony did. Later that night Anthony went with Malone to a hotel in Norman, and Malone told him more about what had happened.[17] Malone showed him the gun he had used, which Malone said belonged to "the cop." [18] Anthony testified that Malone also referred to the officer as a "Hi–Po," meaning a highway patrolman. Anthony acknowledged that he himself put the gun in a hotel trash can and covered it up with trash.[19] Anthony left the hotel and went home, but later called Malone, who was still there, and suggested that he might be able to use the gun to frame someone else.[20]

¶ 12 J.C. Rosser testified that when Malone came home on the morning of December 26, 2003, he had a handcuff on his right wrist, bruising on his hands, and some blood on his shirt.[21] Malone told Rosser that he had "killed a cop." Malone asked Rosser to give him a ride to his home in Duncan, which Rosser agreed to do. Rosser testified that he and his wife got in the car and that Malone came out wearing different clothes and carrying a white plastic garbage bag. They stopped at Sturdevant's car, and Malone retrieved a big black case from it. They also stopped at a wooded area on Camel Back Road, where Malone got out and dis-

15. All four of these witnesses spent time in jail on material witness warrants in this case.

16. Anthony was in jail on a material witness warrant until after his preliminary hearing testimony, when his bond was reduced. He acknowledged at trial that he agreed to testify in exchange for the district attorney's agreement not to charge him as an accessory after the fact or on any prior drug-related offenses. At the time of Malone's trial, Anthony was back in jail, charged with a new count of aggravated manufacture of methamphetamine.

17. At trial Anthony recounted that Malone told him the following. Malone was asleep and woke up to a gun and a flashlight in his face. The cop told him to get out, and Malone tried to run but tripped and fell. The cop got on his back and got a handcuff on him, but then they were rolling around and fighting, until Malone saw a gun on the ground and was able to get it. The cop prayed, said he had kids, and begged Malone not to shoot him or kill him, but Malone said, "You would have done it to me," and shot him twice in the back of the head. (The audio of the videotape does not contain anything similar to the quoted statement, though the other statements attributed to Malone by Anthony are consistent with the videotape.)

18. Malone told Anthony that he lost the gun he had borrowed from Anthony and that he thought he dropped it at the scene of the shooting.

19. The murder weapon was never found. Malone testified at trial that Anthony got rid of it.

20. During cross examination Anthony testified that at the time of the shooting, he, Sturdevant, the Rossers, and Malone were all "heavy into the use of methamphetamine" and that they were high "constantly," from December 20 until December 26, 2003.

21. J.C. Rosser testified that he was in jail in Stephens County on various methamphetamine-related charges when he first spoke with officers about Malone. Rosser's charges stemmed from a November 2003 raid on his home, which resulted in the Rossers moving in with Sturdevant. Rosser agreed to testify in Malone's case in exchange for having these prior charges dropped and not being charged as an accessory after the fact in Green's murder. Rosser was released on bond after his preliminary hearing testimony in Malone's case.

posed of the white bag.[22] J.C. Rosser testified that on the way to Duncan, Malone told the Rossers that he had killed a state trooper and that he "was real sorry." [23] Rosser testified that he dropped Malone off on the back side of his Duncan home and that he and Jaime went in through the front. They waited in the garage while Malone got the big black case and a gun out of the car and then waited while Malone got his own handcuff key. Malone showed them a "black Glock," saying it was the one he'd used to kill the trooper. Rosser testified that the gun had blood and grass and hair on it. Malone also told Rosser that he "fucked up" and was "sorry." [24]

¶ 13 Jaime Rosser testified that her husband woke her around 8:30 a.m., on December 26, 2003, and insisted she go with him to Duncan.[25] She waited in the car with her husband until Malone came out with a white garbage bag and got in the back seat. Rosser testified that on the way to Duncan, Malone stated, "I killed him. I killed him. I killed a cop." When she turned to look at him, she saw that he had a handcuff on his right wrist. Rosser testified that Malone said he had shot "a Hi–Po" two times in the head and that on the first shot, "the bone part of the skull stuck to the gun, and so [I] shot it again to get the gun clean." [26] Jaime Rosser testified consistently with her husband regarding Malone disposing of the white bag and their time in his home that morning.[27] She also testified that when she saw Malone back at the trailer that night, he could tell she was upset and told her, "Don't think of it as me killing him; think of him as an animal and I was hunting." Malone also told her that he had gotten everything "cleaned up" and that "there shouldn't be anything left out there to identify [me]." When Rosser asked him, "What about the tape?" referring to the patrol car videotapes often seen on TV, Malone responded, "Oh, fuck." [28]

¶ 14 Tammy Sturdevant, Malone's sister, also testified.[29] She recalled that Malone

22. With J.C. Rosser's assistance, the white garbage bag was later recovered. Its contents, *i.e.,* Malone's clothing from the morning of the shooting, were entered into evidence at trial.

23. J.C. Rosser described Malone's account of what had happened as follows. Malone had been sleeping and was awakened by the officer with a gun and a flashlight. The officer had Malone on the ground, with a knee in his back, when Malone said, ''Fuck this,'' and started fighting and struggling. According to Malone, the officer was hitting him on the head with his baton, and Malone said, ''I like it; give me some more.'' The officer begged for his life, but Malone said, ''You would have did it if you were in my shoes. You'd have did the same.'' Malone then ''shot him once and then he shot him again just to make sure,'' *i.e.,* to ''make sure he was dead.''

24. Rosser testified that in late December of 2003, he, his wife, Anthony, Sturdevant, and Malone were high on methamphetamine together ''almost all the time.''

25. Jaime Rosser testified that she (like her husband) was in Stephens County Jail (on drug charges stemming from the November raid on their home) when she was first approached about Green's murder, in late December of 2003. Although her husband negotiated the agreement, she got basically the same deal. She was released and her drug charges were dropped after she testified at Malone's preliminary hearing. She acknowledged on cross examination that she could have gotten as much as a life sentence on the attempted manufacturing charge she faced in the other case and that she was guilty of that charge.

26. Jaime Rosser testified that Malone said he fell asleep during the cook, and the officer came up and tapped him on the shoulder. They rumbled around and fought, and the officer got one handcuff on him. She remembered that Malone said that the officer had begged for his life and that Malone responded, ''If you were in my shoes, you would do the same thing.'' Rosser did not remember Malone talking about the officer praying or referring to his family.

27. She described waiting in the garage while Malone left to get a handcuff key and then came back and took off the handcuff. Rosser testified to being upset by the sight of the gun, which she described as ''nasty,'' because it ''was gooey and it had blood and hair on it.''

28. A clip from Green's Dashcam video, showing Malone in front of Green's car, was shown on local television stations that same night. Officer Keith Stewart, a Duncan police officer who was familiar with Malone, recognized Malone in the video and immediately reported this information.

29. Sturdevant acknowledged at trial that she had lied in all of her initial contacts with law enforcement officers, in an attempt to help her brother. She also admitted that although she had agreed

borrowed Anthony's black handgun before leaving to do the cook on Christmas Night, "just in case there was trouble." She next saw her brother at around 8:00 a.m. the next morning, when he came into her bedroom and said, "I need your help. I need you to call your car in stolen. I—I shot a trooper." Malone then told her and Anthony the details of what had happened.[30] Sturdevant testified that Malone had a handcuff hanging from his right wrist, which was bruised and swollen, and his hands were cut. Sturdevant acknowledged that she got Malone the white trash bag for his clothes, and later that day she dyed his hair blond and cut it.[31] Sturdevant testified that she, her brother, and all of the occupants of her trailer were heavily into methamphetamine in December of 2003, that methamphetamine distribution was their sole source of income, and that they were all "high all the time," from December 20, 2003, until the morning of the shooting.[32]

¶ 15 By December 29, 2003, investigators had found the car driven by Malone, recovered his clothes on Camel Back Road, and obtained significant information from J.C. Rosser and Tyson Anthony about Malone's involvement in the killing of Trooper Green.[33] In an interview on this date, Malone acknowledged that what Anthony had told investigators—that Malone had killed the trooper, that he shouldn't have done so, and how it happened—was "true" or "probably true."[34] When pressed to take responsibility himself, Malone responded, "I can't—I can't say. If I say anything, I'm going to get the death penalty." Later in the interview Malone stated, "Well, maybe it was an accident."

¶ 16 Malone testified at trial. He provided a history of his involvement with drugs, legal and illegal, beginning with steroids to get bigger when he was a firefighter, including Prozac to combat depression when his marriage was in trouble, and then Lortabs, which began with a football injury but developed into an addiction. Malone testified that he began using methamphetamine in April of 2002, around the time his mother died. He described the effects of the drug and how his usage of methamphetamine, like his usage of pain pills, increased over time.[35] He acknowledged that by October of 2003, his methamphetamine addiction had caused him to be fired from his jobs at the fire department and as an EMT with an ambulance service, and that all of his income was coming from making and selling methamphetamine. Malone claimed that he didn't sleep from December 4 through December 26, 2003, due to being continuously "amped up on meth,"

to testify truthfully at Malone's preliminary hearing, she had not done so, because she was still trying to help her brother. Consequently, she remained in jail from the time of Malone's June 2004 preliminary hearing until the time of his May 2005 trial. Sturdevant also testified that she was telling the "absolute truth" at trial and that she expected to be released after the trial ended.

30. Sturdevant described Malone's account of what happened as follows. Malone woke up to a flashlight in his eyes, and an officer made him get out of the car. Malone was on his stomach, with one arm behind his back, and the officer got one cuff on him, but somehow Malone got up. Malone tried to run, but tripped, and was hit on the head a few times, and he and the officer got into a "scuffle" and went into some barbed wire. Malone saw a gun on the ground and picked it up. The officer begged for his life, saying "Jesus Christ, no." Malone also recounted that he said to the officer, "If I wouldn't have done it to you first, you'd have done it to me."

31. Sturdevant also reported her car "stolen" to the Lawton Police Department.

32. Sturdevant also acknowledged that she introduced her brother to methamphetamine.

33. DNA evidence presented at trial established that Green's blood was found on the driver's seat of the car driven by Malone, on a black container inside the car, and on various items of Malone's clothing recovered on Camel Back Road.

34. When Malone was first interviewed, on December 27, he denied any involvement and claimed he was home with his wife on the night of the shooting. Nevertheless, investigators noted marks on his right wrist consistent with a handcuff and that Malone seemed very stiff, as if he was sore.

35. Malone described how methamphetamine made him moody and paranoid and that he sometimes heard voices and thought he saw things that weren't there—like when he would "hear" people in his attic and when he "saw Bigfoot" while he was out cooking at the lake.

and that he was hearing voices and seeing things during this time.[36]

¶ 17 Regarding the night of December 25, 2003, Malone described hearing voices and seeing "people jumping ... around" as he was stealing and transporting the anhydrous ammonia needed for the cook. He testified that while in the middle of the cook, his back started hurting, so he took some Lortabs and then passed out. He described waking up to a gun and a flashlight in his face and testified that he thought he was about to get robbed or killed. Malone repeatedly denied that he knew Green was connected with law enforcement, until after he had killed him.[37] He described finding a gun and the other man begging him not to shoot. Malone testified that the other man kept trying to get up and that the "voices in my head" told him to shoot him, because the man was "going to get me." So he shot him.[38]

¶ 18 Dr. David Smith, a California physician specializing in addiction medicine, testified as an expert witness on Malone's behalf. He provided extensive testimony on his own expertise, particularly regarding methamphetamine, on genetic predisposition to addiction and depression, and on the science of how methamphetamine affects the brain. In particular, Smith explained how when someone is extremely "intoxicated" on methamphetamine, to the point of "amphetamine psychosis," the effect on the person is comparable to paranoid schizophrenia. He explained that like paranoid schizophrenia, amphetamine psychosis can include auditory and visual hallucinations, where an individual will respond to non-existent environmental stimuli or threats.[39] Dr. Smith also described less severe, but still serious methamphetamine effects, including a "rage reaction," where the individual responds to an actual threat, but overreacts.

¶ 19 Dr. Smith testified that he had met with Malone the previous day (a Sunday) and reviewed various materials associated with the case, including the Dashcam video. Smith testified about the substantial history of addiction and depression in Malone's family and the history and extent of Malone's drug abuse, including how much he was using and its effect on his life at the time of the shooting.[40] Smith described the time Malone was convinced he had seen Big Foot, whom Malone thought was after him, which Smith indicated was an example of someone experiencing amphetamine psychosis. He also recounted that Malone was smoking methamphetamine "every hour" and was "hearing voices" and "seeing things" on the night before and morning of his encounter with Green.[41] Dr. Smith concluded that Malone was most likely in a state of "amphetamine psychosis" on the morning of the shooting, making him likely to engage in "crazy, irrational violence." He further testified that he did not think Malone could have formed the intent to commit first-degree murder.[42]

36. Malone acknowledged on cross examination that he was stopped on December 15, 2003, and given a verbal warning for having loaded and concealed weapons in his car. He was stopped again on December 22, 2003, and this time he was charged with attempted manufacturing, possession of precursor ephedrine, and possession of three loaded and accessible firearms.

37. Malone testified that he was "fighting for his life" and that he kept "trying to get away from this dude." Malone claimed that he didn't know the person he was fighting was law enforcement until he saw the highway patrol sticker on the man's open car door, after Green was already dead. Malone also testified that it was "too dark" to see that the other man was in uniform and had a badge and that he would have submitted if he'd realized that Green was a highway patrol trooper.

38. Malone testified on cross examination that he did not notice the handcuff on his wrist until he was back in his car. He couldn't explain what "keys" he kept asking for on the Dashcam video.

39. Dr. Smith testified that users sometimes refer to this hallucinatory effect as "tweaking."

40. Dr. Smith testified that Malone told him that in late December of 2003, he was hardly sleeping and "was using 4 to 5 grams of methamphetamine, smoking it, and using 20 to 40 Lortab."

41. Dr. Smith testified, "He thinks he's being attacked by all these people, and then this unfortunate altercation occurs." Dr. Smith also recounted Malone's perception "[t]hat he was under attack and that the dead body was coming after him."

42. The State's impeachment of both Malone and Dr. Smith is discussed within Proposition I.

ANALYSIS

¶ 20 In Proposition I, Malone argues that errors in the jury instructions regarding his voluntary intoxication defense violated his right to a fair trial. Initially, the State responds that the evidence presented by Malone was inadequate to even require instructions on voluntary intoxication; hence any error in the instructions given could not have harmed him.

¶ 21 We rejected a parallel claim made by the State just last year in *Coddington v. State.*[43] In *Coddington,* we held that expert opinion testimony that is otherwise admissible is not objectionable simply because it embraces an "ultimate issue" to be decided by the trier of fact.[44] In particular, we held that an expert on the effects of illegal drugs or other intoxicating substances could properly offer an opinion on whether a defendant was so affected by the use of such substances that he or she was unable to form the specific intent required for first-degree malice murder, *i.e.,* "malice aforethought," defined as a deliberate intent to kill.[45] In *Coddington,* this Court rejected the State's argument that the defendant's jury should not have been instructed on the defense of voluntary intoxication.[46] We do so again here.

[1–3] ¶ 22 Malone, like Coddington, raised sufficient evidence to require the trial court to instruct the jury on his defense of voluntary intoxication.[47] The test for evaluating whether sufficient evidence has been introduced to instruct the jury on the defense of voluntary intoxication is the same as the test used regarding other affirmative defenses. Voluntary intoxication instructions should be given when evidence has been introduced at trial that is adequate to raise that defense, *i.e.,* to establish a prima facie case of voluntary intoxication, as that defense is defined under our law.[48] As we have

43. 2006 OK CR 34, 142 P.3d 437.

44. *Id.* at ¶ 41, 142 P.3d at 449 (citing 12 O.S. 2001, § 2704). We noted that expert testimony that merely tells a jury what result to reach remains inadmissible and also that expert testimony is improper regarding issues that lay jurors are qualified to evaluate based upon the experiences of everyday life. *Id.* (citations omitted). The key issue remains whether the proposed expert testimony would likely "assist the trier of fact." *Id.*

45. *Id.* at ¶ 42, 142 P.3d at 449. At Malone's trial Dr. Smith was allowed to give his expert opinion that due to Malone's use of methamphetamine and Lortabs, he could not have formed a deliberate intent to kill at the time he shot Trooper Green.

46. *See id.* at ¶¶ 43–44, 142 P.3d at 450 ("Coddington raised sufficient evidence for the trial court to instruct the jury on his defense of voluntary intoxication.... We disagree with the State's position that Coddington's jury was 'erroneously instructed' on the defense of voluntary intoxication.").

47. *See id.* at ¶ 43, 142 P.3d at 450.

48. *See Jackson v. State,* 1998 OK CR 39, ¶ 65, 964 P.2d 875, 892 (per curiam) ("The test used should be no different from the test used on any other defense. When sufficient, *prima facia* [sic] evidence is presented which meets the legal criteria for the defense of voluntary intoxication, or any other defense, an instruction should be given.") In Jackson, four of the five voting judges on this Court agreed that this was the appropriate test for evaluating whether voluntary intoxication instructions should be given. *See id.* (two judges concurring in the opinion) *and* 964 P.2d at 902 (Lane, J., dissenting, joined by Strubhar, J.) ("I applaud and concur with the majority's clarification of the test to be used in determining whether an instruction on defendant's theory of defense should be given.").

The State invokes *Taylor v. State,* 2000 OK CR 6, ¶ 20, 998 P.2d 1225, 1230, in which this Court found that "an instruction on voluntary intoxication was not warranted by the evidence and it was error for the trial court to so instruct." Although evidence of drug and alcohol use was admitted in *Taylor,* the evidence presented at that trial was inadequate to establish a prima facie case that the defendant was intoxicated at the time of the crime, to the extent that he was unable to form a deliberate intent to kill. *Id.* at ¶¶ 18–20, 998 P.2d at 1230. We note that the test cited in *Taylor, i.e.,* that in order to rely upon voluntary intoxication as a defense, "the defendant must introduce sufficient evidence to raise a reasonable doubt as to his ability to form the requisite intent," *id.* at ¶ 19, 998 P.2d at 1230 (citing *Crawford v. State,* 1992 OK CR 62, ¶ 53, 840 P.2d 627, 638), which is recited just after citing *Jackson, see id.,* is the very test that was explicitly rejected in *Jackson. See Jackson,* 1998 OK CR 39, ¶¶ 63–65, 964 P.2d at 891–92. We find that the test cited in *Taylor* and *Crawford* for determining whether to instruct the jury on the voluntary intoxication defense—by evaluating whether the defendant's evidence is sufficient to "raise a reasonable doubt" about his ability to form the requisite intent—is an incorrect statement of the legal standard to be applied in this

emphasized in the past and in regard to other affirmative defenses, "[t]he evidence of the defense may come from any source and should not be weighed by the trial court. The trial court should leave the weighing of the evidence to the finders of fact, in whose judgment our system of trial by jury is based." [49]

¶ 23 We find that the evidence presented at Malone's trial adequately raised the defense of voluntary intoxication. Hence the trial court properly determined that his jury should be instructed on this defense. The evidence presented at Malone's trial—in particular, Malone's own testimony about his drug use and the effects it was having on him at the time of the shooting, as well as the testimony of Dr. Smith that Malone could not have formed the intent of malice aforethought—when looked at simply to determine if, *on its face*, it established a prima case of intoxication, certainly was sufficient to raise a voluntary intoxication defense, such that Malone was entitled to have his jury instructed on this defense.

¶ 24 The State acknowledges that the voluntary intoxication instructions provided to Malone's jury were legally incorrect. The State maintains, however, that the errors in the instructions were harmless beyond a reasonable doubt. We consider the instructions given at Malone's trial as a whole. We begin by noting that defense counsel did not raise an objection to the jury instructions given at Malone's trial.[50] Hence we review these instructions for plain error.[51]

[4] ¶ 25 Malone's jury was correctly informed that evidence had been introduced in support of intoxication as a defense to the charge of first-degree murder.[52] The next instruction, however, which purported to give the requirements for establishing an intoxication defense, was wrong. Malone's Instruction No. 38 stated as follows:

> The crime of murder in the first degree has an element the specific criminal intent of Mens Rea. A person in entitled to the defense of intoxication if that person was incapable of forming the specific criminal intent because of his intoxication.

The State concedes that this instruction "erroneously omits 'malice aforethought' as the element of first degree murder to which the voluntary intoxication defense applies."

¶ 26 The applicable uniform instruction in effect at the time, OUIJI–CR (2d) 8–36, stated as follows:

> The crime of **[Crime Charged in Information/Indictment]** has an element the **(specific criminal intent of [Specify Specific Mens Rea])/special mental element of [Specify Special Mental State]).** A person in entitled to the defense of intoxication if that person was incapable of forming the **(specific criminal intent)/(special mental element of the crime)** because of **his/her** intoxication.

Hence it is important to evaluate the instruction given in Malone's case in the context of the uniform instruction in place at the time, which itself had two obvious "typos"/grammatical errors.[53]

context. The proper legal standard to be applied in this context is the prima facie evidence standard used in this opinion.

49. *Jackson,* 1998 OK CR 39, ¶ 66, 964 P.2d at 892.

50. Just before closing arguments in the first stage of Malone's trial, the district court held a very brief conference on jury instructions. The court indicated that it had prepared the instructions, along with a verdict form. Counsel for both the State and Malone confirmed that they had examined the instructions, and both the State and defense counsel indicated that they had no objections to the proposed instructions and did not request any further instructions. The trial court also asked Malone if his attorneys had spoken with him about the instructions. Malone confirmed that he had a general awareness of the instructions and was satisfied with them.

51. *See, e.g., Norton v. State,* 2002 OK CR 10, ¶ 17, 43 P.3d 404, 409.

52. Malone's Instruction No. 37 accurately tracks OUJI–CR(2d) 8–35, which introduces the voluntary intoxication defense, and which has not changed since the adoption of the Second Edition to Oklahoma's Uniform Criminal Jury Instructions in 1996. We note that Malone's Instruction No. 37, following the language of OUJI–CR(2d) 8–35, does not distinguish between voluntary and involuntary intoxication.

53. From the time of its adoption in 1996 until the 2005 Supplement, which took effect on July

[5] ¶ 27 We begin by noting that although this Court has repeatedly announced that district courts are required to use the applicable uniform instructions, unless the trial court determines that those instructions do not accurately state the law,[54] where it is *obvious* that a uniform instruction contains a typographical error, grammatical error, or other similar mistake, the district court should correct the error in the instruction provided to the jury.[55]

¶ 28 In the current case this Court is not troubled by the missing "as" in the first sentence or the word "in" in the second sentence of Malone's Instruction No. 38. We are confident that his jury was not confused or misled by these small errors, which followed the applicable uniform instruction. The use of the word "Mens Rea" in the first sentence, however, is a much more significant error. This word should *not* have appeared in the instructions provided to Malone's jury, nor should it appear in any version of OUJI–CR 8–36 that is provided to a jury.

¶ 29 Rather, it was the duty of the trial court to use the template of OUJI–CR 8–36 to formulate the appropriate instruction in Malone's case, by filling in the specific criminal intent at issue, namely, "malice aforethought," in place of the bracketed phrase "Specify Specific Mens Rea."[56] And it was the duty of the parties, both defense counsel and the State, to assist in ensuring that this was done appropriately.

¶ 30 The following would have been a proper and legally accurate version of Instruction No. 38 in Malone's trial:

> The crime of murder in the first degree has as an element the specific criminal intent of malice aforethought. A person is entitled to the defense of voluntary intoxication if that person was incapable of forming this specific criminal intent because of his intoxication.[57]

Since "malice aforethought" is defined by our law as a deliberate intent to kill, it would also have been acceptable for the first sentence to read: "The crime of murder in the first degree has as an element the specific criminal intent of a deliberate intent to kill."[58] As the State acknowledges, however, instructing Malone's jury that "The crime of murder in the first degree has an element the specific criminal intent of Mens Rea" was incorrect, confusing, and legally nonsensical. This is a serious error, and it is not corrected or mitigated by the other intoxication instructions

28, 2005, OUJI–CR(2d) 8–36 has been missing the word ''as'' after the initial ''has,'' uses the word ''in'' for what should obviously be an ''is'' in the second sentence, and has contained references to the potentially confusing term ''special mental element.'' The 2005 Supplement added the missing ''as'' and deleted the references to ''special mental element,'' but failed to change the ''in'' to ''is,'' apparently because the drafters mistakenly believed it already said ''is.'' (The ''marked-up'' version of the new 8–36, attached to this Court's Order Adopting the 2005 Revisions to OUJI–CR(2d), has an ''is'' rather than an ''in'' in the second sentence). Hence the current version of 8–36 states:

> The crime of **[Crime Charged in Information/Indictment]** has as an element the specific criminal intent of **[Specify Specific Mens Rea].** A person in entitled to the defense of voluntary intoxication if that person was incapable of forming the specific criminal intent because of **his/her** intoxication.

OUJI–CR(2d), Supp.2005, 8–36.

54. *See, e.g., Flores v. State,* 1995 OK CR 9, ¶ 5, 896 P.2d 558, 560 (citing *Fontenot v. State,* 1994 OK CR 42, ¶ 55, 881 P.2d 69, 84).

55. It would aid this Court's review if district courts would note in the record that they are making such a correction, either by explaining the change in a transcribed hearing or by an ''as corrected'' designation on the actual paper instruction provided to the jury.

56. *See, e.g., Hogan v. State,* 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 (''It is settled law that trial courts have a duty to instruct the jury on the salient features of the law raised by the evidence with or without a request.'') (citations omitted), *cert. denied,* —— U.S. ——, 127 S.Ct. 994, 166 L.Ed.2d 751 (2007).

57. In this version this Court has added the missing ''as'' in the first sentence and replaced the ''in'' with an ''is'' in the second sentence; we have also substituted the word ''this'' for the word ''the'' before the phrase ''specific criminal intent,'' to more clearly inform the jury that ''malice aforethought'' is one kind of ''specific criminal intent.''

58. *See, e.g.,* OUJI–CR(2d) 4–62 (defining and explaining ''malice aforethought'').

provided at Malone's trial.[59]

¶ 31 In fact, some of the other intoxication instructions may have further confused Malone's jury regarding what exactly the specific mental state was that had to be overcome by intoxication, in order for Malone to prevail on his voluntary intoxication defense. Malone's Instruction No. 39 accurately tracked OUJI–CR(2d) 8–37 and informed his jury that the intoxication defense could be established "by proof of intoxication caused by drugs." [60] Malone's Instruction No. 40 likewise tracked OUJI–CR(2d) 8–38, regarding the State's burden to prove beyond a reasonable doubt that Malone possessed the specific intent at issue and was not prevented by intoxication from forming this intent.[61] Unfortunately, this instruction did *not* inform Malone's jury what specific mental state was at issue, referring again to the general phrase "specific criminal intent," rather than the particular mental state at issue in this case.

¶ 32 Finally, Malone's Instruction No. 41, the last intoxication instruction, stated as follows:

> "Drugs" are defined as substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in a human or other animal; substances other than food intended to affect the structure or any function of the body of a human or other animal; under the law, the substance methamphetamine is a drug.
>
> "Incapable of Forming Special Mental Element" is defined as the state in which one's mental powers have been overcome through intoxication, rendering it impossible to form the special state of mind known as willfully.
>
> "Incapable of Forming Specific Criminal Intent" is defined as the state in which one's mental powers have been overcome through intoxication, rendering it impossible to form a criminal intent.
>
> "Intoxication" is defined as a state in which a person is so far under the influence of an intoxicating drug that his judgment is impaired.

This instruction tracked OUJI–CR(2d) 8–39 as it existed at the time.[62] Yet, once again, it was not properly tailored to Malone's case.[63]

59. Malone's jury was correctly instructed regarding the elements of first-degree murder, including ''malice aforethought,'' which is also correctly defined. These separate instructions, however, make no reference to the legalistic phrase ''specific criminal intent,'' which is used repeatedly in the intoxication instructions. Hence even a jury that sought diligently to apply its instructions ''as a whole'' could have been left uncertain regarding the meaning of ''specific criminal intent'' and what that particular intent was supposed to be in Malone's case.

60. *See* OUJI–CR(2d) 8–37 (''The defense of intoxication can be established by proof of intoxication caused by **narcotics/drugs/(hallucinogenic substances)''**). This instruction has not been modified since the adoption of the second edition in 1996.

61. Malone's Instruction No. 40 stated as follows:

> It is the burden of the State to prove beyond a reasonable doubt that the defendant formed the specific criminal intent of the crime of murder in the first degree. If you find that the State has failed to sustain that burden, by reason of the intoxication of Ricky Ray Malone[,] then Ricky Ray Malone must be found not guilty of murder in the first degree. You may find Ricky Ray Malone guilty of murder in the second degree if the State has proved beyond a reasonable doubt each element of the crime of murder in the second degree.
>
> Except for the two missing commas (noted by brackets), this instruction accurately tracks OUJI–CR(2d) Supp.1997, 8–38, which was in effect at the time. This instruction was modified in 2005 to delete a potential reference to the term ''special mental element'' in the first sentence, which was not used in Malone's case anyway. *See* OUJI–CR(2d) Supp.2005, 8–38.

62. OUJI–CR(2d) 8–39 was not modified from the time of its adoption in 1996 until 2005. Prior to the 2005 Supplement, OUJI–CR(2d) 8–39 provided four possibilities for defining the ''special mental element'' term: ''corruptly/knowingly/willfully/maliciously.'' In 2005, the ''incapable of forming special mental element'' definition was eliminated, and the definition of ''intoxication'' was modified as follows (eliminating crossed out terms and adding the underlined terms) to ''[a] state in which a person is ~~so far~~ under the influence of an intoxicating **liquor/drug/substance** to such an extent that **his/her (passions are visibly excited)/(judgment is impaired)''.** OUJI–CR(2d), Supp.2005, 8–39.

63. The record contains no explanation of why the ''incapable of forming special mental element'' definition was included in Malone's instructions, since this term was not otherwise used in the instructions; nor does the record reveal why the ''special state of mind'' referenced in that definition is ''willfully.'' The record re-

¶ 33 Malone's counsel correctly notes that (following the version of 8–38 in effect at the time) the definition of "incapable of forming specific criminal intent" refers to intoxication that overcomes a person's mental powers and renders it impossible "to form a criminal intent." This definition is unhelpful at best and confusing/misleading at worst.[64] This Court directs that the Oklahoma Uniform Jury Instruction Committee review the current voluntary intoxication instructions and propose amendments in accord with this opinion.[65]

¶ 34 This Court does not hereby conclude that Oklahoma's uniform instructions for the voluntary intoxication defense are or were legally inaccurate, inadequate, or unconstitutional. When properly utilized, OUJI–CR(2d) 8–36 did and still does specifically inform a jury what particular criminal intent/mens rea is at stake. Hence it is legally accurate and adequate and provides due notice regarding the defendant's defense. We simply recognize that the instructions could be and should be improved, and we direct that this be done.

¶ 35 Most jurors come to their assigned task with a basic understanding of what their job will be, but individual perceptions may be confused or flawed regarding many of the specifics of jury service and the jury's role. And very few jurors are versed in the particular elements of the various crimes and defenses they may be asked to evaluate. Hence jury instructions serve a fundamental and critical role in our system of trial by jury. Jury instructions serve as the jury's job description, rule book, and mission statement. The key "institutional actors" in our criminal system—trial courts, prosecutors, defense counsel, and this Court—should all do everything reasonably possible to make the contents of these juror guidebooks as clear, readable, and legally accurate as they can possibly be. And this Court appreciates and acknowledges the work of the Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Jury Instructions for its consistent and committed efforts in assisting this Court in this regard.

[6] ¶ 36 This leaves us with the problem in the current case that Malone's jury instructions did not, by themselves, adequately or accurately inform his jury that he should prevail on his intoxication defense if he could establish that due to methamphetamine intoxication at the time of the crime, he was unable to form the required "malice aforethought" for first-degree murder, *i.e.*, if the evidence established he was unable to form a deliberate intent to kill Trooper Green.[66]

veals only that it was the trial court who prepared the instructions and that the parties did not object. Malone makes much of the improper inclusion of this definition in his instructions, particularly the reference to ''willfully.'' This Court finds, however, that this error was not significant. The phrase ''special mental element'' was not otherwise used in Malone's instructions; thus a reasonable jury reading its instructions as a whole, as it was directed to do, would have no occasion to apply this definition in Malone's case. *Cf. Norton v. State,* 2002 OK CR 10, ¶ 18, 43 P.3d 404, 409 (concluding that ''superfluous definition'' of term that ''was not enumerated as an element of the offense'' was ''harmless'').

64. The definition should reference intoxication that overcomes a person's ability to form the ''specific criminal intent'' at issue, which would be best done by actually *naming* that intent, *i.e.*, in this case, either ''malice aforethought'' or ''a deliberate intent to kill.'' Of the current five uniform instructions on this defense, only one—OUJI-CR(2d) 8–36—informs the jury what ''specific criminal intent'' is actually at issue, by directing the trial court to ''**[Specify [the] Specific Mens Rea].**'' Phrases like ''mens rea'' and ''specific criminal intent,'' when not defined in plain language, are unhelpful and may be incomprehensible to lay jurors.

65. This Court recognizes that the 2005 Supplement to the voluntary intoxication instructions cleared up some of the typos and potentially confusing aspects of these instructions, in particular, the ''special mental element'' references. Yet the instructions remain in need of further improvement. (For example, although the 2005 Supplement added the clarifying word ''voluntary'' to the phrase ''defense of [voluntary] intoxication'' in OUJI–CR(2d) 8–36, the voluntary intoxication instructions otherwise refer simply to an ''intoxication defense.'' It would be clearer to consistently refer to the ''voluntary intoxication defense,'' particularly in cases that might also involve an involuntary intoxication defense.)

66. This Court notes that Malone's Instruction No. 14, following OUJI–CR(2d) 4–63, informed his jury that ''all [ ] circumstances connected with a homicidal act'' ''may be considered'' in the determination of ''whether or not deliberate intent existed in the mind of the defendant to take a human life.'' This instruction, though

This Court concludes that the failure of Malone's jury instructions to accurately instruct his jury in this regard constitutes plain error. This was the critical question in determining whether Malone could prevail on his voluntary intoxication defense, and his jury instructions, even read as a whole, fail to adequately articulate this standard.[67]

[7] ¶ 37 Hence this Court must evaluate the effect of this instructional error and determine whether or not it was harmless beyond a reasonable doubt.[68] We recognize that such an infirmity can and often will require reversal, particularly where the defendant has requested the instructions and adequately raised the defense at issue. Nevertheless, upon a thorough review of the entire record in this case, this Court is convinced that despite the inadequacy of the jury instructions, no juror could possibly have been unaware that Malone's defense was voluntary intoxication and that he should prevail on this defense if he could establish that due to his drug-induced intoxication, he did not deliberately intend to kill Green. A review of the transcripts in this case makes readily apparent that Malone's fundamental defense—from opening statements to closing arguments of the first stage of his trial—was that his methamphetamine use, coupled with his use of Lortab, left him so intoxicated that he was unable to and did not intend to kill Trooper Green.[69] More importantly, this Court is convinced that there was no reasonable possibility that Malone's jury would have agreed with and accepted his voluntary intoxication defense, regardless of how thoroughly the jury was instructed upon it.

¶ 38 The real problem for Malone was not his jury instructions. The problem was that no reasonable juror who heard all the evidence in the first stage of his trial could possibly have concluded that he was unable to form "malice aforethought" at the time of the shooting or that he did not deliberately intend to kill Trooper Green.[70] The evidence

general, allowed Malone's jury to consider the potential impact of his alleged intoxication on the "deliberate intent" element of first-degree murder. *Cf. Fontenot v. State*, 1994 OK CR 42, ¶ 52 n. 20, 881 P.2d 69, 84 n. 20 (noting that this instruction allowed the jury to consider "all circumstances surrounding the homicidal act in determining whether [defendant] had the requisite intent to kill"). Yet this general instruction failed to require Malone's jury to consider the impact of his alleged intoxication in this way.

67. This Court recognizes that the jury's verdict, finding Malone guilty of first-degree murder, necessarily implies that his jury did, in fact, conclude that he deliberately intended to kill Trooper Green. Nevertheless, Malone's jury should have been correctly instructed regarding how his intoxication defense related to the first-degree murder charge against him.

68. The United States Supreme Court has confirmed that harmless error analysis is appropriate even in cases where jury instructions omit a required element for a crime upon which the defendant was convicted. *See Neder v. United States*, 527 U.S. 1, 4, 119 S.Ct. 1827, 1831, 144 L.Ed.2d 35 (holding that "harmless-error rule of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)," applies to failure to submit required element of "materiality" to jury); *see also id.* at 15, 119 S.Ct. at 1837 ("[T]he omission of an element is an error that is subject to harmless-error analysis . . ."). If harmless error analysis applies even when an element of a criminal offense has been omitted, it is certainly appropriate here.

69. Malone's attorney noted early in her opening statement that the case would be about "methamphetamine . . . what it does to a person, how it affects a person's life, and how it can ruin lives—not only of the person taking it, but of others." Defense counsel concluded her opening statement by telling the jury that Dr. Smith would tell them "that a person who is using methamphetamine as much as these people were using, and particularly Mr. Malone, cannot form the intent to do anything. They cannot form the intent to commit a crime." In her first-stage closing argument, defense counsel argued that Malone "was a paranoid schizophrenic when he was on that road and he was awakened by Nik Green. He could not form the intent." And she concluded her closing argument as follows:

> We would submit to you that Mr. Malone was so intoxicated on methamphetamine and Lortab that he did not and could not have physically formed the thought, whether that be a second before, an hour before, or a day before, to kill Trooper Nik Green. He did not have the ability to do that because he was smoking meth every hour on the hour, and taking 40–some Lortab a day. He could not do that. And we would request that you find in our favor.

70. In *Neder*, the Supreme Court concluded that the failure to submit the issue of "materiality" to the jury in that case was "harmless beyond a reasonable doubt," because "no jury could reasonably find that Neder's failure to report substantial amounts of income on his tax returns was not 'a material matter.'" *Id.* at 16, 119

in this case, though not uncontested, was overwhelming and clearly established that Malone knew what he was doing and deliberately chose to shoot and kill Green.[71]

¶ 39 Malone's testimony about what happened and his lack of comprehension at the time of the shooting was thoroughly impeached by the State, mainly by going through the audio contents of the Dashcam video, in addition to the physical evidence at the crime scene.[72] The prosecutor focused particularly on the theme that Malone's words and actions, both during his encounter with Green and in the days afterward, were logical and goal-oriented and did not suggest that Malone was experiencing any sort of disconnect from reality. The prosecutor cross examined Malone about the fact that he never mentioned anything to his friends about seeing things or hearing "voices" on the morning of the shooting.[73] Malone acknowledged on cross examination that he was "solely responsible for this trooper's death," and that he shot him "[t]o make sure he don't get up" and "to keep him down." Although Malone would not ultimately admit that he intended to kill Green, his own statements—on tape and afterward—as well as the two close-range shots fired purposefully into the back of Green's head, leave no reasonable doubt about Malone's intent.

¶ 40 Furthermore, although Malone presented an impressive expert on methamphetamine and its potential effects generally, Dr. Smith's case-specific testimony about Malone and his likely mental state at the time of the shooting was thoroughly and convincingly impeached by the State.[74] The State demonstrated, through cross examination, that Smith had met with Malone for at most two hours, on a single occasion, in the middle of his trial; that Dr. Smith was remarkably unquestioning when it came to accepting the credibility of Malone's statements; that he could not verify Malone's reports regarding the extent of his drug use at the time; that he did not talk to any of Malone's family members; and that Dr. Smith did not seriously consider or take into account evidence that contradicted Malone's account to him.[75]

¶ 41 In fact, Dr. Smith acknowledged that up until the preceding weekend, Malone had maintained (and Smith's expected testimony had been) that Malone had a "total blackout" about the shooting and did not remember anything, but that after meeting with Smith—who informed Malone that such memory loss "didn't make sense" in the methamphetamine context—Malone finally provided what Dr. Smith "perceived was an accurate history," *i.e.*, the story about Malone hearing voices.[76] Smith acknowledged

S.Ct. at 1837. The Court noted that the evidence of materiality in that case was "overwhelming." *Id.*

71. *Cf. Brown v. State*, 1989 OK CR 33, ¶¶ 9–10, 777 P.2d 1355, 1358 (although trial court erred in modifying first-degree manslaughter instruction, by omitting "heat of passion" element, new trial not required where "evidence clearly showed appellant had a design to effect death").

72. The State apparently made exhibit boards from the transcript of the Dashcam video, which it went through line by line with Malone on cross examination, to demonstrate that his exchange with Green was entirely logical and result-oriented. Defense counsel objected to the State's use of these demonstrative exhibits at trial, but Malone raises no challenge to this tactic on appeal.

73. In all of Malone's statements to his friends after the shooting, he consistently depicted the incident as one in which he knowingly and intentionally killed the highway patrol trooper who was attempting to arrest him. In fact, the allegation of hearing "voices" around the time of the shooting was not even raised by Malone or his counsel until after the State had rested its case—after Malone met with Dr. Smith over the weekend break.

74. Dr. Smith acknowledged that he was neither a psychiatrist nor a psychologist and that he had not administered any tests on Malone. At one point Smith testified, "[M]y only role was to interview him to determine whether he had a methamphetamine addiction problem."

75. When cross examined about the fact that Malone talked to four different people about what happened and consistently described the events as him purposefully killing the trooper, with no mention of "voices" or seeing nonexistent threats, Smith simply maintained that "there was a lot of conflict in the record" and that he "really [had] no opinion on that." Smith testified that his evaluation of Malone was based upon the Dashcam video and Malone's statements to him.

76. Smith acknowledged that Malone lied to him about not remembering what had happened. Smith testified, however, that Malone told him that the reason he had not previously informed

that there was nothing in the Dashcam exchanges between Malone and Green that was illogical or that suggested Malone was delusional. Smith was also forced to acknowledge, when presented with the extensive evidence about Malone's efforts to avoid being caught, that all of these actions were examples of "logical, goal-oriented behaviors," and that all of them "speak against brain impairment." [77]

¶ 42 Although Malone presented a bare prima facie case of intoxication and was able to produce an expert who would say that he didn't think Malone "could have formed the intent to commit murder in the first degree," Malone's testimony and that of his expert were thoroughly and convincingly impeached on the issue of whether Malone could have and did deliberately intend to kill Trooper Green. While Malone may well have experienced "methamphetamine psychosis" at some point, such as when he "saw Big Foot," no reasonable juror could have concluded, based upon the entire record in this case, that he was in such a state at the time he shot Green or that he did not deliberately intend to kill Green. Consequently, although we find plain error in the trial court's failure to properly instruct Malone's jury on his voluntary intoxication defense, we do not hesitate to conclude that this error was harmless beyond a reasonable doubt in this case.

¶ 43 In Proposition II, Malone raises a claim of first-stage prosecutorial misconduct, asserting that the State's cross examination of Malone was too long and unnecessarily adversarial and that the cross examination of Dr. Smith was overly argumentative.[78] We evaluate such claims to determine whether the challenged actions so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts cannot be relied upon.[79]

[8] ¶ 44 This Court does not accept Malone's assertion that the prosecutor's tough questioning of these crucial defense witnesses was improper. As noted above, the testimony of these two witnesses contained much that was worthy of pointed and thorough impeachment.[80] In fact, Malone acknowledges that the prosecutor was entitled to challenge these witnesses on the topics at issue; Malone just thinks he should have been a bit gentler and less repetitive in doing so.[81] This Court continues to insist that the State treat all witnesses, including a testifying defendant, with dignity and respect and that the trial court has a continuing duty to maintain the dignity and decorum of the courtroom during trial.[82] This does not mean that a testifying defendant must be treated with kid gloves. Malone recognizes that "defense counsel utterly failed to object

his current counsel about what he remembered was that a former attorney had told him not to do so.

77. Smith used the phrases "logical, goal-oriented behaviors" that "speak against brain impairment" like a mantra in his testimony on cross examination.

78. Malone asserts that the "lengthy cross-examination of the defendant was excessively argumentative, resembling nothing so much as an interrogation under hot lamps," and that the conduct "was hardly any better during the cross-examination of defense expert David Smith."

79. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974) (consider whether challenged conduct made trial "so fundamentally unfair as to deny [defendant] due process"); *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) ("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.' ") (quoting *DeChristoforo*).

80. For example, Malone challenges the questioning of Dr. Smith about whether he could verify Malone's account of the amount of Lortab he was taking. This was proper cross examination.

81. Malone's brief states: "That is not to say that these were not all legitimate lines of inquiry, but it was not necessary or appropriate for Mr. Schulte to continue to badger Appellant about things he either expressly denied, explained, or stated that he could not remember."

82. *Cf. Mitchell v. State,* 2006 OK CR 20, ¶ 101, 136 P.3d 671, 710 ("We conclude that the manner in which the prosecutor presented his closing argument—yelling and pointing at the defendant as he addressed him directly—was highly improper and potentially prejudicial."); *see id.* at ¶ 102, 136 P.3d at 710 ("Trial judges are responsible for protecting and uholding the honor, dignity, and integrity of the proceedings held before them.").

to most of" the now-cited questioning-probably because it was largely unobjectionable. While particular questions and comments may have been inappropriate, and the cross examination of Malone could have been more efficient, we do not hesitate to conclude that the challenged cross examinations did not constitute prosecutorial misconduct.[83] Malone's trial was certainly not rendered unfair thereby.[84]

¶ 45 In Proposition III, Malone raises various challenges relating to the presentation of victim impact evidence in his case. He asserts: (1) that victim impact evidence, in general, is unconstitutional and has no appropriate role in Oklahoma's capital sentencing scheme; (2) that allowing victim impact witnesses to give a recommendation regarding the defendant's punishment violates the Eighth Amendment; (3) that the sentencing recommendation delivered by Mrs. Green, the victim's wife, exceeded the scope of a permissible sentencing recommendation and was highly prejudicial; (4) that testimony quoting birthday cards from the victim to his mother and sister was improper and inadmissible hearsay; and (5) that overall, the victim impact testimony at Malone's trial was too long and overly emotional. We take up these issues in turn.

¶ 46 Malone's general challenge to victim impact evidence has been repeatedly raised by defendants and repeatedly rejected by this Court.[85] We rely upon the Supreme Court's decision in *Payne v. Tennessee*,[86] along with the precedents of this Court following *Payne*, all of which recognize the limited but appropriate role of victim impact evidence within the second stage of a capital trial.[87] Hence we again reject this challenge to victim impact evidence as a whole.

[9] ¶ 47 This Court has likewise previously addressed and rejected Malone's challenge to allowing victim impact witnesses to recommend a particular sentence to the jury.[88] In *DeRosa v. State*, we recently acknowledged that "although the Supreme Court had earlier forbidden such evidence, the decision in *Payne* left open the question of the validity of such evidence."[89] Malone strongly urges

83. Malone states that a number of the prosecutor's questions were not "necessary." Necessity, standing alone, is not the measure of misconduct.

84. And defense counsel's failure to object to the cited exchanges did not prejudice Malone.

85. *See, e.g., Cargle v. State,* 1995 OK CR 77, ¶ 75 n. 15, 909 P.2d 806, 828 n. 15, *habeas relief granted on other grounds in Cargle v. Mullin,* 317 F.3d 1196 (10th Cir.2003); *see also DeRosa v. State,* 2004 OK CR 19, ¶ 83 n. 142, 89 P.3d 1124, 1153 n. 142 (citing cases).

86. 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

87. *See, e.g., Cargle,* 1995 OK CR 77, ¶¶ 68–71, 909 P.2d at 826–27 (discussing appropriate role of victim impact evidence within Oklahoma's capital sentencing scheme).

88. *See, e.g., Ledbetter v. State,* 1997 OK CR 5, ¶¶ 26–29, 933 P.2d 880, 890–91 (recognizing Oklahoma's legislative authorization of victim sentencing recommendations and finding no general constitutional ban to such testimony); *Conover v. State,* 1997 OK CR 6, ¶ 62, 933 P.2d 904, 920 (victim sentencing recommendations do not violate the Eighth Amendment).

89. *DeRosa,* 2004 OK CR 19, ¶ 81, 89 P.3d at 1151 (citing *Payne,* 501 U.S. at 830 n. 2, 111 S.Ct. at 2611 n. 2); *see also Murphy v. State,* 2002 OK CR 24, ¶ 41, 47 P.3d 876, 885. Indeed, *Payne* specifically stated that its holding was "limited to" the admissibility of "evidence and argument relating to the victim and the impact of the victim's death on the victim's family." 501 U.S. at 830 n. 2, 111 S.Ct. at 2611 n. 2. The *Payne* opinion noted that *Booth v. Maryland* "also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment," but that such evidence was not presented in *Payne. Id.; see Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Hence the Payne Court declined to comment upon the constitutionality of allowing victim impact witnesses to recommend a particular sentence for a defendant. In Justice O'Connor's concurring opinion, joined by Justices White and Kennedy, she emphasized that the Court's *Payne* decision did not address the constitutionality of second-stage "opinions of the victim's family about the crime, the defendant, and the appropriate sentence." 501 U.S. at 833, 111 S.Ct. at 2612 (O'Connor, J., concurring). Although earlier cases from this Court indicated that *Payne* had "implicitly overruled" *Booth* on this issue, *see Conover,* 1997 OK CR 6, ¶ 60, 933 P.2d at 920; *see also Ledbetter,* 1997 OK CR 5, ¶ 27, 933 P.2d at 890–91, more recent authority from this Court has clarified our understanding of the Supreme Court's position on this issue.

that this Court adopt a "more appropriate" response to the failure of *Payne* to address this question and that we join the numerous other jurisdictions that have ruled (post-*Payne*) that a victim family member's sentence recommendation is always irrelevant to a capital sentencing.[90] We note that defense counsel failed to raise this issue in the district court; and we decline to revisit this issue in a case in which it was waived.[91]

¶ 48 We consider, instead, the specific victim impact evidence presented in Malone's case. On December 1, 2004, Malone's counsel filed a Motion to Produce Victim Impact Statement, as well as a Motion for In Cam-

90. Malone also argues that the specific statutory language at issue, *citing* 22 O.S.2001, §§ 984, 984.1, does not actually allow victims and family members to ask a jury for a particular sentence, but rather only allows them to express their "opinion" to the court, at formal sentencing, about the sentence already "recommended" by the defendant's jury. This same view was expressed by Judge Lane (and joined by Judge Strubhar) in some of this Court's earliest victim impact cases. *See, e.g., Ledbetter,* 1997 OK CR 5, 933 P.2d at 902–03 (Lane, J., concurring in result); *Conover,* 1997 OK CR 6, 933 P.2d at 923–25 (Lane, J., concurring in result). This view, however, has never been able to gain the support of a majority on this Court; and a recent amendment to § 984.1(A) confirms this Court's consistent interpretation that the language of this provision *is* intended to apply to victim impact evidence presented to a capital sentencing jury. *See* 22 O.S.Supp.2006, § 984.1(A) (adding language noting that cross examination of victim impact witnesses must be permitted "in a proceeding before a jury . . .") (effective November 1, 2006).

91. Malone emphasizes, correctly, that even though our legislature has approved this kind of evidence, this Court always retains the obligation to evaluate the constitutionality of statutes, when they are properly challenged in a criminal case. I personally agree with Malone and would vote to hold that sentencing recommendations from victim family members in capital cases always violate Due Process and the Eighth Amendment, because they are irrelevant to the jury's sentencing determination.

Since the U.S. Supreme Court's 1976 decision in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), it has been a guiding principle of death penalty law in this country that the decision about whether or not a person convicted of first-degree murder should be sentenced to death should be based upon an individualized consideration of the defendant's crime and his or her character/background. Justice Stewart's plurality opinion in *Woodson* asserted: "[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304, 96 S.Ct. at 2991 (internal citation omitted). This has been a bedrock principle of capital jurisprudence in this country ever since. *See, e.g., Lockett v. Ohio,* 438 U.S. 586, 603–604, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973 (1978) (quoting and relying upon *Woodson* to conclude that capital defendant must be allowed to present virtually any evidence relating to crime committed and defendant's character/background); *see also Roberts v. Louisiana,* 431 U.S. 633, 636, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977) (per curiam) (quoting *Woodson*); *Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982) (same); *Enmund v. Florida,* 458 U.S. 782, 798, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982) (same); *Blystone v. Pennsylvania,* 494 U.S. 299, 304, 110 S.Ct. 1078, 1082, 108 L.Ed.2d 255 (1990) (same); *Tuilaepa v. California,* 512 U.S. 967, 976, 114 S.Ct. 2630, 2637, 129 L.Ed.2d 750 (1994) (same).

Yet the recommendations of grieving victim's family members about whether or not *they* want the defendant to be sentenced to death is totally irrelevant to the jury's individualized evaluation of the defendant and the crime. And such sentencing recommendations are also not justified by the logic of *Payne,* which allows the jury to find out some basic information about the victim whose life was taken. Such recommendations do reveal something about the feelings and moral sensibilities of the persons left behind; yet this information is simply not relevant to the jury's capital sentencing decision in our system. Furthermore, in my view, this evidence is simply *too* powerful—bringing with it the very real potential of "swamping" all the other factors and considerations that a capital jury is required to evaluate within its sentencing determination.

It should be noted that this view, *i.e.,* that capital sentencing recommendations by victim family members remain unconstitutional post-*Payne,* is also the view of the Tenth Circuit Court of Appeals and the highest courts of numerous States that allow the death penalty, as well as other appellate courts that have examined the issue. *See, e.g., Hain v. Gibson,* 287 F.3d 1224, 1238–39 (10th Cir.2002); *Fryer v. State,* 68 S.W.3d 628, 630 (Tex.Crim.App.2002) *Ware v. State,* 360 Md. 650, 759 A.2d 764, 783 (2000); *People v. Harris,* 182 Ill.2d 114, 230 Ill.Dec. 957, 695 N.E.2d 447, 467 (1998); *Farina v. State,* 680 So.2d 392, 399 (Fla.1996); *State v. Muhammad,* 145 N.J. 23, 678 A.2d 164, 172 (1996); *State v. Taylor,* 669 So.2d 364, 370 (La.1996); *State v. Pirtle,* 127 Wash.2d 628, 904 P.2d 245, 269 (1995); *State v. Hoffman,* 123 Idaho 638, 851 P.2d 934, 941 (1993); *Ex parte McWilliams,* 640 So.2d 1015, 1017 (Ala.1993); *Parker v. Bowersox,* 188 F.3d 923, 931 (8th Cir.1999).

era Hearing Regarding Victim Impact Statement, asking that the State be required to produce the victim impact evidence that it intended to use at trial and that the district court hold the required hearing (citing *Cargle*) regarding the admissibility of this evidence. On April 4, 2005, the district court issued an order resolving most of Malone's pending motions, within which the court noted that the State had "agreed to produce victim impact statements, if necessary prior to such statements being introduced at trial." This same order also summarily granted Malone's motion for an in camera hearing on the victim impact statements.

¶ 49 The record in this case does not establish that the State ever produced its victim impact evidence, however, defense counsel conceded at oral argument that this evidence was provided to defense counsel prior to trial. The record also contains no indication that a hearing was ever held before the district court about this evidence; and the State conceded at oral argument that it could not find any evidence that a *Cargle* victim-impact hearing was held in this case.[92] In fact, the transcribed hearings and trial record in this case contain no substantive discussion of this evidence prior to its introduction at Malone's trial—and no objection from defense counsel in this regard.[93] In addition, this Court notes that the second-stage instructions provided to Malone's jury failed to include the required uniform instruction informing the jury about the role of victim impact evidence in the jury's sentencing determination.[94] Yet defense counsel failed to raise any objection to any aspect of the victim impact testimony that was introduced at trial or to the failure of the jury instructions to address this issue.[95] Hence we review only for plain error.[96]

¶ 50 The State presented three victim impact witnesses at Malone's trial: Nita Bowles (the victim's mother), Karen Huyssoon (the victim's sister), and Linda Green (the victim's wife).[97] After asking Bowles a few questions, to establish that she was the mother of two children, Nikky Green and Karen Huyssoon, the prosecutor essentially turned the stage over to Bowles, who provided a narrative that covers over thirteen transcript pages, without interruption by either question or objection.[98] Following a brief recess, the

92. *See Cargle,* 1995 OK CR 77, ¶ 76, 909 P.2d at 828 ("[T]he State should file a Notice of Intent to Produce Victim Impact Evidence, detailing the evidence sought to be introduced; and an in-camera hearing should be held by the Trial Court to determine the admissibility of the evidence.").

93. The curious silence of the district court record is continued at the appellate level, since Malone's appellate counsel fails to note this incomplete procedural history in his current appeal.

94. *See* OUJI–CR(2d) 9–45. This instruction was promulgated in *Cargle,* wherein this Court ordered that it was "to be used in all future capital murder trials where victim impact evidence has been introduced." *See Cargle,* 1995 OK CR 77, ¶ 77, 909 P.2d at 828–29. Once again, however, this failure is not noted or challenged within Malone's brief on direct appeal.

95. In Proposition X, Malone asserts that defense counsel's failure to object to the now-challenged victim impact evidence constituted ineffective assistance of trial counsel.

96. *Wackerly v. State,* 2000 OK CR 15, ¶ 59, 12 P.3d 1, 18.

97. The State concluded its second-stage case by presenting these three witnesses.

98. Bowles provided a basic history of her son's life, from the perspective of his mom. She began with her marriage to his father and how five years later they were "wonderfully blessed" with a healthy son. She described their life and parenting style, how careful they were not to overindulge Green, how dependable and loving he was even as a young child, how he grew up and graduated from college and got married, and how he asked her to be there when each of his daughters was born. Bowles testified about how tender and gentle Green was and how much he helped both her and her daughter when they went through divorces and when each of them went through a health crisis. She testified about how Green struggled in the Oklahoma Highway Patrol Academy, how he asked for her prayers to get him through, how he would check on her regularly, since she lived alone, and how he would tell her, "I love you mama. I'm still your little boy." She also read from a birthday card he had given her. (The introduction of this card into evidence is addressed *infra.*) Bowles testified about how she was most proud of her son when he got baptized and was later ordained a deacon and a minister. She testified about how she got him some special t-shirts that he had requested for Christmas, how they were planning to get together later that week for a family celebration, how she wanted to call him on Christmas Day but didn't, and how she left the t-shirts

State then presented the testimony of Karen Huyssoon. After some basic questions to establish that she was the sister of Green and was married and had three children of her own, the prosecutor again simply let this witness present a narrative.[99] Huyssoon's victim impact testimony covers approximately six transcript pages.[100]

¶ 51 The final witness for the State was Linda Green, wife of Nik Green and mother of their three daughters.[101] She testified that the family lived next to the First Baptist Church in Devol, Oklahoma, because her husband had been the youth pastor and associate pastor there. She testified about what she overheard from their bedroom on the morning of December 26, 2003, when someone came to their door, and about her husband coming to kiss her good-bye, already in uniform, and telling her he was "going to go 10–8" early that day. She then described her mounting anxiety that morning, as she began to get information that something might be wrong and was eventually informed, by the dispatcher, that her husband was dead. After describing her reaction to this horrifying news, Mrs. Green suggested that the easiest way for her to provide her victim impact testimony was to read from her prepared statement.

¶ 52 In this prepared statement, which covers over nine transcript pages, Mrs. Green described how she felt like she "prayed Nik into [her] life," since she prayed that God would send her "a Godly man, a good husband, and a loving dad," and her husband was all of these things and more.[102] She

at the funeral home after his death. She testified about the misery and numbness she experienced when she was told of her son's death and how depressed and isolated she felt afterward. She described her efforts to cope with the loss, for the sake of her grandchildren, through working in the schools. She described where Green was buried and seeing one of the white doves that was released at his service. She described spending time with Green's daughters and talking with them about what he was like. Bowles also described having a dream, in which she is out with her son at the time of the shooting and she is begging ''that person,'' just like Green did, ''Please, don't. Please don't.'' At the end of her testimony, Bowles apologized that she had ''kind of messed this up,'' apparently by going off her scripted victim impact statement. The prosecutor then asked her if she had a request of the jury regarding punishment, and she answered, ''I request the death penalty.'' There was no cross examination.

99. The prosecutor directed Huyssoon: ''Just tell them what you'd like them to know about him.''

100. Huyssoon began by reading from a birthday card her brother had given her. (The propriety of this evidence is discussed *infra*.) She described how blessed she was to have such a wonderful big brother, who would have done anything in the world for her. She described their childhood and how they spent almost all their free time together, playing games, working on the farm, sometimes fighting but never tattling (because neither could stand to see the other punished), and how Green would scare her and she would pester him. She described how they supported each other when their father died unexpectedly, how Green was her ''rock through a terrible divorce and custody battle,'' how he brought her through surgery and looked after her three children, how she was there when his children were born, and how he stood beside her when she got married. Huyssoon testified how much she and Green enjoyed sharing stories about their children and how they wanted to live close to each other, so their children could grow up together. She testified that when their mother eventually died, she'd be alone. She described having nightmares about the morning Green was killed, reliving his final ten minutes every night, and how she wished she could have traded places with him. She also described the reactions of Green's wife, their mother, and herself to the news of his death and how it scared her children. And she described the look in the eyes of Green's three daughters on the day they went in to view their daddy's body. Huyssoon testified that she had trouble sleeping and eating for the first six months, ''because it didn't seem fair'' that Green could no longer eat, and how helpless and awful she continued to feel when others in the family cried. She testified that words could not express how much she missed her brother and that she wished she could tell him ''what an awesome example he was to me and how much I loved him.'' She noted that Christmas would never be the same, that a huge part of herself died when her brother died, and that nothing could ever fill that void. Finally, after a question from the prosecutor about whether she would like to request a specific sentence, Huyssoon concluded by stating, ''I would like to request the death penalty.'' There were no objections and no cross examination.

101. Mrs. Green testified that at the time of the trial, over seventeen months after the murder, their daughters were 10, 7, and 3 years old.

102. Mrs. Green described how six months after she prayed for such a man, she and Nik Green began dating, and she knew ''he was the one that

described being in denial about his death for months and about how hard it was to find herself raising three children alone. She described experiencing deep, gripping, physical pain, which she attributed to "broken heart syndrome," and having difficulty breathing and feeling her heart racing, with no apparent physical cause. She also described the emotional struggles of "living single in a double world" and always feeling "lost and out of place." Mrs. Green testified that she had lost her best friend and soulmate, but that the hardest thing was "to press on with our daughters." She testified that their oldest child, Cortni, suffered from depression and severe headaches and had become afraid of the dark; that their middle daughter, Brooklyn, suffered from abdominal pain, for which a physical cause couldn't be found, and that she wouldn't talk about her feelings and fears to anyone; and that their youngest child, Morgyn, frequently had nightmares and pronounced separation anxiety.

¶ 53 Mrs. Green testified that prayer had always been important in the family, but that now their prayers "reflect pain and their longing for their dad." She testified about how she wanted to lift the spirits of the family toward the future, but that they were "caught in the present, our lives revolving around what we've lost, and, quite frankly, who is responsible for putting us in this situation." She testified that birthdays, anniversaries, and holidays had become "horrible experiences that we just have to endure and just hope that we can get the day over with as soon as possible." She added that "the most painful thought" she could conjure up was of the future weddings of her three daughters, with "no proud father to walk them down the aisle."

¶ 54 Mrs. Green then concluded her testimony with the following recommendation of punishment for Malone:

> I know, as you all do here today, that Nik begged for his life that day. He asked for mercy. There was no mercy shown. Here on earth our government and those in positions of authority, including law enforcement, are given a devine [sic] charge outlined in Romans 13 of the Holy Bible. Nik took that charge very seriously every time he went 10–8. Perhaps that is why he was honored to be named Trooper of the Year two of the six years he proudly served the citizens of the State of Oklahoma.
>
> Also found in that same chapter of the book of Romans is our charge as citizens to do our duties and obligations, including those as jurors in a court of law, as a devine [sic] undertaking in upholding and enforcing the laws of our country. We know that Nik was murdered beyond a reasonable doubt. It is for this reason today, ladies and gentlemen, that I beseech you to show no mercy to him. I beg for you to give him the maximum penalty under the laws of the State of Oklahoma, which is the death penalty, and leave the business of mercy for Malone in the hands of the Heavenly Father, where it belongs.

Defense counsel asked only a few questions, in an attempt to establish that since her husband's death, Mrs. Green had spoken at schools and other organizations about the dangers of methamphetamine and how it can ruin lives.

¶ 55 The State acknowledges that this Court has consistently held that victim sentencing recommendations should be limited to "a straight-forward, concise response to a question asking what the recommendation is" or "a short statement of recommendation in a

God had provided.'' She described their shared Christian backgrounds and values, how they waited to get married until Nik had graduated from college, and how their first daughter was born two years later. She testified about her husband's calling to law enforcement, how he began as a reserve deputy and ultimately realized his dream of graduating from the Oklahoma Highway Patrol Academy, just before the birth of their second child. Mrs. Green also testified about her husband's other calling, to serve the Lord as a minister, and how they got increasingly involved in the First Baptist Church in Devol, particularly in youth ministry. She described the birth of their third child, who was ''daddy's sugar,'' and how close she was to her daddy. Mrs. Green described how her husband was surrounded by women in their family and how he loved taking care of all of them. She testified that her husband had a ''servant's heart,'' which was why he was happy to help the young lady who came to their door that December morning.

written statement, without amplification." [103] The State does not attempt to argue that Mrs. Green's sentencing recommendation can pass this test—or even that it is not plain error. Rather, the State argues that any error in this regard was harmless, in light of the totality of the evidence presented at Malone's trial.

¶ 56 We find clear plain error in this regard. We do not blame or criticize this grieving, widowed spouse for her statements or question the sincerity or appropriateness of the feelings she expressed. Nevertheless, the parties who are repeat players in our criminal justice system—the trial court, the prosecutor, and defense counsel—all had an obligation to ensure that her victim impact testimony was appropriately limited, in the manner required by this Court.[104] We are particularly troubled by Mrs. Green's sentencing recommendation, which so obviously violates the simple rules established by this Court.

[10] ¶ 57 Mrs. Green literally "beseeches" and "begs" the jury to sentence Malone to death. She focuses on the idea of mercy, notes that her husband begged for mercy, but was given none, and implores the jury to show "no mercy" to Malone and "leave the business of mercy for Malone in the hands of the Heavenly Father, where it belongs." Furthermore, and particularly troubling to this Court, Mrs. Green invokes the Bible and suggests that jurors have a religious obligation, beyond civic duty, in their work as jurors, in a way that seems to suggest that giving a death sentence may be part of the jury's "divine undertaking in upholding and enforcing the laws of our country." This invocation of religious belief and obligation in the context of a capital sentencing recommendation is totally inappropriate.[105] We find that the trial court committed plain error in allowing this extended and unduly prejudicial sentencing recommendation to be presented at Malone's trial.[106]

[11, 12] ¶ 58 Malone also challenges the victim impact testimony of Nita Bowles and Karen Huyssoon, in which they describe and read from birthday cards that Green sent them prior to his death.[107] The record does

103. *Dodd v. State,* 2004 OK CR 31, ¶ 101, 100 P.3d 1017, 1046 (quoting *Welch v. State,* 2000 OK CR 8, ¶ 46, 2 P.3d 356, 374); *Ledbetter,* 1997 OK CR 5, ¶ 31, 933 P.2d at 891 (''Any opinion as to the recommended sentence should be given as a straightforward, concise response to a question asking what the recommendation is; or a short statement of recommendation in a written statement, without amplification.''); *see also Conover,* 1997 OK CR 6, ¶ 70, 933 P.2d at 921 (recommendation of sentence ''should be limited to a simple statement of the recommended sentence without amplification'').

104. This Court noted in *Ledbetter* that trial courts ''must use extraordinary care'' in evaluating victim sentencing recommendations and that ''while theoretically admissible, this evidence will be viewed by this Court with a heightened degree of scrutiny as we apply the probative-value-versus-prejudicial-effect analysis.'' 1997 OK CR 5, ¶ 31, 933 P.2d at 891; *see also Conover,* 1997 OK CR 6, ¶ 69, 933 P.2d at 921 (noting ''heightened degree of scrutiny'' for such recommendations).

105. *See Washington v. State,* 1999 OK CR 22, ¶ 61 & n. 13, 989 P.2d 960, 978 & n. 13 (finding that letter from father of murder victim, which stated ''Our Bible say's [sic] eye for eye'' and requested that the jury ''[p]lease just accomlish [sic] the right Godly justice,'' ''exceeded the bounds of permissible victim impact evidence given the overamplified request for the death penalty and the biblical references''); *see also Long v. State,* 1994 OK CR 60, ¶ 48, 883 P.2d 167, 177 (''[I]mplying God is on the side of a death sentence is an intolerable self-serving perversion of Christian faith as well as the criminal law of this State.''). This Court has recognized that it is not improper in a victim impact statement to address ''the victim's religious preferences, so long as this evidence does not dominate the statement.'' *Ledbetter,* 1997 OK CR 5, ¶ 25, 933 P.2d at 890.

106. We address whether this error can be considered ''harmless'' or not *infra*.

107. Bowles testified that in her card Green wrote, ''Thank you, Mama, for raising me the way you did. Now I know, since I'm raising my three girls, and I appreciate it.'' She testified that he also wrote, ''Thank you for sharing Jesus Christ with me, and making me do what was right.'' Huyssoon described the front of her card, which contained a picture of a little boy and girl and the writing, ''Love to my sister on her birthday,'' as well as the inside of the card, which said, ''Many of my happiest memories have been made side by side with you.'' Huyssoon testified that Green added the following handwritten note to her card:

> We've had a lot of fun and good times together. I have a special feeling of closeness to you, although I don't see or talk to you each day. I occasionally thought of you when you were

not indicate whether the cards were displayed to the jury; they were not admitted into evidence. In *Washington v. State,*[108] this Court ruled that a letter from a victim to her parents, which was read by the district attorney, did not constitute proper victim impact evidence, "as it was written prior to the murder and does not address how [the victim's] murder affected her family." [109] This Court acknowledged that the letter "arguably is evidence about some personal characteristics of the victim," since it showed some aspects of the kind of person she was.[110] Nevertheless, we held that "the letter is hearsay for which no exception applies and its admission was error." [111] The State argues that Green's letters were admissible to demonstrate the victim's "state of mind," but fails to explain why this is relevant to Malone's capital sentencing.[112]

[13] ¶ 59 We find that the rule of *Washington* applies and that the victim's mother and sister should not have been allowed to read from their cards from the victim. Because defense counsel failed to object to this evidence at trial, we review it only for plain error. The applicability of *Washington* is clear; hence we find that the admission of this evidence was plain error. We note that if this evidence was the only improper victim impact evidence presented, we would find that this error was harmless. Yet these cards were but a small portion of the extensive victim impact evidence presented at Malone's trial.

¶ 60 Hence Malone also asserts that, overall, the victim impact testimony presented in his case was too long and overly emotional. We note that the victim impact testimony in this case comprises nearly thirty-six transcript pages, of which twenty-eight pages were in the form of uninterrupted narrative. While this Court declines to adopt specific rules governing the length of such testimony, we note that we have previously held that such statements should not be "lengthy" and that they should contain only a "quick glimpse" of the life that has been extinguished.[113] Victim impact statements were never intended to be—and should not be allowed to become—eulogies, which summarize the life history of the victim and describe all of his or her best qualities. The Supreme Court's decision in *Payne,* as well as this Court's subsequent decisions recognizing the legitimacy of victim impact evidence in capital sentencing proceedings in Oklahoma, are all based upon the idea that the State should be allowed to present some basic evidence about the victim and his or her admirable characteristics, in order to remind the jury that the victim is more than just a corpse and to "balance" the array of mitigating evidence that a capital defendant can present about his or her background and admirable qualities.[114]

> little as a pest [indicating], but I certainly did and continue to truly love you. I look back on all of it and love that I was and I am blessed [indicating] to have you as my little sis. Happy birthday. Brother (Nik)

108. 1999 OK CR 22, 989 P.2d 960.

109. *Id.* at ¶ 60, 989 P.2d at 977–78.

110. *Id.* at ¶ 60, 989 P.2d at 978.

111. *Id.* (citations omitted); *see also Ledbetter,* 1997 OK CR 5, ¶ 48, 933 P.2d at 895 (noting that hearsay statements outside of recognized exceptions are "just as inadmissible in a victim impact statement as [they are] in any other form of evidence presented at trial") (citing *Conover*).

112. And this Court finds that the letters were not admissible on this basis.

113. *See Ledbetter,* 1997 OK CR 5, ¶ 24, 933 P.2d at 890 (cautioning that victim impact evidence "should not be lengthy"); *Cargle,* 1995 OK CR 77, ¶ 75, 909 P.2d at 828 (evidence about victim's "personal characteristics should constitute a 'quick' glimpse" of the victim's life) (citing *Payne,* 501 U.S. at 830, 111 S.Ct. at 2611).

114. In *Cargle,* this Court, relying upon the rationale and language of *Payne,* summarized the legitimate purpose of victim impact evidence as follows:

> [V]ictim impact evidence is permissible because "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

1995 OK CR 77, ¶ 69, 909 P.2d at 826 (quoting *Payne,* 501 U.S. at 825, 111 S.Ct. at 2608); *see also Conover,* 1997 OK CR 6, ¶ 64, 933 P.2d at 920 (finding that improper victim impact evi-

¶ 61 We conclude that the testimony of the victim impact witnesses in this case goes well beyond the limitations established by this Court for appropriate victim impact evidence. In *Cargle,* this Court's seminal case on victim impact evidence, we noted that Oklahoma's statutes on victim impact evidence clearly limit this evidence to the " 'financial, emotional, psychological, and physical effects,' or impact, of the crime itself on the victim's survivors; as well as some personal characteristics of the victim." [115] We noted that testimony about the personal characteristics of the victim "should constitute a 'quick' glimpse" of the life that the defendant extinguished and that this evidence "should be limited to showing how the victim's death is affecting or might affect the victim's survivors, and why the victim should not have been killed." [116] Our *Cargle* decision warned that victim impact testimony focused mainly upon the emotional impact of a victim's death "runs a much greater risk of [being] questioned on appeal." [117] And while there have been some adjustments to this Court's understanding of what can qualify as victim impact evidence,[118] the basic rules that govern and limit this evidence have not changed in the over eleven years since *Cargle.*

[14, 15] ¶ 62 We conclude that the overall victim impact evidence presented in this case was indeed "too much"—both too long and too emotional. This Court recognizes that the determination of how much victim impact testimony to allow and when that testimony is "too emotional" is a subjective determination, which necessarily rests, in the first instance, with the sound discretion of the trial court. Hence the admission of victim impact testimony—both what is admitted and how much is admitted—is necessarily reviewed by this Court only for an abuse of that discretion. Of course when the record suggests that the district court failed to *exercise* its discretion over the admission of this evidence—by failing to review and evaluate it prior to its presentation at trial—our review is less deferential. In the current case, where the record is silent regarding any pre-admission trial court oversight, we find that the trial court abused its discretion by failing to constrain the amount and content of the victim impact evidence presented at Malone's trial.

[16] ¶ 63 Although the record does not establish that the State provided adequate notice regarding its victim impact evidence, defense counsel acknowledged at oral argument that Malone's trial counsel was provided this evidence prior to trial.[119] Yet providing notice does not exhaust the State's responsibility in this regard. As officers of the Court, prosecutors are duty-bound to assist and guide their victim witnesses, to

dence "weigh[ed] the scales too far in favor of the prosecution").

115. *Cargle,* 1995 OK CR 77, ¶ 74, 909 P.2d at 828 (quoting 22 O.S.Supp.1993, § 984).

116. *Id.* at ¶ 75, 909 P.2d at 828 (internal citations omitted). This Court summarized:

> Mitigating evidence offers the factfinder a glimpse of why a defendant is unique and deserves to live; victim impact evidence should be restricted to those unique characteristics which define the individual who has died, the contemporaneous and prospective circumstances surrounding that death, and how those circumstances have financially, emotionally, psychologically, and physically impacted on members of the victim's immediate family.

Id. at ¶ 75, 909 P.2d at 828.

117. *Id.* at ¶ 81, 909 P.2d at 830. We added: "The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." *Id.*

118. For example, in *Cargle,* this Court found that testimony about what the victim was like as a child, *i.e.,* that he was "a cute child at age four," did not fit *any* of the criteria for permissible victim impact evidence, and in particular, that it did not show how the death "financially, emotionally, psychologically, [or] physically impacted" on the victim's family. *Id.* at ¶ 80, 909 P.2d at 829. Yet in *Conover,* 1997 OK CR 6, ¶ 66, 933 P.2d at 921, this Court characterized comments about what the victim was like as a baby and growing up as relevant to "the emotional impact of the victim's death," though we still cautioned against the due process risks of such testimony.

119. In *Ledbetter,* this Court noted that "victim impact evidence must ordinarily be turned over to the opposing party at least ten (10) days before trial," and found that stating simply that a witness would testify regarding "the impact [the victim's] death has had on him and his family" was insufficient notice. 1997 OK CR 5, ¶¶ 42–46, 933 P.2d at 894.

ensure that their testimony is in accord with the binding precedents of this Court. In the current case, the failure of the trial court and defense counsel to take any action to ensure that this testimony was properly limited is particularly troubling. This Court finds plain error in the failure of the trial court to hold a hearing on the admissibility of the State's victim impact evidence; and we likewise find that defense counsel's performance was inadequate for failing to challenge this evidence.[120]

[17] ¶ 64 If any of the key players (the State, defense counsel, or the trial court) had properly done their job regarding this evidence, it is entirely possible that the victim impact testimony presented at Malone's trial could have been appropriately tailored, such that it would all have been admissible. As it is, this Court is left with the task of attempting to determine whether the result of this joint failure to properly screen and constrain this evidence, particularly the highly prejudicial sentencing recommendation of Mrs. Green, is nevertheless harmless beyond a reasonable doubt. We recall that Malone's jury was given no instruction on how it was to evaluate and consider the victim impact evidence, within the context of its overall sentencing decision. And we conclude that this failure likewise constituted plain error, since the required uniform instruction regarding this evidence is well established and clear.[121]

[18] ¶ 65 Nevertheless, this Court acknowledges that despite the serious and plain nature of the numerous errors committed in connection with the victim impact evidence in this case, the determination of whether these errors were harmless or not is no easy task. During the second stage of Malone's case, the State incorporated its evidence from the first stage and presented a very substantial amount of additional evidence in support of the aggravators alleged, which we summarize herein. The State presented evidence that two years before the murder of Green, in late December of 2001, Malone assaulted Glendale Reyes, a Mexican man with cerebral palsy, by hitting him on the head from behind with a beer bottle, rendering him unconscious for ten to fifteen minutes.[122] When Reyes's girlfriend, Rachael Maldonado, attempted to push Malone away from Reyes, Malone punched her in the face. When the police arrived, they encountered Malone, whose right-hand knuckles were scraped and bloody, arrested him for assault with a dangerous weapon, and found marijuana and Lortab in his coat pocket. Malone was later charged with possession of the drugs, but not assault, since no one at the party wanted to press charges.

¶ 66 The State also presented evidence of a May 1998 incident, when Duncan police officers were called to the home of Malone and his then–wife, Beth Malone, on a domestic disturbance.[123] When officers arrived they observed an altercation between Malone and Beth in the entryway area of the home. As officers approached they ordered Malone, who was very angry, to let go of his wife, whom he was holding tightly by either her arm or her hair. Malone did not respond to these commands, and it took a while for the officers to free Beth from his grasp.[124] It also took officers a while to arrest and handcuff Malone. No charges were filed, however, because Malone's wife did not want him charged.

¶ 67 The State presented further evidence that in early September of 2003, Malone and

120. We address the issue of prejudice from inadequate performance within Proposition X *infra*.

121. *See Cargle,* 1995 OK CR 77, ¶ 77, 909 P.2d at 828–29 (promulgating uniform instruction now known as OUJI–CR(2d) 9–45 and ordering that it "be used in all future capital murder trials where victim impact evidence has been introduced"). Here again, we hold accountable all of the parties who could have prevented this error, *i.e.,* the State, defense counsel, and the trial court.

122. Malone and numerous Mexican people were attending an after-hours party at the Altus home of a Mexican man, who, along with many of his guests, had asked Malone to leave, but Malone refused to go.

123. An affidavit from Beth Malone is attached to Malone's Application for an Evidentiary Hearing in this case and is discussed *infra* in Proposition X.

124. One of the officers testified that Malone had blood on the knuckles of his right hand.

one other firefighter, Scott Smith, were working the overnight shift at the Duncan Fire Department. When Smith woke up the next morning, he discovered a clear baggie sitting on top of the microwave, which contained a powdered substance and drug-related paraphernalia. The baggie was not there the previous night. Smith reported this to his supervisor; and the substance was field tested and came back positive for methamphetamine. When confronted Malone initially denied the baggie was his, saying it probably belonged to another firefighter, Dewayne Kaspereit.[125] Malone later acknowledged, however, that if tested, the torch lighter and other items in the baggie would likely have his fingerprints on them, since he had been "curious" about them and had handled them. Malone was ultimately charged with possession of CDS and fired from the fire department. Shortly thereafter Malone was also fired from his job as a paramedic with the ambulance service.[126]

¶ 68 The State also presented evidence that on December 15, 2003, Malone was stopped for speeding by Highway Patrol Trooper Darin Carman.[127] During the stop Carman discovered a loaded, short-barreled 12 gauge shotgun and a loaded .22 rifle.[128] Carman advised Malone that the barrel on the shotgun was too short and read and discussed with Malone the Oklahoma statute dealing with carrying concealed firearms in a vehicle. Malone was polite and responsive throughout the exchange, and Carman let him go without citing him for any of the weapons-related violations. Malone was stopped again around midnight, on the night of December 21 into December 22, 2003 (just four days before the murder), by Duncan Police Officer Brian Attaway, this time for a defective brake light. During this stop other officers arrived with a trained drug dog, who alerted on the driver's side of Malone's truck. Malone and his passengers, J.C. and Jaime Rosser, were removed from the truck, and a search of the truck revealed a loaded .22 revolver and a stun gun in the driver's door pocket, a loaded semi-automatic Berretta .22 pistol under the front seat, a loaded .22 rifle on the back seat, and also an unloaded 12 gauge shotgun, night vision goggles, and numerous items associated with clandestine methamphetamine manufacture, including a substantial amount of ephedrine.[129]

¶ 69 The State also presented evidence about two early attempts by Malone to escape from jail and other bad behavior during the ten-month period following his arrest on December 28, 2003. The evidence presented suggests that Malone had a handcuff key with him when he was arrested and that he brought it into the Stephens County Jail by swallowing it. The evidence suggests that Malone later retrieved this handcuff key from his own feces and that on the day of Green's funeral, he faked a heart problem and was taken to Duncan Regional Hospital. While at the hospital Stephens County Sheriff Jimmie Bruner observed Malone fidgeting with something under the sheet that was covering him, but when he was confronted, Malone put the item in his mouth and swallowed it. An x-ray revealed what appeared to be a handcuff key in Malone's stomach. Malone was apparently able to retrieve this handcuff key a second time, by again going through his own feces.[130] And on January 5, 2004, as Malone was being checked prior to a

125. An affidavit from Kaspereit is attached to Malone's Application for an Evidentiary Hearing in this case and is discussed *infra* in Proposition X.

126. After losing both of his jobs, Malone apparently began using methamphetamine even more heavily and devoted all his efforts to manufacturing and distributing this drug.

127. A videotape of this stop, taken from inside Carman's vehicle, was admitted into evidence.

128. Carman noted that the shotgun had "no butt.... So basically it was just like a pistol and it was a pump shotgun."

129. As noted earlier, Malone was charged with attempted manufacture of methamphetamine, possession of precursor ephedrine, and with possessing three loaded and accessible firearms. He was released on a $50,000 bond.

130. Evidence was presented that Malone would defecate in the corner of his cell, even though he had a working toilet in his new cell, and that he did so directly underneath a videocamera intended to monitor his cell, *i.e.,* in an area outside the view of this camera.

scheduled transport to Cotton County Jail, Officer Tim King discovered the handcuff key in Malone's mouth and was able to recover it before Malone could swallow it again.[131]

¶ 70 Finally, the State presented evidence about a series of October 7, 2004 incidents at the Comanche County Detention Center, to which Malone had been transferred. Officers first noted that Malone was throwing paper out of the "bean hole" of his cell door and that water from his plugged toilet was flowing out underneath the door. Three officers went to his cell, restrained Malone by placing him in handcuffs and leg shackles, and ordered him to sit on a chair outside the cell. As the two other officers began clearing and cleaning the cell, Sergeant Andy Moon stood guard over Malone. Malone twice stood up, after being told to stay seated, and then began coming toward Moon, who sprayed him in the face with "OC," a chemical intended to impair a person's vision and breathing. Malone paused, but then "shook it off" and continued advancing toward Moon, at which time the other officers intervened and were able to take Malone down and get him under control.[132]

¶ 71 Later that day Benjamen Lehew, jail administrator for the detention center, met with Malone, who was very upset about the privileges Lehew had taken away from him. Malone threatened Lehew, who then ordered that Malone be placed in leg irons and handcuffs. Shortly thereafter Lehew was advised that Malone had handed the leg irons and handcuffs back to a jail officer, after escaping from them and damaging them to the point that they were no longer usable.[133] The State also presented evidence that during his initial ten months in jail, Malone managed to fashion various crude weapons, which were discovered in his cell.[134]

¶ 72 It is probably not surprising that Malone's counsel basically conceded that the three aggravating circumstances alleged by the State were met in this case; and we find that this concession was a reasonable strategy.[135] That Malone murdered Green in order to "avoid arrest or prosecution" for manufacturing methamphetamine and that Green was, at the time, a "peace officer . . . killed while in performance of official duty" were both clearly established by the evidence presented in the first stage of Malone's trial. Furthermore, if there was any doubt about whether Malone was a "continuing threat to society" after the first stage, there really wasn't much doubt that his jury would reach this conclusion after hearing the State's evidence in the second stage. It seems unlikely that Malone's jury had much trouble deciding that the mitigating evidence presented at trial (which was quite limited and not particularly powerful) was substantially outweighed by the aggravating circumstances of his case.[136]

[19] ¶ 73 Thus the current case presents this Court with the dilemma of essentially excusing the commission of serious and obvious errors in the presentation of victim impact evidence in a capital trial, by ruling that all of these errors were nevertheless "harmless," or reversing the death sentence of a defendant who has committed a heinous and undoubtedly "death-eligible" crime, by sending his case back for a second capital sentencing. This Court emphasizes, as we have in the past, that although a defendant's crime may make him eligible to receive the death

131. King's testimony in this regard is further discussed *infra* in Proposition V.

132. Moon testified that the OC used on Malone had "325,000 burning units," but that as a result of the incident with Malone, the detention facility ordered a stronger OC, containing "2 million burning units," which is what it currently uses.

133. Lehew's testimony regarding these incidents is further discussed *infra* in Proposition V.

134. These potential weapons included shanks made from strung-together shards of tile, a plastic spoon, and a shaving can.

135. Malone does not challenge the sufficiency of the evidence to support the three aggravators found by the jury in his case.

136. This Court notes that Malone has raised a substantial claim on appeal that his counsel was ineffective for failing to investigate and present a significant amount of available and potentially powerful mitigating evidence on his behalf. This claim is addressed *infra* in Proposition X.

penalty, a jury is never obligated to sentence a defendant to death,[137] and that a single juror has the power to prevent a death sentence in a given case.[138]

¶ 74 We conclude that while Malone might have had only a slim chance of avoiding a death sentence in his original trial, the religious and duty-based plea of the victim's wife that Malone be shown "no mercy" squelched whatever slim chance he had.[139] The numerous other errors committed in connection with the victim impact evidence in this case—including the failure to hold the required hearing on this evidence, the failure to use the required instruction, the presentation of inadmissible hearsay through cards from the victim, and being both too extensive and too focused upon the emotional impact of Green's death—further strengthen this Court's determination that we cannot make a "harmless beyond a reasonable doubt" finding in the current case.[140] This Court notes that the prosecutor's final, second-stage closing argument—referring back to the family member requests for the death penalty, urging jurors to feel sympathy for these victims, who were counting on the jury to give the death penalty, and arguing that anything less than a death sentence would be "a travesty"—further enhanced the potential prejudice from Mrs. Green's impassioned plea and the other improper victim impact evidence in this case.[141]

[20] ¶ 75 We take no joy in reversing the death sentence in this case, but find that it is our duty to do so. It is the province of the jury, not this Court, to determine whether a death-eligible defendant should actually be sentenced to death; and we conclude that a new jury, which has been properly instructed and before which the State's victim impact evidence has been properly circumscribed, should make that determination in the current case.[142]

¶ 76 Even though we have determined that we must reverse Malone's death sentence, we address his other propositions—both because some of these other claims further support our decision that his death sentence must be reversed and to resolve these issues in aid of his resentencing. In Proposition IV, Malone maintains that the "avoid arrest" and "peace officer victim" aggravating circumstances are "duplicative," thereby unconstitutionally skewing the capital sentencing process in his trial.[143] Malone acknowledges that the Tenth Circuit Court of Appeals case upon which he relies, *i.e.*, *United States v. McCullah*,[144] has subsequently been "clarified,"

137. Malone's jury was properly instructed, in accord with OUJI–CR(2d) 4–80, which states: "Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life," with or without the possibility of parole.

138. In Oklahoma, if a single juror refuses to agree to a death sentence, the defendant must be sentenced to life or life without parole by the trial court, even if all eleven of the remaining jurors agree that the defendant should be sentenced to death. *See* 21 O.S.2001, § 701.11.

139. *See Washington,* 1999 OK CR 22, ¶ 62, 989 P.2d at 978–79 (insisting that sentencing recommendations "should be concise statements of the recommendation without amplification and reference to a higher power" and warning that "[d]eviating from these rules allows reversible error to creep in"); *id.* at ¶ 64, 989 P.2d at 979–80 (reversing death sentence and modifying to life without parole based upon improper victim impact evidence, including overamplified and religious request for death penalty, ineffective assistance, and prosecutorial misconduct).

140. *See Ledbetter,* 1997 OK CR 5, ¶ 84–86 933 P.2d at 902 (remanding for new capital sentencing based upon admission of improper victim impact evidence, "as we cannot say the introduction of the evidence in this particular case was harmless beyond a reasonable doubt"); *Conover,* 1997 OK CR 6, ¶ 80, 933 P.2d at 923 (remanding for new capital sentencing based, in part, upon "improperly admitted victim impact evidence").

141. *See* discussion of prosecutor's second-stage closing argument in Proposition XI *infra.*

142. *Cf. Mitchell,* 2006 OK CR 20, ¶ 110, 136 P.3d at 712 ("Although a capital jury certainly could choose to sentence [the defendant] to death even after a properly conducted resentencing, ... we find that an actual jury, not this Court, should make this call.").

143. This claim is often (though strangely) characterized, by parties and courts alike, as a claim that the cited aggravators are "duplicitous." Yet this challenge is about duplication, not deceit.

144. *See United States v. McCullah,* 76 F.3d 1087, 1111 (10th Cir.1996) (finding that "double counting of aggravating factors, especially in a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sen-

such that the accepted test for impermissibly duplicative aggravating circumstances "is not whether certain evidence is relevant to both aggravators, but rather, whether one aggravating circumstance 'necessarily subsumes' the other." [145]

[21] ¶ 77 This Court has taken a similar approach to claims of impermissible "double counting," by evaluating not whether the separate aggravating circumstances can be established by reliance upon the same evidence, but rather whether the separate aggravating circumstances focus upon different aspects of the defendant's crime or character.[146] This Court recognizes that the same evidence was relied upon to support the "avoid arrest" and "peace officer victim" aggravating circumstances in Malone's case. Yet these two aggravators focus upon different *aspects* of the crime at issue. The avoid arrest aggravator focuses upon the reason *why* the victim was killed, based upon the idea that it is particularly wrongful to kill another person in an attempt to avoid being arrested or prosecuted for some other crime; while the "peace officer victim" aggravator focuses upon *who* was killed, based upon the idea that it is particularly wrongful to kill an on-duty law enforcement officer. While these aggravating circumstances will often be supported by the same or overlapping evidence, they are based upon different aspects of a defendant's crime. Thus they are not unconstitutionally duplicative and do not skew the capital weighing process. This claim is rejected accordingly.

[22] ¶ 78 In Proposition V, Malone challenges the admission of testimony from two law enforcement officers about whether he is a "security risk," claiming that this testimony was (1) improper expert opinion testimony, (2) irrelevant to his trial, and (3) unduly prejudicial to the jury's sentencing verdict.

¶ 79 Tim King testified that he was the Undersheriff for Cotton County and that he had been Undersheriff for ten years. King testified that as Undersheriff, he had the responsibility of running the Cotton County Jail and that he was used to dealing with inmates. King also testified that on January 5, 2004, he went to the Stephens County Jail to pick up Malone and bring him back to Cotton County. King was preparing to transport Malone, by checking him thoroughly, when King discovered that Malone had a handcuff key in his mouth.[147] King and another transporting officer had to wrestle Malone to the ground, and King choked Malone until he passed out and they were able to retrieve the key. At the end of his testimony, King testified that he evaluated people for security risk, and when asked for his evaluation of Malone, King testified, over objection, that he considered Malone "high risk."

¶ 80 Benjamin Lehew testified that he was the jail administrator for Comanche County, that he had been in this position for two years, and that for the preceding eighteen years, he had been chief of security for the Oklahoma Department of Corrections. Lehew testified about how he was called back to

tence will be imposed arbitrarily and thus, unconstitutionally'').

145. *See Cooks v. Ward,* 165 F.3d 1283, 1289 (10th Cir.1998) (quoting *McCullah,* 76 F.3d at 1111). We note that Malone's brief effectively concedes that the challenged aggravators are not duplicative under this test, when it states as follows: ''It is certainly possible for the murder to avoid arrest aggravator to apply even when the victim was not a peace officer, . . . just as it is at least theoretically possible for a peace officer to be murdered in the performance of his or her duties for a purpose other than avoiding arrest.''

146. *See, e.g., Wood v. State,* 1998 OK CR 19, ¶ 51, 959 P.2d 1, 14 (''[B]ecause each aggravator covers a different aspect of Appellant's criminal history, there is no overlapping of the aggravating circumstances.''); *Cannon v. State,* 1998 OK CR 28, ¶ 57, 961 P.2d 838, 853 (''Because these aggravators address different aspects of Appellant's conduct and one can be found without necessarily finding the other[ ], there is no double counting of aggravating factors . . . .''); *see also Smith v. State,* 1991 OK CR 100, ¶ 35, 819 P.2d 270, 278 (noting that where same evidence ''is used to establish multiple aggravating circumstances referring to the same aspect of a defendant or his crime, . . . only one of the duplicated circumstances should be weighed against whatever mitigating factors the jury may consider'') (citing cases).

147. The transporting officers apparently knew about the prior handcuff key incident at the hospital, and they did a thorough body cavity search in preparation for Malone's transport.

the jail on October 7, 2004, because Malone was "basically out of control." [148] Lehew described meeting with Malone, who was upset about the privileges Lehew had taken away from him; and Malone essentially threatened Lehew, saying "he wasn't playing any more; he didn't care about anything, and he was going to go to OSP," meaning the Oklahoma State Penitentiary. Lehew testified that he told one of the sergeants at the jail to place Malone in leg irons and handcuffs, but that he was soon after advised that Malone had "handed the leg irons and handcuffs back," after escaping from them and damaging them to the point that they were no longer usable.[149] When asked for his evaluation of Malone as a security risk, Lehew responded, "He's a very high-risk inmate." [150]

¶ 81 In Oklahoma, lay opinion testimony must be rationally based upon the witness's perception, helpful to the jury, and not based upon "scientific, technical or other specialized knowledge." [151] Expert opinion testimony, on the other hand, is based on "scientific, technical, or other specialized knowledge" and can be provided only by a witness who is "qualified as an expert," in the field at issue, "by knowledge, skill, experience, training, or education." [152]

[23] ¶ 82 This Court finds that the security risk evaluations offered by both King and Lehew were proper expert opinion testimony.[153] These evaluations were based not merely upon personal interaction with Malone, but on the specialized knowledge and extensive experience that both men possess in the field of jail administration and security.[154] Evaluating the potential security risk of individual inmates is a natural and proper part of expertise in this field. Hence the determination by both officers that Malone was a "high" or "very high" security risk was proper expert opinion testimony. And although being a "security risk" and being a "continuing threat of violence" are not equivalent or co-extensive concepts, this security risk testimony was certainly helpful and relevant to the jury's determination on the continuing threat aggravator.[155] This Court further finds that the challenged testimony was not unfairly prejudicial and that it was properly admitted during the second stage of Malone's trial.

¶ 83 In Proposition VI, Malone asserts that Oklahoma's "continuing threat" aggravating circumstance is unconstitutionally vague and overbroad, both on its face and as applied by this Court, because it does not sufficiently narrow the class of persons eligible for the

148. Malone's behavior on October 7, 2004, was summarized *supra* in Proposition III.

149. Lehew testified that in his 23 years of experience, he had never seen anyone else tear up a set of cuffs or leg irons in this way.

150. Defense counsel did not object to this testimony.

151. 12 O.S.Supp.2002, § 2701.

152. 12 O.S.Supp.2002, § 2702. Expert opinion testimony is only admissible if it will "assist the trier of fact to understand the evidence or determine a fact in issue." *Id.*

153. *But see Littlejohn v. State,* 2004 OK CR 6, ¶¶ 34–35, 85 P.3d 287, 299 (characterizing as "lay opinion testimony" the testimony of a witness who had investigated multiple complaints filed against the defendant—for violent, assaultive, and dangerous behavior—that the defendant was "dangerous even in a prison setting," because this conclusion was partially based upon some personal interactions with, *i.e.,* perceptions of, the defendant). Even though King and Lehew also testified as fact witnesses, regarding one or more encounters they personally had with Malone, their risk evaluation testimony appears to have been based primarily upon their substantial experience in evaluating inmates for "security risk." Their testimony was not and did not purport to be "scientific," however; hence it was not subject to the requirements of *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

154. While the State acknowledges that the security assessment of Malone by Lehew was offered as expert opinion testimony, the State argues that the assessment by King was merely lay opinion testimony, since King testified only about one particular experience he had with Malone. This Court disagrees and finds that King neither stated nor implied that his risk assessment of Malone was based entirely on his one interaction with Malone. King was apparently well aware of the prior incident with Malone, which was why he was looking so thoroughly for the handcuff key.

155. *See Littlejohn,* 2004 OK CR 6, ¶ 35, 85 P.3d at 299 (testimony that defendant was "dangerous even in a prison setting" was relevant to prove continuing threat aggravator).

death penalty from among all persons convicted of first-degree murder. This Court has previously and repeatedly rejected these challenges to this aggravator.[156] We decline to revisit the issue here.[157]

¶ 84 In Proposition VII, Malone challenges numerous items of evidence and areas of testimony admitted during the second stage of his trial to support the continuing threat aggravator. Malone failed to object to any of this evidence at trial; hence we review only for plain error.[158] We find no plain error. As defense counsel acknowledged at trial, the State's second-stage case presented a picture of Malone as a man whose life was spiraling out of control due to his increasing drug abuse, loss of lawful employment, involvement in methamphetamine production and related criminal activity, and his determination not to be apprehended for his crimes, resorting to violence as needed. All of this evidence, along with his actions while incarcerated after the murder, was certainly relevant to the jury's determination of whether Malone posed a "continuing threat" of future violence. Malone's complaints about the referenced evidence relate to the weight to be afforded this evidence, not its admissibility. Hence this claim is rejected entirely.

¶ 85 In Proposition VIII, Malone challenges the admission into evidence of a framed portrait of Nik Green, dressed in his highway patrol uniform. This picture was admitted during the second stage, under the authority of 12 O.S.Supp.2003, § 2403, which provides that an "appropriate photograph of the victim while still alive shall be admissible evidence . . . to show the general appearance and condition of the victim while alive." [159] Malone maintains that such evidence is patently irrelevant and unfairly prejudicial and that Oklahoma's revised statute allowing it is unconstitutional. Malone acknowledges that this Court has recently rejected the challenge he raises.[160] We decline to revisit this issue here.

[24] ¶ 86 In *Payne v. Tennessee,*[161] the United States Supreme Court ruled that it was not necessarily unconstitutional, in the context of the second stage of a capital trial, to allow the State to put on victim impact evidence to provide the jury a "quick glimpse" of the life of the victim, in order to balance out the vast array of mitigating evidence that the defendant is constitutionally entitled to present.[162] This Court notes that a capital defendant is allowed to appear before the jury in "cleaned up" fashion—calm, well-groomed, and dressed in appropriate courtroom attire—usually looking quite different than he or she did at the time of the crime.[163] We find that in capital cases, in

156. *See, e.g., Walker v. State,* 1994 OK CR 66, ¶ 66, 887 P.2d 301, 320 (rejecting vagueness and overbreadth challenges to continuing threat aggravator, as well as challenges to its application); *Malone v. State,* 1994 OK CR 43, ¶ 27, 876 P.2d 707, 715–16 (listing cases rejecting constitutional challenges to continuing threat aggravator); *VanWoundenberg v. State,* 1986 OK CR 81, ¶ 25, 720 P.2d 328, 336–37 (finding aggravator to be ''specific and readily understandable'' and not requiring further definition). The United States Supreme Court has likewise recognized that ''the likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty.'' *See Barefoot v. Estelle,* 463 U.S. 880, 896, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983).

157. We likewise decline to address Malone's derivative (and waived) challenge to Oklahoma's uniform jury instructions regarding this same aggravator.

158. *See Dunkle v. State,* 2006 OK CR 29, ¶ 41, 139 P.3d 228, 242.

159. *See* 12 O.S.Supp.2003, § 2403.

160. *See Hogan v. State,* 2006 OK CR 19, ¶¶ 62–64, 139 P.3d 907, 930–31; *see also Marquez–Burrola,* 2007 OK CR 14, ¶¶ 30–31, 157 P.3d 749, 760 (addressing constitutional challenge to amended § 2403 and noting that its constitutionality does not depend upon the political motives of the legislators who voted for it).

161. 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

162. *Id.* at 822, 111 S.Ct. at 2607; *see also id.* at 832, 111 S.Ct. at 2612 (O'Connor, J., concurring) (" 'Murder is the ultimate act of depersonalization.' It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about that person. The Constitution does not preclude a State from deciding to give some of that back.'') (internal citation omitted).

163. The prosecutor pointed out this phenomenon during his second-stage closing argument, when he stated as follows: ''The individual you're setting on has a very dark, cold side. Nik Green saw that side. You've seen him at his very best.

particular, it is constitutional to allow the sentencing jury an actual "quick glimpse" of the person who later became the victim in the case—before he or she was reduced to the corpse shown in crime scene photographs—through the admission of an "appropriate photograph of the victim while still alive."

¶ 87 In Proposition IX, Malone challenges Oklahoma's uniform jury instruction defining "mitigating circumstances," which was included in the second-stage jury instructions used at his trial.[164] Malone asserts that this instruction unconstitutionally limits consideration of evidence that may support a sentence less than death, by excluding consideration of evidence about such things as the defendant's previous law-abiding lifestyle, loving family, and heroic deeds.[165] This Court finds that Oklahoma's uniform instruction defining "mitigating circumstances" is broad and open-ended. It specifically notes that "the determination of what circumstances are mitigating" is up to the jury "to resolve under the facts and circumstances of this case" and that individual jurors do not have to agree upon this determination.[166] We have previously rejected comparable challenges to the constitutionality of this aggravator.[167] We see no reason to depart from these authorities.

¶ 88 In Proposition X, Malone alleges that he received ineffective assistance of counsel in both stages of his trial. In order to establish such a claim, Malone must demonstrate that the performance of his counsel was deficient and unreasonable and that he was prejudiced thereby.[168] We take up his challenges to the two stages of his trial separately.

A. First–Stage Ineffective Assistance

¶ 89 Regarding the first stage, Malone asserts that his counsel was ineffective for (1) failing to object to improper cross examination by the prosecutor; (2) introducing otherwise inadmissible evidence of prior bad acts during Malone's direct testimony; (3) failing to have Dr. Smith actually meet with Malone until midway through the first stage; and (4) failing to object to the voluntary intoxication jury instructions. In order to establish prejudice in these first-stage claims, Malone must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [169]

[25] ¶ 90 Malone's allegation regarding improper cross examination is resolved within Proposition II. Since the cross examinations were largely unobjectionable, defense counsel's failure to object was not deficient performance, nor was Malone prejudiced thereby. Regarding Malone's complaint that his counsel opened the door to otherwise inadmissible testimony (in the first stage) about a domestic incident with his wife and a fight he got into at a party, the record suggests that this strategy may have been reasonable, and we are convinced that Malone was not prejudiced thereby.[170] There is *not*

This is the best—best face he can put on for a two-week period. Jailers and others saw the other side of him."

164. *See* OUJI–CR(2d) 4–78 ("Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame.").

165. Malone did not preserve this claim at trial, however, hence we review it only for plain error.

166. *See* OUJI–CR(2d) 4–78 ("[U]nanimous agreement of jurors concerning mitigating circumstances is not required.")

167. *See, e.g. Williams v. State,* 2001 OK CR 9, ¶¶ 108–09, 22 P.3d 702, 727–28; *Cummings v. State,* 1998 OK CR 45, ¶ 58, 968 P.2d 821, 838; *Knighton v. State,* 1996 OK CR 2, ¶¶ 74–76, 912 P.2d 878, 895–96.

168. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Williams v. Taylor,* 529 U.S. 362, 390–91, 120 S.Ct. 1495, 1511–12, 146 L.Ed.2d 389 (2000).

169. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. And a "reasonable probability" in this context "is a probability sufficient to undermine confidence in the outcome." *Id.*

170. Although Malone complains that his counsel "opened the door" on this issue, he does not cite anywhere in the record that the State took advantage of this action. The State suggests that defense counsel's strategy was to establish that Malone had previously submitted to authorities when he was arrested, to support Malone's asser-

a reasonable probability that had this evidence been omitted, Malone's jury would have failed to convict him of first-degree murder. The evidence of his guilt was simply overwhelming.

[26] ¶ 91 Malone characterizes his second claim as a "lack of preparation" allegation; yet the only tenable example of ineffective assistance in this regard is defense counsel's failure to meet with Malone's expert witness, Dr. Smith, until midway through the first stage of his trial.[171] This Court does not hesitate to conclude that it is unreasonable and deficient performance for attorneys who are defending a case in which the only plausible defense to first-degree murder involves drug use that impaired the defendant's mental processes—where the fact that the defendant killed the victim is established by overwhelming evidence—to fail to arrange a meeting between the defendant and his chosen expert until the defendant's murder trial is well underway. This certainly does not exemplify diligent trial preparation; and the resulting mid-trial switch of defense theory made the State's task of discrediting Malone's expert witness that much easier.[172]

¶ 92 Once again, however, Malone cannot show prejudice, since he cannot demonstrate a reasonable probability that his jury would have rejected the murder charge against him if he had met with Smith earlier. Malone argues that if his attorneys "had not waited until the middle of trial to have their client evaluated by their expert, the true facts of Appellant's memory of events would have come out much sooner."[173] Yet the "true facts" of Malone's memory did come out at trial—just as Malone's memory of what occurred came out the day of the murder, when he accurately described to his friends what happened and what he did. In the current case, it would not have mattered how defense counsel attempted to "contextualize" Malone's mental state. The State's evidence that Malone willfully, knowingly, and deliberately shot Trooper Green, with the intent to kill him, was simply too compelling. Hence even though counsel's failure to arrange a timely (pre-trial) meeting between Malone and his intended expert made impeachment of this witness that much easier for the State, the *result* of the first stage of Malone's trial was not affected thereby. Malone would still have been convicted of the first-degree murder of Green.

¶ 93 Regarding the voluntary intoxication jury instructions, this Court has thoroughly addressed this issue in Proposition I; and the failure of defense counsel to ensure that Malone's jury was accurately and compre-

tion that he would have submitted to Trooper Green if he had realized Green was a law enforcement officer. This later exchange between defense counsel and Malone supports this argument:

> Q. Had you known it was a highway patrol trooper what would you have done?
> A. I would have submitted.
> Q. Which you did every other time you were confronted with law enforcement.
> A. Yes.

The fact that Malone's *testimony* was unreasonable and unbelievable does not mean that his counsel's attempt to develop a broader case theory around this testimony was unreasonable.

171. Malone also notes, as an example of inadequate preparation, that he prevailed on his change of venue motion because of the failure of his counsel to provide the State with a timely copy of this defense expert's report. *See* note 1 *supra*. Yet Malone can hardly claim he was prejudiced by any incompetence in this regard—whether of his counsel or his expert—because it resulted in the granting of his change of venue motion, which was presumably to his benefit.

172. As Malone acknowledges, however, the trial court did not penalize him for this mid-trial shift in theory. In fact, the trial court granted Malone's request that his jury be instructed upon both voluntary intoxication and insanity—based upon Smith's testimony that methamphetamine intoxication is akin to paranoid schizophrenia—even though Malone had given no notice that he would present an insanity defense. The court's generosity in this regard was wise and prudent.

173. Malone contends that the "true facts" are that he has basic memory of what happened, but that he was essentially insane due to "amphetamine psychosis"; hence he was not perceiving reality accurately. Malone maintains that if he had met with his expert sooner, his attorneys would have earlier learned that he was *lying* to them about his lack of memory; hence they could have better pursued an insanity theory (by securing more experts, arguing one coherent theory at trial, *etc.*). This Court has grave doubts about whether a defendant can ever establish ineffective assistance based upon defense counsel's failure to more timely discover that the defendant is lying to that same counsel, *i.e.*, that the defendant is lying to his or her own attorney(s).

hensibly instructed on his theory of defense, *i.e.*, drug-induced intoxication, does suggest deficient and unreasonable performance in this regard. Nevertheless, just as we concluded in Proposition I that the instructional errors in this regard were harmless beyond a reasonable doubt, we likewise conclude that Malone could not have been prejudiced thereby.

B. Second–Stage Ineffective Assistance

¶ 94 Regarding the second stage of his trial, Malone initially argues that his counsel was ineffective in relation to three claims developed elsewhere in his brief, *i.e.*, failing to object to improper victim impact evidence (Proposition III), a live photograph of the victim (Proposition VIII), and the State's improper second-stage closing argument (Proposition XI). This Court fully addressed Malone's victim impact challenges in Proposition III. Based upon this analysis, we further conclude that defense counsel's performance in regard to the victim impact evidence presented in this case was both deficient and unreasonable and that Malone was prejudiced thereby. Just as we could not confidently conclude that the presentation of this improper victim impact evidence, particularly Mrs. Green's sentencing plea, was harmless, we find that the inclusion of this evidence does undermine our confidence in the death penalty verdict in this case. Regarding the live photograph, our rejection of Malone's Proposition VIII claim compels our rejection of this derivative claim. And regarding the State's final closing argument, we will address Malone's ineffective assistance claim after addressing this argument in Proposition XI.

¶ 95 Malone also raises three independent second-stage ineffective assistance claims: (1) failure to "marshal the evidence" with a strong closing argument; (2) failure to utilize available expert testimony to counter the State's "continuing threat" evidence; and (3) failure to adequately investigate and present available mitigating evidence. On July 10, 2006, Malone filed an Application for Evidentiary Hearing on Sixth Amendment Claims, seeking an evidentiary hearing and the opportunity to supplement the record with new evidence in support of his second and third claims herein. We have reviewed this Application and the attached affidavits.

¶ 96 Malone challenges numerous aspects of defense counsel's second-stage closing argument and suggests various ways it could have been better. He notes that defense counsel began by conceding the aggravators.[174] In fact, defense counsel also began his opening statement in this stage of the trial by conceding the applicability of at least some of the aggravators.[175] This Court finds counsel's strategic decision not to contest the "avoid arrest" and "peace officer victim" ag-

174. After acknowledging the trial court, the prosecutor, and the jury, defense counsel began:

> This is the last time that anyone will speak for Ricky Malone. In essence, I am the last voice on his behalf, which is, quite frankly, a pretty heavy burden to bear.
>
> I'm going to come to you and ask you, unlike Mr. Schulte, to consider something less than death. You have already, by your verdict on Tuesday, in—found that my client has committed murder and that the murder was premeditated.
>
> And let's just cut to the chase: With those aggravating circumstances there's no question—I mean, your verdict said that he killed a highway patrolman in the performance of his duty. That is a given. I'm not going to stand here and argue that that aggravator isn't present. I'm not going to stand here and argue that the second one of murder to prevent arrest or prosecution isn't present. Of course it is. There isn't any question. You could check that now.
>
> But there's more to this case than that. There is more to this case than just the fact that there are at least two—I mean, the third aggravator—what does it matter in the greater scheme of things so far as the legal ramifications go?

175. Defense counsel began his second-stage opening statement as follows:

> Ladies and gentlemen of the jury, this—this phase of the case is obviously the hardest. The issue is what kind of penalty you're going to assess against Rick Malone.
>
> Obviously, you have, by your verdict, found that he is guilty. Obviously, the aggravating circumstances that are necessary to assess the death penalty by your verdict have been—have been found. So the only issue in this case is Ricky Malone and the only issue is what kind of punishment will you assess.

gravating circumstances entirely reasonable.[176]

¶ 97 Whether defense counsel ever really "concedes" the continuing threat aggravator is unclear, since his closing argument reference to it seems more to indicate that this aggravator does not really "matter in the greater scheme of things."[177] It is clear, however, that defense counsel never argues that this aggravator does not apply. Malone suggests a number of ways that defense counsel could have contested this aggravator and challenged the evidence presented by the State in support of it. This Court does not think such arguments would have been helpful, in light of the vast amount of evidence presented by the State to support this aggravator.[178] We do agree, however, that defense counsel's second-stage remarks to Malone's jury were brief, tepid, reserved, and virtually resigned.[179] The most emotional part of defense counsel's closing remarks was when he recounted Malone's "downward spiral into the abyss," after he got addicted to methamphetamine in 2002—a disturbing story that the State had already effectively conveyed to the jury.[180] And although counsel concluded by attempting to reassure the jury that Malone would never be out of prison, he failed to provide the jury with any significant reason to spare Malone's life and failed even to directly ask the jury to do so.[181]

¶ 98 We do not question the reasonableness of defense counsel's overall second-stage strategy of attempting to get the jury to look beyond Trooper Green's murder and the other "bad acts" committed by Malone in the time period surrounding the murder, to consider the potential value of Malone's life as a whole, and in particular, his life before methamphetamine. This strategy was evident in his opening statement, his closing argument, and in his questioning of the two witnesses he presented. And it was a very reasonable strategy. The problem, as outlined further below, is that the mitigating evidence discovered and presented by defense counsel at trial about Malone's life "pre-meth" was very limited and not particularly noteworthy or compelling.

[27] ¶ 99 Before moving to consider Malone's claim that his counsel did not adequately discover and present available mitigating evidence, we briefly address his claim that his counsel failed to utilize available expert testimony to counter the State's "continuing threat" evidence. Malone maintains that his counsel should have presented statistical evidence to counter the State's evidence about his future dangerousness. Support for this claim is contained within *Claim Two of Malone's Application for Evidentiary Hearing* ("Application") and the Exhibit X documents attached thereto.[182]

176. It is somewhat surprising, however, that defense counsel would begin the second stage by suggesting that the aggravators necessary to execute Malone already "have been found," which appears to minimize the jury's fact-finding responsibilities in the second stage.

177. This too seems a rather strange suggestion, since whether a defendant remains "a continuing threat" of future violent acts would seem, almost inevitably, to be a highly significant question for jurors attempting to decide whether or not to sentence that individual to death.

178. In fact, Malone's brief "acknowledges that there simply was no defense to these aggravators."

179. In addition to conceding aggravators, defense counsel failed to make any argument countering the State's claim that the aggravating circumstances in the case exceed the mitigating evidence presented. In fact, shortly after suggesting in his opening statement that "our lives are not defined by a single act," and that the rotten things Malone did all occurred in a two-year period, defense counsel appeared almost to concede the inevitability of a death sentence. He stated, "But before you decide that you're going to kill Ricky Malone or have him executed, you need to look at all of his life, not just the very narrow window that the District Attorney is going to present."

180. Defense counsel noted that "just 18 months before . . . [Malone] was a productive, fun-going, caring person, who has now become a paranoid, hallucinating person who would shoot another human being."

181. Defense counsel's final remarks were as follows: "The bottom line is that Ricky Malone will die in prison. He will die in prison. And the only decision that you'll make is who will determine the day, the year, the month. Will you make that determination, or will you let God."

182. Although the claim is labeled "Claim Three" in Malone's application, there are only two claims; and this is the second one.

¶ 100 Malone suggests that his counsel should have sought out and presented a "risk assessment" regarding his future dangerousness, comparable to Exhibit X–2, which was prepared by Psychologist J. Randall Price.[183] Malone presents an extensive argument in his Application about the value and reliability of such an assessment, which is based upon a clinical interview, various psychological tests, and an actuarial methodology. We need not decide whether defense counsel's performance was deficient for failing to pursue and present such an assessment. In the context of Malone's case, where the State presented substantial and frightening evidence about Malone's behavior while incarcerated—indicating a determination to escape through whatever means necessary—this Court is convinced that the jury would not have been swayed or moved by the statistical analysis of Price's report. Hence we conclude that Malone cannot show prejudice and has failed to establish that he should be granted an evidentiary hearing in this regard.[184] Consequently, we reject this claim and here DENY CLAIM TWO OF MALONE'S APPLICATION FOR AN EVIDENTIARY HEARING.

¶ 101 Malone's final claim of second-stage ineffective assistance is that defense counsel failed to adequately investigate and present available mitigating evidence. Support for this claim is contained within *Claim One of Malone's Application for Evidentiary Hearing* and Exhibits A through W and Y, attached thereto. This application is governed by Rule 3.11(B)(3)(b) of this Court's Rules, which deals specifically with evidentiary hearing requests based upon a claim of ineffective assistance for failure to adequately investigate and develop evidence.[185] Under this Rule, Malone is entitled to an evidentiary hearing only if his application and attached affidavits "contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." [186]

¶ 102 Both the Supreme Court and this Court have recognized the importance and potential impact of mitigating evidence in the sentencing stage of a capital trial.[187] Evidence about a capital defendant's background and life prior to his crime can affect the jury's determination of whether the aggravating circumstances outweigh the mitigating circumstances in the case, as well as its decision about whether to impose the death penalty on a defendant who is "death-eligible." [188] Hence both the Supreme Court and this Court have reversed capital sentences based upon trial counsel's failure to develop and present available mitigating evidence.[189]

183. At the end of his nine-page report, Dr. Price concludes that Malone ''represents a minimal risk for violence if incarcerated and a mild-to-moderate risk if released into the free world.''

184. *See* Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2006) (quoted *infra* in text).

185. *Id.;* see *also Taylor v. State,* 1998 OK CR 64, 972 P.2d 864 (discussing and applying rule).

186. *See* Rule 3.11(B)(3)(b)(i).

187. *See, e.g., Williams v. Taylor,* 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000) (''[I]t is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.''); *Warner v. State,* 2001 OK CR 11, ¶ 15, 29 P.3d 569, 575 (''It is beyond dispute that mitigating evidence is critical to the sentencer in a capital case.''); *Wallace v. State,* 1995 OK CR 19, ¶ 12, 893 P.2d 504, 510 (''It is beyond question mitigating evidence is critical to the sentencer in a capital case.'') (citations omitted).

188. *See Williams,* 529 U.S. at 398, 120 S.Ct. at 1516 (''Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.''); *Marquez–Burrola v. State,* 2007 OK CR 14, ¶ 46, 157 P.3d 749, 764 (''[M]itigation evidence can, quite literally, make the difference between life and death in a capital case.'').

189. *See Williams,* 529 U.S. at 398–99, 120 S.Ct. at 1516; *Wiggins v. Smith,* 539 U.S. 510, 538, 123 S.Ct. 2527, 2544, 156 L.Ed.2d 471 (2003); *Rompilla v. Beard,* 545 U.S. 374, 393, 125 S.Ct. 2456, 2469, 162 L.Ed.2d 360 (2005); *Marquez–Burrola,* 2007 OK CR 14, ¶ 62, 157 P.3d at 768; *Warner,* 2001 OK CR 11, ¶¶ 14–18, 29 P.3d at 574–75; *cf. Garrison v. State,* 2004 OK CR 35, ¶¶ 168–69, 103 P.3d 590, 619–20 (reversing death sentence based upon appellate ineffective assistance, for failure to adequately present seemingly meritorious claim of ineffective assis-

[28, 29] ¶ 103 The crucial importance of mitigating evidence during the second stage of a capital trial imposes upon capital defense counsel a corresponding duty to investigate a defendant's background and develop potential mitigating evidence.[190] While this obligation is not unlimited, and an attorney is entitled to make reasonable strategic decisions about which leads to investigate and how far to pursue them, strategic decisions made after an incomplete investigation are evaluated according to the reasonableness of the attorney's decision to limit the investigation, under all the circumstances of the case.[191] Although defense counsel is entitled to make strategic decisions about what mitigating evidence to focus upon, decisions made without adequate investigation of potential mitigating evidence cannot be justified by merely invoking the mantra of "strategy." [192]

¶ 104 The affidavits attached to Malone's Application suggest that his trial attorneys chose to present a very limited mitigation case—just Malone's one sister (Tammy Sturdevant) and his wife (Colleen Malone)—without fully investigating what other mitigation evidence and witnesses were available.[193] And according to the affidavit of Sturdevant, she barely met with Malone's counsel and was not given adequate time to consider or prepare for her second-stage testimony.[194] Similarly, an affidavit from Malone's maternal aunt states that she talked to an investigator for his attorneys the summer after the crime and that she made a list for him of people who knew Malone. She told the investigator that she did not know the names of the men Malone worked with at the fire department, but that the fire captain could provide those names.[195] Yet of the nine co-worker affidavits attached to Malone's Application, eight state that the affiant was not contacted by defense counsel and that the affiant would have testified for Malone if asked to do so.[196] And retired firefighter

tance of trial counsel regarding second-stage mitigation case).

190. *See Williams*, 529 U.S. at 396, 120 S.Ct. at 1515 (noting capital defense counsel's "obligation to conduct a thorough investigation of the defendant's background").

191. *Strickland*, 466 U.S. at 690–91, 104 S.Ct. at 2066; *see also Wiggins*, 539 U.S. at 527, 123 S.Ct. at 2538 ("In assessing the reasonableness of an attorney's investigation, ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."); *Marquez–Burrola*, 2007 OK CR 14, ¶ 54, 157 P.3d at 766 ("[C]ounsel's decisions about the nature and quantity of mitigating evidence must be based on reasonable professional judgment, which requires experience, training, and some basic research into what evidence is available and how it might make a difference.").

192. *See id.* at ¶ 54, 157 P.3d at 766 ("The amount of deference given to counsel's strategic decisions depends on the amount of investigation that went into them") (citing *Strickland*); *Wiggins*, 539 U.S. at 526–27, 123 S.Ct. at 2538 (contrasting "strategic decision" to limit pursuit of mitigating evidence with "*post-hoc* rationalization of counsel's conduct") (emphasis in original).

193. *Cf. id.* at 524, 123 S.Ct. at 2537 (criticizing defense counsel who "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

194. Sturdevant states that she only spoke to Malone's attorneys twice, once before she testified for the State in the first stage and once just before testifying in the second stage. She adds:

> Right before I testified for the Defense, Mr. Gutteridge told me to tell him about my brother and our childhood. He said to just tell the good points about my brother from childhood to the day this happened. I didn't have time to think about it and get myself together. Mr. Gutteridge spent about 10 to 15 minutes with me each time he talked to me.

See Affidavit of Tammy Sturdevant, Exhibit W.

195. *See* Affidavit of Martha King, Exhibit Y. King also states that she told Malone's attorney that she would testify as a character witness, but that the attorney said "no," "because he was going to use Rick's sister Tammy and Rick's wife Colleen." *Id.*

196. *See* Affidavit of Cathy Lehew, Exhibit J (EMS co-worker); Affidavit of Jeff Lehew, Exhibit K (EMS and fire department co-worker); Affidavit of Dewayne Kaspereit, Exhibit M (fire department co-worker); Affidavit of Greg Wortham, Exhibit N (fire department co-worker); Affidavit of Johnny Owens, Exhibit O (fire department co-worker); Affidavit of Gary Wainscott, Exhibit P (fire department co-worker); Affidavit of Phil Stidham, Exhibit Q (EMS co-worker); Affidavit of Teresa D. "Reese" Marshall, Exhibit V (ER nurse). The only co-worker affidavit that does

Dewayne Kaspereit indicates that he actually called Malone's trial attorney to offer to testify, but that the attorney never returned his call.[197] Malone's ex-wife, Beth Malone, also states that she was never contacted, but that she would have testified if asked to do so.[198] And ten other affidavits attached to Malone's Application, from friends and family members, including his two other sisters, also state that these affiants would have testified if they had been asked to do so.[199] In fact Malone's other sisters, who are twins and who were mentioned at his trial, apparently attended the entire trial, just in case they were needed, but defense counsel never spoke to them.[200]

¶ 105 The affidavits attached to Malone's Application strongly suggest that his attorneys unreasonably limited their investigation into the potential mitigating evidence in his case and that they did not conduct a thorough, thoughtful mitigation investigation.[201] This Court finds the failure of Malone's attorneys to find and offer testimony from *any* of his former co-workers particularly troubling, since defense counsel knew Malone had a substantial work history as a paramedic and a firefighter—both of which are demanding fields that are devoted to serving other people. In light of the many potential witnesses brought forward through Malone's Application, it seems likely that a reasonable effort would have resulted in finding at least a few co-workers who would have testified on Malone's behalf. The testimony of such witnesses seems a rather obvious and necessary supplement to the testimony of Malone's sister and wife—since both of these witnesses were related to him, and both were known to have already lied on his behalf in connection with his case.[202] As we recently noted in

not make these assertions is that of Darrel Meadows. *See* Affidavit of Darrel Meadows, Exhibit L (fire department co-worker). Meadows does not address whether he was contacted by defense counsel or not.

197. *See* Affidavit of Dewayne Kaspereit, Exhibit M. Kaspereit states that Don Gutteridge was the attorney for whom he left the message. The fact that Kaspereit was willing to testify for Malone at all is noteworthy, since when Malone's methamphetamine was found at the fire station, he initially attempted to implicate Kaspereit, stating that the drugs probably belonged to him.

198. *See* Affidavit of Mary Beth Malone, Exhibit C. The identity of Beth Malone was known to both defense counsel and Malone's jury, since she was referred to in both stages of his trial in regard to a "domestic disturbance" at their home and their subsequent divorce.

199. *See* Affidavit of Donna Childers, Exhibit A (paternal aunt); Affidavit of Katy Landrum, Exhibit B (sister); Affidavit of Ricky Brad Malone, Exhibit D (adopted son); Affidavit of Rick Malone Senior, Exhibit E (father); Affidavit of Kenneth Vaughn, Exhibit F (brother-in-law); Affidavit of Kristy Vaughn, Exhibit G (sister); Affidavit of Calvin Townley, Exhibit H (stepfather); Affidavit of Harold Childers, Exhibit I (grandfather); Affidavit of Ron Mulkey, Exhibit T (pastor); Affidavit of Sally Yearicks, Exhibit U (cousin of Beth Malone). Two other attached affidavits do not contain a specific statement about willingness to testify, but their content strongly suggests a desire to help Malone, whom the affiants knew, admired, and appreciated in better times. *See* Affidavit of Susan Evans, Exhibit R (friend and employer); Affidavit of Dale Harris, Exhibit S (coach and teacher).

200. *See* Affidavit of Katy Landrum, Exhibit B ("Rick's wife Colleen Malone asked my twin sister Kristy and me to attend the whole trial just in case Rick's lawyer needed to put us on the stand. We were at the trial the whole time, but Rick's attorney never talked to us.").

201. *Cf. Wiggins,* 539 U.S. at 526, 123 S.Ct. at 2537 (noting record suggests that defense counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"); *Marquez–Burrola,* 2007 OK CR 14, ¶ 54, 157 P.3d at 766 ("[C]ounsel's brief, eleventh-hour discussion with Appellant's parents and sister about testifying in the punishment stage ... surely does not begin to approach a true mitigation investigation.").

202. Defense counsel's decision to rely only on these two witnesses is particularly surprising, since counsel was (or should have been) well aware of their vulnerabilities and limited value as witnesses. Defense counsel knew that Sturdevant was the one who introduced Malone to methamphetamine, that she was one of his drug-making cohorts, that she did what she could to help Malone avoid being caught for killing Green, and that she later told numerous lies on his behalf, in a continuing effort to help her brother avoid conviction for his crime—including under oath at his preliminary hearing. And defense counsel had to know that Malone's jury would learn all of these things as well.

And while Colleen Malone did not have quite so many vulnerabilities as a witness, she had only been married to Malone for two years and had only known him for six months when they got married. In fact, it wasn't clear from her

Marquez–Burrola v. State, there is a "*qualitative* difference between having a family member generally ask the jury to spare the life of the defendant, and having third parties offer the jury *more objective and specific* examples of *why* the defendant's life should be spared." [203] While jurors may question the objectivity of testimony from a defendant's sister and wife (particularly this sister and this wife), "they may give different treatment, and perhaps greater weight, to the testimony of less biased witnesses which illuminates the man whose life is in their hands." [204]

¶ 106 The affidavits offered by Malone suggest that there exists a significant amount of powerful, varied, unbiased, and potentially result-altering mitigating evidence that could have been discovered and presented at his trial. Former co-workers of Malone describe him as follows. "He was very caring to the patients," particularly "elderly patients," who "loved Rick." [205] "Rick was a caring person and a dedicated person—always," and he treated all his patients "with the utmost respect." [206] "Rick had one of the best bedside manners I have ever seen" and "always treated the people real nice." [207] He was "a skilled paramedic," who did "[w]hatever needed to be done or was asked of him." [208] He was "a good guy," and what happened was "way out of character"; "[e]veryone at the fire department said if anything happened to you, we sure wish Rick would be the one to answer the emergency call and . . . be the one to work on you." [209] "[Y]ou couldn't ask for a nicer person"; Rick "treated everybody well," "worked all the time . . . [and] was burning the candle at both ends." [210] He was "a good guy," who "knew what he was doing" and "worked all the time to take care of his kids." [211] Malone was "a good man" and "a faithful husband." [212] One nurse, who worked in the emergency room and knew Malone from his work in the ambulance service, described him as "the young, strong and energetic one in the group," who "never hesitated to make himself available if needed." [213]

testimony that she ever knew him very well. She testified that she did not know that he was terminated from the fire department in September of 2003, or that he was subsequently fired from the ambulance service, and that she did not learn that he had lost these jobs until ''much later.'' She testified that Malone ''seemed depressed'' and got ''real distant'' in the fall of 2003, and that ''he was always just away from me.'' Although they lived in the same home, and Colleen admitted knowing that her husband was buying guns and putting up surveillance equipment, she denied having any knowledge that he was using or making methamphetamine—despite Malone's testimony that he was using heavily during this time and the vast array of materials associated with manufacturing this drug that were found in their home and garage (and put into evidence by the State during the second stage). In fact, defense counsel acknowledged in his second-stage opening that Colleen Malone would ''say that she didn't know, but she did know what was going on.'' She did admit to initially providing police false information regarding her husband's whereabouts on the morning of the murder, explaining that Malone asked her to do so and that she didn't know ''the severity'' of what was at stake.

Overall, the testimony of Colleen Malone, wife of a man whose life was on the line, appears to have been surprisingly anemic. Her descriptions of her husband's personality were rather cryptic—''real funny,'' ''[r]eal sweet,'' ''always happy''—and while she said Malone was a ''good father'' to their son (born in December of 2002), her only example of this was that Malone was ''always taking care of him, you know.'' In fact, although Colleen Malone testified that she would continue to visit Malone in jail, because he was her husband and she loved him, she concluded her testimony without ever even asking the jury to spare his life.

203. 2007 OK CR 14, ¶ 55, 157 P.3d at 766 (emphasis in original).

204. *Id.* at ¶ 55, 157 P.3d at 767.

205. Affidavit of Cathey Lehew, Exhibit J.

206. Affidavit of Jeff Lehew, Exhibit K.

207. Affidavit of Darrel Meadows, Exhibit L.

208. Affidavit of Dewayne Kaspereit, Exhibit M.

209. Affidavit of Greg Wortham, Exhibit N.

210. Affidavit of Johnny Owens, Exhibit O.

211. Affidavit of Gary Wainscott, Exhibit P.

212. Affidavit of Phil Stidham, Exhibit Q.

213. Affidavit of Teresa D. ''Reese'' Marshall, Exhibit V. Marshall also recalls Malone ''resting his head on the counter, totally exhausted after doing CPR on a patient until it was no longer

¶ 107 Most of Malone's former co-workers also refer to a very public affair that his ex-wife, Beth Malone, had with an assistant fire chief at the fire department. Kaspereit's affidavit describes Malone as "a good, honest, dependable, gullible kid," until the time when "one of the shift supervisors was having an affair with Rick's wife while on-duty and throwing it in his face." Kaspereit states, "Rick went to the Fire Chief about it, and he told Rick to leave it alone. It was thrown in his face every day." Kaspereit traces Malone's decline to the experience of this humiliating affair, after which Malone "went downhill," "slipping into depression," and also "taking meth." [214] Various co-workers likewise note how humiliating the affair was for Malone and how much it affected him.[215] Other affidavits echo the testimony presented at trial about how the subsequent death of his mother impacted his decline into depression and drug use.[216] Many co-workers express regret about not recognizing signs of methamphetamine use in Malone.[217]

¶ 108 Perhaps the most surprising affidavit offered by Malone with his Application is that of his ex-wife, Beth Malone. Despite the negative information about their marriage that came out at trial, Beth offers a substantial and very positive portrayal of her ex-husband, whom she "never stopped loving." [218] She describes their early relationship and how they married in May of 1992.[219] Malone then adopted her three children: eight-year-old Randy, five-year-old Amanda, and the youngest, who was two, and who they renamed Ricky Bradford Malone, after his new father. She states that Malone started going to EMT school to be a paramedic and encouraged her to do the same. Malone then encouraged her to go to college and get her R.N., which she did.[220] Beth describes how they would alternate 24–hour shifts, "so that one of us could always be home with the children," and how Malone helped the kids with their homework.[221] Malone's role as a father to these children was never even mentioned at his trial.[222]

¶ 109 Beth Malone admits that she got involved with a firefighter who worked with Malone and that she started seeing him publicly while she was still married to Malone. Beth addresses the "domestic incident" and states that it arose from an argument about Malone's jealousy regarding this other firefighter. While Beth's depiction of what happened at their home that day may be somewhat dubious, her statements certainly place

needed—drained physically, emotionally and drenched in sweat."

214. Affidavit of Dewayne Kaspereit, Exhibit M. Kaspereit notes that he does not "condone what Rick did because I knew Nikky Green. But I believe Rick wasn't in his right mind."

215. *See, e.g.,* Affidavit of Cathey Lehew, Exhibit J ("There was really a change in Rick when it came out that Beth was seeing the assistant fire chief.... I think he was embarrassed and humiliated. This went on for quite awhile."); Affidavit of Martha King, Exhibit Y ("Rick and his wife Mary Beth divorced in about 2000, and his mother passed away in April 2002. Rick took both losses very hard.").

216. *See, e.g., id.;* Affidavit of Donna Childers, Exhibit A ("I think some of Rick's breaking point was when his mom passed away."); Affidavit of Katy Landrum, Exhibit B ("I noticed Rick changing about six months to a year after our mom passed away.").

217. *See, e.g.,* Affidavit of Darrel Meadows, Exhibit L ("When drugs were found at the fire station, most of us thought it was some other guy. After the murder happened, we took a series of courses about what to look for with meth addiction in a co-worker.").

218. *See* Affidavit of Beth Malone, Exhibit C.

219. Beth, who is over seven years older than Malone, notes that she initially thought Malone was too young for her. *Id.* They got married the day after Malone graduated from high school. *See* Affidavit of Martha King, Exhibit Y. Malone was 17 years old at the time.

220. *See* Affidavit of Beth Malone, Exhibit C ("Now I am a nurse supervisor at ICU at Duncan Regional Hospital. I wouldn't have done this if Ricky hadn't pushed me and supported me.").

221. *Id.*

222. Other affidavits also attest to Malone's fatherly commitment to these children. *See* Affidavit of Donna Childers, Exhibit A (noting that Malone did various "typical 'dad' things with his children" and that "[h]e loved those kids and those kids loved him"); Affidavit of Sally Yearicks, Exhibit U ("He was so good with the kids. Rick came to family get-togethers and participated in the stuff the kids had at school."); *see also* Affidavit of Johnny Owens, Exhibit O ("He loved

the incident in a different light.[223] Beth also acknowledges the pain and humiliation her affair caused Malone.[224] This affair and its impact on Malone were never mentioned at his trial. Beth also describes Malone's descent into drug use, starting with steroids, then Lortabs after a football injury, and later methamphetamine, which was consistent with Malone's trial testimony.[225]

¶ 110 Beth Malone was also a former co-worker of Malone's, since they both worked as paramedics for the same ambulance service. In this regard, Beth attests to an incident involving an elderly woman who was choking. When Malone heard on the radio that Beth and her partner were having trouble helping the woman, he came to the scene to help, administered the Heimlich maneuver, dislodged the meat in the woman's throat, "and saved her life." [226] Other witnesses offer similar testimony about Malone helping people and even saving lives.[227] Cathy Lehew states that she "would have liked to ask the jury to take into consideration all the lives Rick saved and the sacrifices he made being called out in the middle of the night and taking care of people at some of the worst points in their lives." [228] Reese Marshall adds, "I know that Rick took a life while under the influence of a horrible mind-altering drug, but in his short lifetime, Rick [also] saved and cared for many lives." [229]

¶ 111 This Court has focused mostly upon the affidavits of Malone's former co-workers, since these persons may well have had the most potential as mitigation witnesses in the current case. A number of affidavits note the prominence of partying and drug use within Malone's family and that his family was not necessarily a very good influence on his life.[230] Nevertheless, Malone's twin sisters and other relatives could have provided valuable information about his early life and

his kids. He worked hard to take care of them.").

223. Beth states that when the police came, Malone was "hugging me but the police thought he was attacking me." She also states, more credibly, "Ricky didn't hit me[,] but he did hit the wall." Affidavit of Beth Malone, Exhibit C.

224. Beth notes that the guys at the fire department "were teasing him about the fireman and me—he couldn't get away from it. They said rude things about me that were very cruel." *Id.*

225. *Id.* Phil Stidham describes Beth contacting him about a week before the crime, saying Malone "was in trouble and I needed to go talk to him." Affidavit of Phil Stidham, Exhibit Q. Malone had been fired from the fire department and ambulance service, "so the other paramedics couldn't associate with him anymore." *Id.* Stidham states, "Since I wasn't working as a paramedic then, I was trying to find Rick to tell him that we still cared about him and we wanted to help him." *Id.*

226. *See* Affidavit of Beth Malone, Exhibit C.

227. Another co-worker/friend describes being at a beach with Rick and Beth Malone when a Mexican man was pulled from the water, not breathing. She states, "Rick and Beth started CPR and did it until the ambulance got there. Rick didn't hesitate to help that man even though it meant mouth-to-mouth resuscitation with no protection." *See* Affidavit of Cathey Lehew, Exhibit J. Such testimony would have been a helpful counter at trial to Malone's incident with the Mexican man at the party.

228. *Id.*

229. Affidavit of Teresa D. "Reese" Marshall, Exhibit V.

230. The words of co-worker Phil Stidham are particularly powerful in this regard:

> Rick and I were close and could relate to each other since we were both raised in families that weren't really there for us. We both came from families that were uneducated and without high standards or ambitions for us, but we both got out and became something when we became paramedics. I understood that it was a lot for Rick to escape to become even a paramedic.... When I heard he was hanging out with his relatives again, I was worried that his loyalty to his family would pull him down.

See Affidavit of Phil Stidham, Exhibit Q; *see also* Affidavit of Beth Malone, Exhibit C ("Ricky wouldn't go see his family on holidays because of the drinking and partying. He never did that. He is the only one in his family that graduated from high school, and he's the only one who started college. His twin sisters dropped out ... in the ninth grade."). All three of Malone's sisters acknowledge being addicted to methamphetamine, although they state that since the shooting, they have stopped using. Sturdevant testified to this at trial and admitted she was the one who first gave Malone methamphetamine. *See also* Affidavit of Katy Landrum, Exhibit B ("I was doing meth since I was 13 years-old."); *but see* Affidavit of Kristy Vaughn, Exhibit G (indicating Malone and his sisters all "got hooked on

positive character traits.[231] They also could have provided specific examples of how using methamphetamine changed his personality entirely.[232]

[30, 31] ¶ 112 Claims of ineffective assistance for failure to adequately investigate and present mitigating evidence are treated in essentially the same manner as other ineffective assistance claims, requiring a showing of both deficient attorney performance and prejudice.[233] The main difference is in the prejudice analysis, where the reviewing court must determine whether there is a "reasonable probability" that if trial counsel had presented the omitted mitigating evidence, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." [234] In making this determination, the newly proffered mitigating evidence must be considered along with the mitigating evidence that was presented and then weighed against the aggravating evidence that was presented.[235] Finally, we also consider whether there is a reasonable probability that inclusion of the omitted mitigating evidence could have "alter[ed] the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." [236]

¶ 113 This Court finds that Malone has presented a significant amount of evidence strongly suggesting that the investigation of his trial counsel into potential mitigating evidence was unreasonable and deficient. We recognize, however, that the current state of the record does not contain any direct evidence from Malone's trial attorneys about what they did, how much they did, why they made the choices they did, *etc.* An evidentiary hearing would allow a more direct investigation of this question—though it appears unnecessary in the current case, for the reasons discussed below. This Court further finds that Malone has presented a vast amount of potentially mitigating evidence from a wide range of sources and that such evidence could have been very helpful in "humanizing" Malone.[237]

¶ 114 The State did a thorough job at trial of depicting Malone as a monster; and the facts of this crime, as well as other actions by Malone in the time period surrounding this murder, provided ample material to work with in this regard. Nevertheless, Malone

meth ... at the same time,'' when their mother died).

231. *See* Affidavit of Katy Landrum, Exhibit B (explaining Malone's role in the family, including taking care of and buying a home for their mother, and not allowing people to pick on his sisters); Affidavit of Kristy Vaughn, Exhibit G (noting that Malone looked out for his sisters, helped pay for her lawyer so she could seek custody of her son, and ''worshipped the ground our mother walked on''); Affidavit of Harold Childers, Exhibit I (grandfather) (''He was a wonderful kid. He never had any problems and never got into trouble or anything like that.''). The affidavit of Rick and Beth Malone's fifteen-year-old son states that Malone took him to football games and gymnastics, helped him with sports, and that ''[u]p until the time he went to jail, my father would take me with him two or three days a week.'' Affidavit of Ricky Brad Malone, Exhibit D. Ricky Brad Malone also states that his father was ''always real nice to me and never hurt me,'' that he was ''never afraid'' of him, and that if he had been asked to testify, he ''would have asked the jury to let my father live so that I can still be with him.'' *Id.* Malone also offers an affidavit from his father, who admits, ''I wasn't there for Ricky growing up because I didn't get along with my ex-wife, Ricky's mother.'' Affidavit of Rick Malone Senior, Exhibit E. Rick also offers affidavits from a former pastor, coach, employer, *etc.*, all attesting to his positive traits as a youth and young man.

232. *See, e.g.*, Affidavit of Calvin Townley, Exhibit H (stepfather) (noting how Malone's personality changed when he started using drugs, that methamphetamine ''seemed to rule Ricky's mind,'' and that ''all he could think of was making more meth and making more money'').

233. *See Williams v. Taylor*, 529 U.S. 362, 390–91, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000); *Strickland v. Washington*, 466 U.S. 668, 686–87, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

234. *See Brown v. State*, 1997 OK CR 1, ¶ 15, 933 P.2d 316, 322; *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068.

235. *See Williams*, 529 U.S. at 397–98, 120 S.Ct. at 1515; *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003) (''In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.'').

236. *Williams*, 529 U.S. at 398, 120 S.Ct. at 1516.

237. *See Marquez–Burrola*, 2007 OK CR 14, ¶ 53, 157 P.3d at 766 (''One important purpose of mitigation evidence is to humanize the defendant in the eyes of the jury.'').

apparently did have a life that was noteworthy, honorable, and admirable prior to his descent into drugs and crime.[238] While his trial counsel attempted to argue this theory at trial, he did not discover or present to Malone's jury the facts to back it up.[239] The affidavits attached to Malone's Application suggest that there is much material that could and should have been presented to the jury that was deciding Malone's fate. Looked at *in toto,* this Court finds there is a reasonable probability that such evidence could have had an impact on the ultimate sentencing determination in this case, by giving the jury—or at least one juror—a reason to spare Malone's life.[240] Hence the failure of Malone's counsel to develop and present this kind of mitigating evidence undermines this Court's confidence in the jury's sentencing verdict in this case.

[32] ¶ 115 This Court concludes that Malone's Application for Evidentiary Hearing and the attached affidavits do contain sufficient information to show, by clear and convincing evidence, that there is a strong possibility Malone's trial counsel was ineffective for failing to identify or utilize the proffered evidence.[241] Hence Malone has demonstrated that he is *entitled to an evidentiary hearing on Claim One of his Application.* In the current case, *however,* this Court need not grant such an evidentiary hearing, and *this claim is rendered moot,* since we can and do choose instead to grant Malone sentencing relief on the claims raised in Proposition III, as well as the other errors discussed herein. We further find that Malone has established that his counsel was constitutionally ineffective due to his failures in connection with the victim impact evidence presented in his case, and that Malone has made a strong case that his counsel was constitutionally ineffective in regard to the second stage of his trial as a whole, for failing to argue vigorously that Malone's life should be spared and, more importantly, for failing to discover and present to his jury available and emotionally significant evidence that Malone's life was worth sparing—because of the kind of person he once was, if for no other reason.

¶ 116 In Proposition XI, Malone argues that the cumulative effect of the prejudicial errors committed in the second stage of his trial, combined with improper prosecutorial argument in the State's final closing remarks, together produced a situation where the jury's decision to sentence him to death was influenced by passion, prejudice, and other arbitrary factors.[242] Malone notes that

238. *Cf. id.* at ¶ 56, 157 P.3d at 767 ("Most of the mitigating evidence counsel failed to present in this case ... highlighted positive aspects of Appellant's character and background, but it was powerfully mitigating nonetheless.").

239. We noted a parallel disparity in *Marquez–Burrola,* in which "the State characterized Appellant as an abusive monster," and "[t]he defense did little to alter this picture." *Id.* at ¶ 58, 157 P.3d at 767. In that case too the crime itself, along with other evidence, supported this harsh characterization. Nevertheless, we recognized on appeal, after an evidentiary hearing in the case, that witnesses who knew the defendant in his earlier life—who were not discovered or contacted until after the defendant's original trial—could have offered "unique and moving vignettes about Appellant's good character." *Id.* at ¶ 52, 157 P.3d at 765. We noted that these stories about the defendant "growing up and doing good things in his rural Mexican community might well have resonated with citizens of a rural Oklahoma county." *Id.* at ¶ 56, 157 P.3d at 767. We find that the comparable, positive stories about Malone that are reflected in the proffered affidavits might well have resonated with his jury as well. In *Marquez–Burrola* we modified the defendant's sentence to life without parole, without remanding for a resentencing. *Id.* at ¶ 62, 157 P.3d at 768. We take a more conservative path in the current case.

240. *See Wiggins,* 539 U.S. at 537, 123 S.Ct. at 2543 (finding prejudice for failure to present more complete mitigation case, noting that if jury had known "petitioner's excruciating life history ..., there is a reasonable probability that at least one juror would have struck a different balance").

241. *See* Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2006).

242. *See* 21 O.S.2001, § 701.13(C)(1) (setting forth this Court's obligation to determine, in all capital appeals, "[w]hether the sentence of death was imposed under the influence or passion, prejudice, or any other arbitrary factor"). Malone does not challenge the sufficiency of the evidence to support the aggravating circumstances found by his jury; and we find that the evidence was indeed sufficient. Hence this portion of our mandatory sentence review is unproblematic. *See* 21 O.S.2001, § 701.13(C)(2).

during voir dire the prosecutor asked prospective jurors, over and over again, to remember that this case was not just about Malone, it was about Trooper Green and those he left behind. The prosecutor concluded his initial second-stage closing argument, just before defense counsel got up to present his final remarks, by referring back to this voir dire.[243]

¶ 117 If there was any uncertainty that the prosecutor was referring to Trooper Green's family and also Green himself, it was erased by his final second-stage closing argument. The prosecutor addressed the jurors directly about how each of them would be "marked by this case in some way or the other," but also noted, "You'll walk out of here probably later today and you'll go on with your lives." He contrasted this ability of jurors to walk away and move on with the plight of others, who "will not have that option." He continued as follows:

> I pray that you're never involved in a case from the standpoint of losing a family member or being a victim. You can't imagine what it's like to go through. You can't take the law into your own hands as much as [you] may want. You cannot take the law into your own hands. Everything that's been done in this case has been done for you. The victims—they have to rely on the investigators. They got to hope investigators they've never met, don't know anything about—they've got to hope those investigators can get enough information, enough evidence to satisfy twelve people so that some day justice can be done.
>
> They've got to let their loved ones go to Oklahoma City where a doctor opens them up, checks organs so that that doctor someday can testify to a panel of twelve people that they're certain that the cause of death is a gunshot to the back of the head.
>
> You can't hire your own attorney to prosecute these cases. You got to rely on a prosecutor that you've never met before. You hope they've got the time and the fortitude to try the case like it ought to be.
>
> But you know the hardest part if you're the victim? The hardest part is right now. Twelve people that didn't know Nikky, twelve people that don't know anything about them other than seeing them on the stand for 15, 20 minutes—is going to decide—make a decision on the person that took Nikky Green's life. Each of those people—and it was difficult. Difficult to take that stand and say the things they had to say. But something that's very important: The law says that we have the right to consider the wishes of the family. Each of those people asked you for the death penalty, and it's appropriate. If you're ever going to set on a case where the death penalty is warranted, you're setting on it right now.
>
> When you go back there to deliberate, there's some strengths on this jury for the death penalty. There's going to be some people, probably, that may have some reservations. Work with them, talk with them; spend some time with them. We've been 15 months waiting on this verdict; if it takes an hour, a day, a week, work with those that may not want the ultimate punishment. This case cries out for it. Anything less would be a travesty.

The prosecutor returned to this same theme again as he began wrapping up his final remarks.[244]

¶ 118 The prosecutor concluded by returning to the theme that the case was about more than Malone; it was about Trooper Nik

243. The prosecutor concluded:

> I had asked you at the start of this case to keep in mind that this case was about more than Rick Malone; that there was people I could not bring before you, but this case was very much about them as well. I would like you to keep that in mind for the next few minutes. other, but come back with the ultimate punishment. This case cries out for the death penalty. We've had one travesty in this case; I pray you don't add a second one to it.

The prosecutor's repeated use of the word "pray" herein seems calculated to recall the idea of the jury's "divine undertaking in upholding and enforcing the laws of our country," which Mrs. Green had described and invoked in her plea that the jury "show no mercy" and "leave the business of mercy for Malone in the hands of the Heavenly Father, where it belongs."

244. He stated,

> I pray you go back there, whatever time it takes. Talk through this case, work with each

Green. He did this by directly contrasting the situation of Malone, though incarcerated, with the plight of his dead victim. The prosecutor ended Malone's trial with the following comparison:

> And I'd like you to think about this when you go back there—and we heard this from Colleen. This man has human contact. He has known human contact since early morning of December 22nd [sic]. He's got to visit with his wife. He's got to determine how his kids are doing. He's been able to determine what's happening in the world.
>
> Nik Green has had none of that since shortly before 7 that morning. Nik Green will never know human contact again. Nik Green will never read a magazine, a paper. He'll never talk with his wife. He'll never see his kids grow up. He'll never know how they turn out in life.
>
> The death penalty. This case cries out for it. You, the strengths on this jury, bring it back.
>
> I thank you.

Malone's jury was then released to begin its deliberations. The jurors returned two hours later, bringing with them the death penalty verdict for which Mrs. Green and the prosecutor had so powerfully "begged" and "prayed."

[33] ¶ 119 Although Malone quotes and challenges these prosecutorial arguments, Proposition XI is not set up as a separate, second-stage prosecutorial misconduct claim.[245] Rather, Malone argues that this Court should consider the State's "egregious misconduct during second stage closing arguments," in conjunction with the numerous other errors committed in connection with the second stage of Malone's case, and conclude that "[t]he confluence of these factors rendered the verdict of death arbitrary and capricious." Hence this Court declines to narrowly parse these remarks against the backdrop of our extensive prosecutorial misconduct jurisprudence. Instead, we simply conclude that the prosecutor's remarks were egregiously improper and unfairly prejudicial to Malone and that they clearly invited passion, prejudice, and arbitrariness into the jury's sentencing determination in this case.[246]

¶ 120 It was improper for the prosecutor to so blatantly suggest that Malone's jurors should sentence him to death because the family member victims were counting on them to do so. It was improper to so directly and profusely appeal to sympathy for the family member victims. And it was highly improper to seek this sympathy based not only upon the loss of Green, but also by invoking the powerlessness, the indignities, and the depersonalization that the American system of trial by jury imposes upon all crime victims and their surviving families.[247] It was likewise improper to imply that Malone's family members should be compensated for their fifteen-month endurance of this painful process by a death penalty verdict from the jury, and that "[a]nything less would be a travesty." And the prosecutor's comparison of Malone's situation (of limited but continuing "human contact") with that of his dead victim (who "will never know human contact again") is yet *another* version of the infamous, but ever-popular, "three hots and a cot" argument that this Court has so strenuously, but unsuccessfully, sought to eliminate from the Oklahoma prosecutorial repertoire of favorite, death-seeking, closing argument incantations.[248]

¶ 121 Hence the prosecutor's improper remarks within his second-stage closing argument further strengthen and confirm this

245. Malone's brief does cite many of this Court's cases addressing second-stage, closing-argument prosecutorial misconduct, in support of its claim that the prosecutor's improper argument further necessitates the reversal of Malone's death sentence.

246. *See* 21 O.S.2001, § 701.13(C)(1).

247. In addition, the prosecutor's remarks about the necessity of an autopsy in a case like this one improperly suggest that the American system is worthy of ridicule in some regards.

248. *See Hooks v. State,* 2001 OK CR 1, ¶ 52 & n. 55, 19 P.3d 294, 316 & n. 55 (noting that this Court has "repeatedly condemned" this argument and citing cases finding various versions of it improper). The State admits in its brief that "[t]his type of argument has been repeatedly condemned by this Court."

Court's finding that the death penalty verdict in this case simply cannot be allowed to stand.[249]

¶ 122 In Proposition XIII, Malone raises an additional cumulative error claim, this time regarding both stages of his trial. This Court has found first-stage error regarding only one issue, namely, Malone's Proposition I challenge to the intoxication jury instructions in his case. Hence this Court's conclusion that the errors discussed in Proposition I were harmless beyond a reasonable doubt resolves Malone's first-stage cumulative error claim as well. Regarding the second stage, this Court has already found that Malone's death sentence must be reversed and that this case should be sent back to the district court for resentencing—thereby rendering moot this second-stage cumulative error claim.

DECISION

¶ 123 For the reasons discussed in this opinion, the **CONVICTION** of Malone for the first-degree murder of Trooper Nik Green is **AFFIRMED.** Malone's **DEATH SENTENCE,** however, is **REVERSED,** and this case is **REMANDED** to the District Court **FOR RESENTENCING.**[250] Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

C. JOHNSON, V.P.J. and A. JOHNSON, J.: concur.

LUMPKIN, P.J. and LEWIS, J.: concur in part/dissent in part.

LUMPKIN, Presiding Judge: Concur in Part/Dissent in Part.

¶ 1 I concur in affirming the conviction but dissent to reversing the sentence and remanding the case for resentencing for the following reasons.

¶ 2 In Appellant's first proposition of error, he argues he was denied his right to a fair trial because the jury instructions on the defense of voluntary intoxication did not state the applicable law. Specifically, he asserts Instruction No. 38 improperly referenced "*mens rea*" instead of setting forth the specific criminal intent for first degree murder, and that other jury instructions did not cure any error. The majority's reliance on *Coddington v. State* is misplaced as the issue in that case was whether trial court limitations on the testimony of the defense expert deprived the defendant of his constitutional rights to present a defense and confront the State's evidence. This Court found that even without the expert's opinion on the effects of cocaine intoxication, the defense raised sufficient evidence for the trial court to instruct the jury on his defense of voluntary intoxication. *Id.,* 2006 OK CR 34, ¶¶ 40–49, 142 P.3d 437, 449–451. However, the Court did not discuss the standard of review used to determine that the evidence was sufficient to warrant a jury instruction. In the present case, we are concerned with the sufficiency of the jury instructions on voluntary intoxication, not admissibility of expert opinion.

¶ 3 Further, I disagree with the majority's need to restate the legal standard used to determine when an instruction on voluntary intoxication is warranted. Our prior case law is not inconsistent and 48 needlessly confuses the issue. Whether the standard is stated as "sufficient evidence to raise a reasonable doubt as to the defendant's ability to form the requisite criminal intent", *see Taylor v. State,* 2000 OK CR 6, ¶ 19, 998 P.2d 1225, 1230; *Crawford v. State,* 1992 OK CR

249. The State mocks Malone's assertion that the challenged remarks were egregiously improper by twice jesting that the quoted statements "were so outrageous that no objection was made to any of them." Malone, on the other hand, asserts in Proposition X that the prosecutor's remarks were indeed outrageous and that counsel was constitutionally ineffective for failing to object to any of them. We agree that a large portion of the challenged prosecutorial arguments were "outrageous," to the extent that they were in clear violation of the precedents of this Court, but decline to resolve this portion of Malone's Proposition X challenge as a separate ineffective assistance claim, based upon this Court's overall resolution of this case.

250. We have resolved Malone's Application for Evidentiary Hearing by ruling that Claim Two is DENIED, and Claim One has been rendered MOOT by our resolution of this case as a whole.

62, ¶ 53, 840 P.2d 627, 638, or as "sufficient, *prima facie* evidence [ ] which meets the legal criteria for the defense of voluntary intoxication", *Jackson v. State,* 1998 OK CR 39, ¶ 65, 964 P.2d 875, 892 (*per curiam*), the requirement is the same.[1] It is not enough for the defense to present evidence of intoxication, the defense must present *prima facie* evidence that the defendant was so utterly intoxicated at the time of the crime that his mental powers were overcome, rendering it impossible for him to form the specific criminal intent or special mental element of the crime.

¶ 4 While I don't fully agree with the majority's analysis of the jury instructions, I do agree that any error was harmless beyond a reasonable doubt. It seems that the majority's admission that no reasonable juror could have concluded that Appellant was so utterly intoxicated at the time of the crime that his mental powers were overcome, rendering it impossible for him form the specific criminal intent or that he did not intend to kill the victim is tantamount to saying that even a "bare *prima facie* " case was not established, in which case Appellant would not have been entitled to the instructions he now finds erroneous.

¶ 5 As for the victim impact evidence, I agree that the trial court erred in failing to hold a hearing to determine the admissibility of the evidence, pursuant to *Cargle,* and that trial court and counsel alike failed in their responsibility to review the victim impact evidence and determine its admissibility prior to the second stage. If a hearing had been held, hopefully it would have prevented the overly emotional victim impact evidence from being presented. However, I find any errors in the admission of the victim impact testimony harmless beyond a reasonable doubt. Evidence of Appellant's cold-blooded execution of Trooper Green, as seen on the Dashcam video, when viewed in conjunction with the evidence in aggravation of Appellant's prior assaults and attempts to escape, show that no reasonable juror would have chosen any punishment other than death. To say that the death sentence in this case was improperly influenced by the victim impact evidence is to turn a blind eye to the other legally admitted evidence. I find the majority is overly generous in giving Appellant another chance to find one juror who will save him from the death penalty.

¶ 6 Further, I find nothing inappropriate about references in victim impact evidence to God and the Bible. It seems as though courts have become overly phobic of any references to God or the Bible. When we review the works of great American orators and trial lawyers such as Abraham Lincoln, William Jennings Bryan and even the agnostic Clarence Darrow, we find quotations from the Bible and references to God. It is hard to determine exactly when such comments became anathemas, but there is certainly no basis in history for such an approach. It is interesting to note the majority finds such references too emotional when included in victim impact evidence or made by the State. However, defense counsel is criticized for not being emotional enough and no objection is raised to his closing arguments calling on the name of God to save his client. The majority's standard for determining what comments are appropriate or inappropriate seems inconsistent.

¶ 7 As for the claims of ineffective assistance of counsel, it is not the role of this Court to dictate when the defendant and his chosen expert witness must meet, nor is it the proper role of this Court to find it *per se* unreasonable if the meeting has not occurred prior to trial. Each case has its own unique facts and circumstances. While it may be unreasonable in one case for the expert to fail to meet with the defendant before trial, in another trial it might not be unreasonable. In this case, I do not find it indicative of ineffective assistance of counsel.

¶ 8 Further, I do not find counsel's failure to investigate further and present additional mitigation witnesses ineffective. Most capi-

1. I also disagree with the statement in 48 that the test cited in *Taylor* was previously rejected in *Jackson*. *Jackson* clarified the standard setting forth the quantum of evidence required before the jury can legally consider the defendant's state of intoxication as a defense. In so doing it did not overrule well established case law regarding when the evidence was sufficient to warrant a jury instruction.

tal appeals include an allegation that additional witnesses could have been called. However, the standard of review on appeal is deficient performance plus prejudice. Here, Appellant has failed to show he was prejudiced by the absence of additional mitigating witnesses. Most of the information contained in the affidavits from family and friends attached to the application for evidentiary hearing was presented to the jury. Appellant's sister and wife testified to his background, childhood, school activities, family life, devotion to his wife, mother and children, his good nature and character, and the fact that he was gainfully employed first with various ambulance services as a paramedic and later as a fireman prior to this arrest for drug possession. These same witnesses also described Appellant's depression and drug use stemming from his mother's death and his own divorce as well as his downward spiral into criminal behavior after he began using methamphetamines. The defense also introduced copies of Appellant's generally positive work evaluations from his employment with the fire department and an ambulance service. Much of Appellant's proposed additional mitigation evidence was cumulative to that presented to the jury. Even if trial counsel had presented all of the mitigating witnesses now proposed, there is no reasonable probability that the outcome of the trial would have been different. Therefore, considering all the facts and circumstances, Appellant has failed to show he is entitled to an evidentiary hearing and that counsel's second stage performance was ineffective.

¶ 9 Additionally, the prosecutor's second stage closing argument was not improper. The comments were based on the evidence and inferences therefrom. The majority's condemnation of the argument is merely another attempt to sanitize the defendant but dehumanize the victim.

¶ 10 I find the death sentence in this case was the result of the jury's thorough consideration and evaluation of the evidence, and that decision was not improperly influenced by victim impact evidence or prosecutorial comments. The facts of this case—the cold-blooded execution of a Highway Patrolman, begging for his life—and not the testimony of a family member, have dictated the result. For all of the above reasons, I would affirm the conviction and the death sentence.

LEWIS, Judge, Concur in Part/Dissent in Part.

¶ 1 I concur in affirming Appellant's conviction but dissent to reversing the death sentence. The victim impact testimony in this case was powerful, but it was properly admitted and any error in its admission is harmless beyond a reasonable doubt.

¶ 2 The majority correctly finds that trial counsel rendered deficient performance in failing to investigate mitigation evidence. Considering this omitted mitigation evidence in light of the aggravating circumstances, I see no reasonable probability of a different outcome at trial, and thus no violation of the right to effective assistance of counsel. I would affirm the death sentence.

2007 OK CIV APP 81

In the Matter of the ESTATE OF Luther Elmer NELSON, Deceased.

Michael Elmer Nelson, Appellant,

v.

Deborah L. Billings, Personal Representative of the Estate of Luther Elmer Nelson, Appellee.

No. 103,816.

Released for Publication by Order of the Court of Civil Appeals of Oklahoma, Division No. 4.

Court of Civil Appeals of Oklahoma, Division No. 4.

April 11, 2007.

Rehearing Denied Aug. 31, 2007.

Background: After filing probate action, personal representative of deceased father's estate, who was also specific devisee of father's will, sought and received permission of court, over objection of brother, also a devisee of will, to sell pipeline ease-

2013 OK CR 1

Ricky Ray MALONE, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. D–2010–1084.

Court of Criminal Appeals of Oklahoma.

Jan. 11, 2013.

Background: Defendant was convicted in the District Court, Comanche County, Mark R. Smith, J., of first-degree murder with malice aforethought, and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, 168 P.3d 185, affirmed conviction, reversed sentence, and remanded for resentencing. On remand, the District Court again imposed death sentence following bench trial. Defendant appealed.

Holdings: The Court of Criminal Appeals, Lumpkin, J., held that:

(1) defense counsel's advice for defendant to waive right to jury trial at resentencing was matter of reasonable trial strategy;

(2) counsel's failure during closing argument to argue that mitigating evidence outweighed aggravating evidence, but instead fashioning argument in manner to provide trial court with reason to spare defendant's life, was matter of reasonable trial strategy;

(3) counsel's failure to point to each piece of evidence that supported 17 mitigating circumstances was matter of reasonable strategy;

(4) counsel's plea for sentence of life without possibility of parole during closing argument was not concession that death sentence was more merciful punishment;

(5) prosecutor could refer to specific incidents showing defendant's character for violence and deception in cross-examination of defendant's witnesses to rebut their testimony about his good character;

(6) defendant's claim that aggravating circumstances of murder of peace officer in performance of official duty and murder committed for purpose of avoiding arrest or prosecution were unconstitutionally duplicative was barred by res judicata;

(7) *Atkins* prohibition against imposition of death penalty on mentally retarded persons did not extend to defendant suffering mental illness at time of killing;

(8) defendant was not suffering from mental illness at time of offense that was so severe as to negate his culpability for killing police officer;

(9) mandatory review of death sentence did not permit de novo review of evidence to establish aggravating or mitigating circumstances; and

(10) death sentence was factually substantiated and appropriate.

Affirmed.

Smith, V.P.J., concurred in result.

1. Criminal Law ⇦1881

The Court of Criminal Appeals reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington,* which requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇦1881

Unless defendant makes showing of both deficient performance and prejudice required to support a claim of ineffective assistance of counsel, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇦1871

On a claim of ineffective assistance, the court begins its analysis with the strong presumption that counsel's conduct fell within

the wide range of reasonable professional assistance. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1871, 1882, 1884

On a claim of ineffective assistance, the defendant must overcome the presumption that counsel's representation fell within the wide range of reasonable professional assistance, and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐1888

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐1883

To demonstrate the "prejudice" prong of a claim of ineffective assistance, the defendant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors, and the likelihood of a different result must be substantial, not just conceivable. U.S.C.A. Const.Amend. 6.

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

7. Criminal Law ⇐1963

Defense counsel's advice for defendant to waive right to jury trial at resentencing for capital murder, following publication of news story concerning defendant's case that referenced evidence that had been deemed inadmissible, was reasonable strategic decision that was virtually unchallengeable, on claim of ineffective assistance; decision to waive jury trial came after extensive consultation with counsel and defense investigators, and it was consensus of defense team that defendant's decision was "the best trial strategy that we could help him form." U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐1963

For counsel's advice to waive a jury trial at capital sentencing to rise to the level of constitutional ineffectiveness, it must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy. U.S.C.A. Const. Amend. 6.

9. Criminal Law ⇐1901

An attorney's advice to a client to waive the right to jury trial is a strategic decision for which judicial scrutiny must be highly deferential. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐1884, 1891

On a claim of ineffective assistance of counsel, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation; in other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐1882

In determining whether counsel's strategic decisions were so unreasonable as to amount to ineffective assistance, the question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from the best practices or most common custom. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐1962

Defense counsel's failure during closing argument in resentencing for capital murder to argue that mitigating evidence outweighed aggravating evidence, but instead fashioning argument in manner to provide trial court with reason to spare defendant's life, by recitation of substantial mitigation evidence, was matter of reasonable trial strategy that did not support claim of ineffective assistance. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐1884

Legal argument to be made is a matter of trial strategy, for the purposes of a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇨1961

Defense counsel's failure to point to each piece of evidence that supported 17 mitigating circumstances was matter of reasonable strategy that did not support claim of ineffective assistance, in resentencing for capital murder, in view of counsel's acknowledgement on record that trial court had "heard it," that trial court "knew it," and that trial court "had it." U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇨1962

Defense counsel's failure to argue during closing argument in sentencing for capital murder that mitigating evidence outweighed aggravating evidence was not unreasonable trial strategy that essentially resulted in concession that aggravating evidence outweighed mitigating evidence, as required to support claim of ineffective assistance; rather, counsel's argument was that, even if court found aggravating factor, such evidence only authorized it to consider death sentence, and was not evidence that death sentence was appropriate. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇨1962

Defense counsel's argument that sentence of life without possibility of parole for capital murder carried greater weight than death sentence because defendant would have to live each day knowing what he did to police officer victim's family and his own family, combined with presentation of substantial mitigation evidence suggesting that defendant was entitled to mercy, was not unreasonable trial strategy; counsel argued that life without parole constituted justice because it was the "just and adequate punishment for this crime," and he argued that death sentence was inappropriate because defendant was not a continuing threat to society, it would end defendant's punishment, it would harm more people, and it would not bring victim back or help his family. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇨1884

That counsel's trial strategy was ultimately unsuccessful does not make it unsound or unreasonable. U.S.C.A. Const. Amend. 6.

18. Criminal Law ⇨1037.1(1)

The appellate court reviews claims of prosecutorial misconduct for plain error under the standard set forth in *Simpson v. State*, pursuant to which the defendant must prove: (1) the existence of an actual error i.e., deviation from a legal rule; (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. 20 Okl.St.Ann. § 3001.1.

19. Criminal Law ⇨1030(1)

If the *Simpson* elements for plain error review are met, the appellate court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. 20 Okl.St.Ann. § 3001.1.

20. Criminal Law ⇨1030(1)

Only if the appellant has shown the existence of an actual error plain on the record will the appellate court turn to the third step of the analysis to determine whether the error affected the appellant's substantial rights. 20 Okl.St.Ann. § 3001.1.

21. Criminal Law ⇨1037.1(1)

On a claim of plain error based on prosecutorial misconduct, the appellate court reviews the entire record to determine whether the cumulative effect of improper comments by the prosecutor prejudiced the appellant; the court considers whether the prosecutorial misconduct so infected the defendant's trial that it was rendered fundamentally unfair. 20 Okl.St.Ann. § 3001.1.

22. Witnesses ⇨266

The State is permitted to cross-examine the defendant's witnesses at trial.

23. Witnesses ⇨268(1), 269(1)

As a general rule, any matter is a proper subject of cross examination which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness.

24. Witnesses ⚿274(2)

The State is permitted to question defense character witnesses concerning specific instances of the defendant's bad character regardless of the character witness' knowledge of the specific instance.

25. Witnesses ⚿274(2)

Prosecutor's questions to defendant's character witness who had worked with defendant as firefighter as to whether witness knew that defendant had hit handicapped man with beer bottle, that defendant had been arrested for marijuana and other controlled substance, and that defendant had started using methamphetamine and had become so addicted that he had started cooking his own, were within permissible scope of cross-examination to rebut witness' testimony on direct examination regarding defendant's professionalism, and that he was hard worker, good firefighter, and good paramedic, in resentencing for capital murder of police officer; circumstances of defendant's drug abuse and attack on handicapped individual had previously been introduced into evidence during State's case-in-chief, witness had worked same shift as defendant at fire department for 18 months and had been partner with defendant for six months, witness had testified that firefighters in department were like brothers, and defendant had begun drug abuse during this period of time that he had worked with witness.

26. Witnesses ⚿274(2)

Prosecutor's questions to defendant's character witness regarding specific incidents of bad conduct, namely, whether witness thought it was appropriate for emergency responders to abuse drugs or alcohol, whether witness was aware that defendant had been fired from fire department for bringing methamphetamine to fire station, and whether witness was aware that defendant had been using methamphetamine while working as firefighter and paramedic were within scope of permissible cross-examination, in resentencing for capital murder, to rebut witness' testimony on direct examination that defendant was hard worker, good paramedic, passionate about helping people, and devoted to his family.

27. Witnesses ⚿274(2)

Prosecutor's questions to defendant's character witness regarding her limited knowledge of defendant, and whether she ever used illegal steroids, abused prescription drugs, smoked marijuana, abused alcohol, or used methamphetamine while on job, were within scope of permissible cross-examination, in resentencing for capital murder, to rebut witness' testimony on direct examination that defendant, who worked as firefighter and paramedic, was good with patients, and was very professional and caring; questions were not misleading, in that circumstances of defendant's drug abuse had been introduced into evidence before witness testified, and it was apparent that defendant's drug abuse occurred during time that witness had remained familiar with defendant.

28. Witnesses ⚿274(2)

Inquiry of a character witness into specific instances of conduct, not resulting in conviction, is permissible as long as the conduct precipitating the arrest impeaches the character trait offered; it is the underlying bad conduct itself that serves to test the witness' opinion as to the defendant's character.

29. Witnesses ⚿274(2)

Prosecutor's questions to defendant's character witnesses regarding their knowledge of defendant's arrest for domestic abuse was within permissible scope of cross-examination to rebut witnesses' testimony regarding defendant's good character, in resentencing for capital murder.

30. Witnesses ⚿274(2)

Prosecutor's questions to defendant's character witnesses regarding their knowledge of defendant's arrest for domestic abuse, which served to impeach their direct examination testimony as to defendant's good character and to establish aggravating circumstance that defendant presented continuing threat to society, was not error, in resentencing for capital murder, despite defendant's claim that he had not committed crime; wife testified that, at time in question, during course of confrontation about wife's affair, defendant had forced his way into

home and punched wall, that he had grabbed her arm and would not let go, that she could not get away from defendant, and that, when police officers arrived, it took defendant's sister and police officers to forcibly remove defendant's hand from wife's arm.

31. Criminal Law ⇦1130(5)

Defendant waived claim on appeal from resentencing for capital murder that prosecutor was "bickering" with witness, where he provided no argument or authority to support claim. Court of Criminal Appeals Rule 3.5(A)(5), 22 O.S.A. Ch. 18, App.

32. Sentencing and Punishment ⇦1789(9)

Even assuming that prosecutor's questions to defendant's character witnesses as to their knowledge about defendant's arrest for assault and battery of his wife amounted to actual error, defendant was not prejudiced by questions, in resentencing for capital murder, where questions were posed to establish aggravating circumstance that defendant presented continuing threat to society, trial court did not find defendant to be continuing threat to society, and evidence was not germane to any other aggravator.

33. Witnesses ⇦274(2), 291

Prosecutor's questions on re-cross examination of defendant's character witness who had worked with defendant as firefighter, whether defendant had misled or deceived witness about his use of methamphetamine and other drugs while working and whether defendant was good at concealing those things from coworkers, were within permissible scope of cross-examination to rebut witness' testimony that defendant was good paramedic.

34. Criminal Law ⇦1171.1(1)

Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial.

35. Judgment ⇦751

Defendant's claim on appeal from resentencing for capital murder, that aggravating circumstances of murder of peace officer in performance of official duty and murder committed for purpose of avoiding arrest or prosecution were unconstitutionally duplicative, was barred by res judicata, where claim had been raised and rejected on original appeal.

36. Sentencing and Punishment ⇦1642

Atkins prohibition against imposition of death penalty on mentally retarded persons did not extend to defendant suffering mental illness at time of killing. U.S.C.A. Const. Amend. 8.

37. Sentencing and Punishment ⇦1793

Capital defendant was not suffering from mental illness that was so severe at time of offense as to negate his culpability for shooting police officer to death or to show that death penalty would not serve as deterrent; jury had rejected insanity defense during first trial, and sentencing court found that, although defendant may have experienced methamphetamine psychosis at some point, no reasonable juror could have concluded that he was in such state at time he shot officer, in view of testimony of witnesses with whom defendant spoke with immediately after shooting that defendant's words and actions were logical and goal-oriented and did not suggest that he was experiencing any sort of disconnect from reality. U.S.C.A. Const.Amend. 8.

38. Criminal Law ⇦1186.1

When there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial.

39. Criminal Law ⇦1186.1

A cumulative error argument has no merit when the appellate court fails to sustain any of the individual errors raised by the defendant.

40. Sentencing and Punishment ⇦1788(5)

When conducting mandatory review of a death sentence, the Court of Criminal Appeals considers (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the trial court's finding of the aggravating

circumstances. 21 Okl.St.Ann. §§ 701.12, 701.13(C).

41. Sentencing and Punishment ⇐1788(5)

In conducting mandatory review of death sentence for capital murder of police officer, Court of Criminal Appeals would not conduct de novo review of evidence supporting aggravating and mitigating factors; rather, review was only to extent necessary to determine whether there was sufficient evidence from which rational trier of fact could find that balance of aggravating and mitigating circumstances warranted death sentence. 21 Okl.St.Ann. § 701.13(F).

42. Sentencing and Punishment ⇐1788(5)

In conducting mandatory review of a death sentence, the Court of Criminal Appeals is required to render its decision on the legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence; however, the Court does not act as an independent factfinder or substitute its judgment for that of the trier of fact. 21 Okl.St.Ann. § 701.13(F).

43. Sentencing and Punishment ⇐1658

Specific standards for balancing aggravating and mitigating circumstances under the capital sentencing scheme are not constitutionally required.

44. Sentencing and Punishment ⇐1658, 1771

The "beyond a reasonable doubt" burden of proof analysis is not strictly applicable to the weighing of the mitigating factors against the aggravating factors, under the capital sentencing scheme; while the State must prove beyond a reasonable doubt the existence of at least one of the enumerated aggravating circumstances in support of a request to impose the death penalty, the determination of the weight to be accorded the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt, but is instead a balancing process. 21 Okl.St.Ann. § 701.13(F).

45. Sentencing and Punishment ⇐1658

The trier of fact's consideration of aggravators versus mitigators is a balancing process which is not amenable to the "beyond a reasonable doubt' standard of proof," but is instead a highly subjective and largely moral judgment about the punishment that a particular person deserves, in sentencing for capital murder; therefore, the Court of Criminal Appeals reviews the evidence only to the extent necessary to determine whether there was sufficient evidence from which a rational trier of fact could find that the balance of aggravating and mitigating circumstances warranted a death sentence. 21 Okl.St.Ann. § 701.13(F).

46. Sentencing and Punishment ⇐1788(5, 7)

When conducting mandatory review of a death sentence, the inquiry under *Fisher* does not require the Court of Criminal Appeals to ask itself whether it believes that the balance of aggravating and mitigating circumstances warranted a death sentence; instead, the relevant question is whether, after viewing the evidence in the light most favorable to prosecution, any rational trier of fact could find that the balance of aggravating and mitigating circumstances warranted a death sentence, and the factfinder's role as weigher of the aggravating and mitigating circumstances is preserved through a legal conclusion that upon judicial review, all of the evidence is to be considered in the light most favorable to the prosecution.

47. Sentencing and Punishment ⇐1788(5)

When conducting mandatory review of a death sentence, if one aggravating circumstance is determined to be invalid, but at least one valid aggravating circumstance remains which enables the trier of fact to give aggravating weight to the same facts and circumstances which supported the invalid aggravator, the Court of Criminal Appeals conducts an independent reweighing of the aggravating and mitigating evidence. 21 Okl.St.Ann. § 701.13(F).

48. Sentencing and Punishment ⇐1788(5, 10)

When conducting its mandatory review of a death sentence, in order for the Court of Criminal Appeals to determine that a death sentence is valid following the invalidation of an aggravating circumstance, it must determine both that the remaining aggravating

circumstances outweigh the mitigating circumstances and the weight of the improper aggravator is harmless. 21 Okl.St.Ann. § 701.13.

49. Sentencing and Punishment ⚿1788(10)

To find an improper aggravator to be harmless error, in the context of conducting mandatory review of a death sentencing, the Court of Criminal Appeals must be able to determine from the record that the elimination of the improper aggravator cannot affect the balance beyond a reasonable doubt. 21 Okl.St.Ann. § 701.13(F).

50. Sentencing and Punishment ⚿1682, 1731

Evidence was sufficient for rational trier of fact to find that balance of mitigating circumstances and aggravating circumstances that defendant had shot and killed police officer, that officer was acting in performance of official duties, and that murder was committed to avoid arrest warranted death sentence, and therefore, death sentence was factually substantiated and appropriate; while attempting to arrest defendant for operation of methamphetamine laboratory, defendant and officer became involved in physical struggle, defendant gained possession of officer's gun in course of struggle, and defendant shot officer twice in head despite pleas from officer to spare his life, defendant had previously told witnesses that he would kill police officers to avoid going to jail, and defendant's mitigation evidence, although substantial, was conflicting. 21 Okl.St.Ann. § 701.13(F).

51. Sentencing and Punishment ⚿1665

The sentencer should consider the circumstances of the offense in deciding whether to impose the death penalty.

An Appeal from the District Court of Comanche County; the Honorable Mark R. Smith, District Judge.

Gary Henry, Matthew Haire, Capital Trial Division, Oklahoma Indigent Defense System, Norman, OK, for Defendant.

Fred Smith, District Attorney, Comanche County Courthouse, Lawton, OK, for the State.

Lee Ann Jones Peters, James H. Lockard, Homicide–Direct Appeals Division, Oklahoma Indigent Defense System, Norman, OK, for Appellant.

E. Scott Pruitt, Attorney General of Oklahoma, Seth S. Branham, Assistant Attorney General, Oklahoma City, OK, for the State.

OPINION

LUMPKIN, Judge.

¶ 1 Appellant, Ricky Ray Malone, was tried by jury and convicted of First Degree Murder (21 O.S.2001, § 701.7) in the District Court of Comanche County, Case Number CF–2005–147. In accordance with the jury's recommendation, the trial court imposed a sentence of death. This Court affirmed Appellant's conviction, but reversed the sentence and remanded the case for resentencing. *Malone v. State,* 2007 OK CR 34, 168 P.3d 185.

¶ 2 Appellant waived his right to jury trial and a resentencing trial was held October 18–29, 2010, before the Honorable Mark R. Smith.[1] The trial court found the existence of two (2) aggravating circumstances: (1) "the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; and (2) "the victim of the murder was a peace officer . . ., and such person was killed while in performance of official duty." 21 O.S.2001, § 701.12.[2] The trial court further found that the aggravating cir-

1. As noted in this Court's opinion on direct appeal, the killing of Trooper Nikky J. Green was committed in Cotton County. Appellant was initially charged in Cotton County District Court but venue was transferred to Comanche County following the State's confession of Appellant's change of venue motion so that the State could achieve an earlier trial date. *Malone v. State,* 2007 OK CR 34, ¶ 1 n. 1, 168 P.3d 185, 189 n. 1.

2. The trial court rejected the aggravating circumstance of "the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." 21 O.S.2001, § 701.12(7).

cumstances outweighed the mitigating circumstances presented and sentenced Appellant to death. Appellant now appeals this sentence.

FACTS

¶ 3 In the late night hours of December 25, 2003, Appellant took his sister's car to a county road in rural Cotton County just east of Devol, Oklahoma.[3] He set up a methamphetamine laboratory and started cooking methamphetamine. Appellant's four meth-making comrades, Tammy Sturdevant (Appellant's sister), Tyson Anthony (her boyfriend), James Rosser and Jamie Rosser (husband and wife) had gathered all of the ingredients necessary to make methamphetamine and loaded them in the car earlier in the day. Appellant went to complete the cook alone because Anthony became ill and stayed behind.

¶ 4 Before Appellant left he asked Anthony if he could borrow his 9mm pistol in case he got pulled over or had trouble with the police. Anthony understood that Appellant wanted the pistol so he could shoot and kill any officer that tried to take him to jail. Appellant had been arrested for possession of methamphetamine on November 10, 2003. On December 21, 2003, he was arrested for conspiracy to manufacture methamphetamine. Following those arrests, Appellant explained to Anthony and his other meth-making comrades that he could not go back to jail because he would be unable to bond out. He threatened that he would shoot and kill the officers before he went back to jail.

¶ 5 Appellant had the lab set up on the ground outside the white four-door car. As the chemicals processed, Appellant fell asleep in the front seat. At 6:20 a.m., the local newspaper delivery person, Abigail Robles, discovered Appellant. Fearing that he was dead, Robles contacted a family friend that lived nearby. Robles traveled to Trooper Nik Green's home and woke him. Green was not scheduled to be on duty until 9:00 a.m. on that date so he reported the circumstances to the Oklahoma Highway Patrol dispatch. When Green learned that no one else was available, he volunteered to enter service early and check out the situation. Trooper Green went on duty at 6:37 a.m., and shortly thereafter he informed dispatch that he had discovered the white car.

¶ 6 Green's patrol unit was clearly marked as an official Oklahoma Highway Patrol car. Green pulled-up behind the white four-door car. His headlights illuminated the vehicle and the ground around the car. Apparently, Green observed the items on the ground and identified them as a meth lab.

¶ 7 Trooper Green was dressed in his OHP brown uniform. He contacted Appellant in the front seat of the car. Green woke Appellant by shining his flashlight and speaking to him. Green informed Appellant he was under arrest. Green had Appellant exit the car and got him face-first on the ground in front of the patrol unit. Green handcuffed Appellant's right wrist. Appellant got up and started fighting Green. Appellant later told his meth-making comrades that he fought Green because he did not want to go back to jail.

¶ 8 A tremendous struggle ensued on the side of the road. Green dropped his service weapon during the fight and resorted to striking Appellant with his baton. Appellant lost the pistol that Anthony had loaned him. The two men fought down into a ditch, through a barb wire fence and back again into the ditch. During the struggle Appellant found Green's service weapon laying on the ground. This gave Appellant the upper hand. Appellant put the gun to Green's head and Green stopped struggling.

¶ 9 Appellant forced Trooper Green to lie face down in the ditch with his arms and legs spread out wide. Appellant was on top of Green so he could not get back up. Green told Appellant that he could run and leave him if he wanted. Green explained to Appellant that he had children and pleaded with him "[i]n the name of Jesus Christ." (Tr. 5B, 975).

3. The facts supporting Appellant's conviction were summarized in this Court's opinion on direct appeal, which is incorporated herein by reference. *See Malone,* 2007 OK CR 34, ¶¶ 2–19, 168 P.3d at 189–95.

¶ 10 Appellant repeatedly asked Green where the handcuff keys were at. When Green indicated that he did not know where the key was at, Appellant explained "[t]hen you'll die." (Tr. 5B, 977). Green continued to plead for Appellant not to harm him throughout the exchange. Appellant asked Green "[w]here did you drop your gun, at?" [4] Green pleaded "Don't shoot me." (Tr. 5b, 982). Appellant promised that he would not shoot Green. After several more requests for the keys, Green told Appellant that the keys were in his pocket. Appellant rolled Green slightly and searched his pocket. Green asked Appellant if he found the keys. When Appellant responded negatively, Green volunteered: "There's some more in my unit." Appellant stated, "I don't need to know." (Tr. 5B, 999).

¶ 11 Unable to find the handcuff keys or the other firearm, Appellant could not prevent the Trooper from taking further action after he left. Appellant decided to kill Trooper Green. Green recognized Appellant's thought process and began to pray. Appellant shot Green in the back of the head. Eleven seconds later, Appellant shot Green in the back of the head for the second time. Appellant cleaned up the meth lab, put the components in the car, and drove away.

¶ 12 Appellant drove directly to his sister's house. He told all four of his meth-making comrades: "I just killed [sic] an f'ing Hi–Po." (Tr. 5B, 1021, 1037). Appellant explained that he killed the cop to avoid going back to jail. Appellant's comrades helped him get rid of the car, the gun, and his clothes. Appellant apologized to each of the four. When he noticed that Jamie Rosser was upset the following evening, Appellant explained to her that he had gotten everything cleaned up and that he had left nothing to identify to him. Mrs. Rosser asked him about the patrol car video and Appellant responded "Oh, fuck." (Tr. 3, 143–44).

¶ 13 Based upon the dashcam video from Trooper Green's patrol unit, Appellant was quickly identified. The Oklahoma State Bureau of Investigation questioned Appellant about Trooper Green's murder. Appellant informed Agent Perry Unruh that Tyson Anthony's account of what had occurred was "probably true" but then claimed "maybe it was an accident." (Tr. 5B, 1045–49). When questioned further Appellant stated: "I can't, I can't say anything or I'll get the death penalty." (Tr. 4, 104).

4. Appellant did not learn until later that he, in fact, had the Trooper's gun and not the firearm that he borrowed from Anthony.

TRIAL ISSUES

[1, 2] ¶ 14 Appellant contends in his second proposition of error that in two separate instances he was denied the effective assistance of counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 270 P.3d 160, 190. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730 (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). Unless the appellant makes both showings, "it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." *Ryder v. State*, 2004 OK CR 2, ¶ 85, 83 P.3d 856, 875 (*quoting Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064).

[3, 4] ¶ 15 The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Appellant must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* This Court has stated that the issue is whether counsel exercised the skill, judgment and diligence of a reasonably competent defense attorney in light of his overall perform-

ance. *Mitchell*, 2011 OK CR 26, ¶ 140, 270 P.3d at 190.

[5, 6] ¶ 16 When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 (*citing Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Bland*, 2000 OK CR 11, ¶ 112, 4 P.3d at 731. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, —— U.S. ——, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

[7] ¶ 17 Appellant, first, claims that defense counsel rendered ineffective assistance by advising him to waive his right to have a jury determine his punishment.

[8] ¶ 18 The Tenth Circuit Court of Appeals has determined that an attorney's decision to waive his client's right to jury trial is a classic example of strategic trial judgment for which *Strickland* requires that judicial scrutiny be highly deferential. *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n. 1 (10th Cir.2001). For counsel's advice in such circumstances to rise to the level of constitutional ineffectiveness, the decision to waive jury trial must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy. *Id.* (quotations and citation omitted).

[9, 10] ¶ 19 We agree that an attorney's advice to a client to waive the right to jury trial is a strategic decision for which judicial scrutiny must be highly deferential. *See Dawkins v. State*, 2011 OK CR1, ¶ 20, 252 P.3d 214, 220 ("[W]e will not second-guess strategic decisions."). Regarding strategic decisions, *Strickland* provides:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066.

¶ 20 Turning to the record in the present case, the trial court held a hearing upon Appellant's waiver of his right to jury resentencing on October 8, 2010.[5] transcript of that proceeding reveals the circumstances of Appellant's jury waiver. On October 6, 2010, the local newspaper ran a story concerning Appellant's case. The writer, unknowingly, referenced State's evidence the Court had determined was inadmissible. The next day, the two attorneys and two investigators making up the defense team met with Appellant. They discussed whether Appellant should file a motion for a continuance or proceed with the jury trial scheduled the next week. This discussion evolved into a discussion of Appellant's right to jury resentencing and the possibility of Appellant taking the "unusual" step of waiving a jury and trying the matter to the judge assigned to the case. Appellant and his defense team extensively discussed the subject. The defense team did not try to influence Appellant one way or the other. Appellant was permitted to think about the matter overnight. He decided that a bench trial was the best thing for him. At the waiver hearing, defense counsel filed the motion for continuance in open court. The trial judge indicated that he would grant the motion if Appellant still wanted a jury trial. Appellant indicated that "strategically" a bench trial was his "best option" and waived his right to jury resentencing. (10/08/2010, Tr. 18–19).

5. We commend Judge Smith for his thoroughness in the determination that Appellant's waiver of jury resentencing was knowing and voluntary.

¶ 21 While the decision to waive jury trial was solely Appellant's decision, the record reflects that the waiver was a carefully crafted strategy developed by the defense team.[6] Defense counsel indicated during the waiver hearing that Appellant's defense team had worked together on Appellant's case for approximately three (3) years, including interviewing 230–some witnesses, to bring the best case they possibly could on Appellant's behalf. The defense team helped Appellant form the strategy of waiving his right to a jury for the resentencing proceeding. Counsel informed the court that they could not think of anything the defense team missed in trying to advise Appellant on how to handle the resentencing proceeding. Appellant spoke to each member of the defense team about the issues, had the advantage of their different viewpoints, and chose to pursue the bench trial strategy. It was the consensus of the defense team that Appellant's decision was "the best trial strategy that we could help him form and have helped him form throughout our time of representation with him." (10/08/2010, Tr. 30). As such, we find that counsels' advice to Appellant concerning the waiver of his right to jury resentencing was a thoroughly investigated strategic decision which is virtually unchallengeable.

[11] ¶ 22 Appellant contends that waiving jury trial in the present case was an unreasonable strategic choice. He argues that a capital sentencing decision is generally best left to a jury, that there was a better way of avoiding a jury tainted by the newspaper article, and the odds of convincing one merciful factfinder to spare his life were greater with a jury.[7] However, that is not the standard adopted by United States Supreme Court. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from the best practices or most common custom." *Harrington v. Richter*, —— U.S. ——, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). We reject Appellant's claim that defense counsel rendered ineffective assistance for allegedly failing to utilize the best practice or most common custom.

¶ 23 Appellant asserts that counsels' strategic decision was unreasonable because a poll allegedly indicated that the jury pool in Comanche County was receptive to a sentence less than death. Appellant cites to statistics within a Change of Venue Survey that defense counsel commissioned and attached to Appellant's Application for Change of Venue. Appellant mischaracterizes this poll. The survey did not collect data on the likelihood that a jury could be found in Comanche County who would impose a sentence less than death. Instead, the survey was "focused on gauging how familiar the respondents were with the case in general, and, more specifically, with the criminal allegations and prior sentencing of defendant." (O.R.1142). Although the survey respondents were asked what they believed was the appropriate punishment for Appellant's offense, they were not provided with any of the evidence either in aggravation of punishment or in mitigation of punishment. (O.R.1150). As best illustrated by the parties' debate within the briefs as to what the poll actually showed, the poll numbers were far from conclusive. Therefore, this poll held limited value in determining the actual receptiveness of the jury pool to a sentence less than death.

¶ 24 Nonetheless, the fact that defense counsel had this information at the time that they advised Appellant regarding the bench trial strategy evinces the thoroughness of defense counsels' investigation. As counsel had the benefit of the poll, we refuse to second guess counsels' strategic decision. *Dawkins*, 2011 OK CR 1, ¶ 20, 252 P.3d at 220. Further, we refuse to find that defense counsel must conform their advice to the statistical analysis set forth in opinion polls

6. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, ... or take an appeal.").

7. In his brief, Appellant solely describes the purpose of waiving jury trial as a means to avoid a jury tainted by the information published in the newspaper. However, defense counsel neither provided this as the reason for the jury waiver strategy nor any other explicit reason. (10/08/2010, Tr. 2–30).

to meet the prevailing professional norm. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

¶ 25 Appellant alleges that there was "tremendous political pressure" to obtain a death sentence in this case and argues that it was unreasonable to put the sentencing decision into the hands of a single decision-maker facing such public pressure. A review of the record in the present case reveals no evidence that the trial court was subjected to political pressure or even any appearance thereof. To the contrary, the record reveals that the trial judge was impartial. There is no tenable claim in the present case that Appellant's trial was unfairly conducted. *Brumfield v. State,* 2007 OK CR 10, ¶ 30, 155 P.3d 826, 838. As we do not find the existence of any political pressure or impartiality, we find that Appellant has failed to show that counsels' representation was unreasonable under prevailing professional norms. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

¶ 26 Appellant further contends that it was unreasonable to proceed with the bench trial strategy because of the trial judge's previous exposure to the victim impact evidence in the first sentencing trial that this Court found inadmissible on direct appeal. *See Malone,* 2007 OK CR 34, ¶¶ 56–62, 168 P.3d at 209–11. We find that defense counsel reasonably concluded that the trial court's previous exposure to the State's evidence was not a detriment to Appellant's case. This Court has long recognized that the trial court acting as trier of fact is capable of hearing inadmissible evidence but only considering competent and admissible evidence in reaching its decision. *See Long v. State,* 2003 OK CR 14, ¶ 4, 74 P.3d 105, 107 ("We presume, when a trial court operates as the trier of fact, that only competent and admissible evidence is considered in reaching a decision."); *Borden v. State,* 1985 OK CR 151, ¶ 9, 710 P.2d 116, 118; *Fox v. State,* 1976 OK CR 307, ¶ 12, 556 P.2d 1281, 1283–84. Since the trial judge had previously seen the State's evidence at the original trial, defense counsel could have reasonably concluded this fact would allow the trial court to better focus on the mitigating circumstances, much of which had not been presented at the first trial. *See Richter,* 131 S.Ct. at 790 ("Although courts may not indulge *post hoc* rationalization for counsel's decision making that contradicts the available evidence of counsel's actions ... neither may they insist counsel confirm every aspect of the strategic basis for his or her actions.") (quotations and citation omitted). We note that defense counsel specifically informed the trial court in opening statement "we intend to show the Court the other side of Rick Malone ... that is a big part of why we're here again today, is because we didn't hear about those things...." (Tr. 5A, 29). Therefore, we find that Appellant has failed to overcome the presumption that counsels' strategic decision to waive jury resentencing fell within the wide range of reasonable professional assistance and show it could not be considered sound trial strategy. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

[12, 13] ¶ 27 Second, Appellant challenges numerous aspects of defense counsel's closing argument and suggests various ways it could have been better. We review Appellant's claim under the familiar two-part *Strickland* test. *Hancock v. State,* 2007 OK CR 9, ¶¶ 106, 110, 155 P.3d 796, 821–22. We note that the legal argument to be made is a matter of trial strategy. *Short v. State,* 1999 OK CR 15, ¶ 87, 980 P.2d 1081, 1107.

¶ 28 Appellant contends that counsel rendered ineffective assistance by failing to argue that the mitigating evidence outweighed the aggravating evidence or otherwise compelled a sentence less than death. A review of the record in the present case reveals that instead of arguing that the mitigating evidence outweighed the aggravating evidence, defense counsel attempted to provide the trial court with a reason to spare Appellant's life. That was counsel's opening argument. (Tr. 5A, 35). In closing argument, counsel connected with this theme by focusing on "what went wrong?" (Tr. 10, 22). He recited that Appellant had: (1) grown up on the other side of the tracks amidst violence, abuse, mental illness and addiction; (2) become a productive citizen dedicating his life to saving lives as a paramedic, (3) spiraled out of control after mental illness, childhood issues, and the pain of loss led to drug addiction. Counsel argued that Appellant had been returned to the man of compassion,

care, and concern from before the mental illness and drugs. Coupled with this argument, counsel recounted that Appellant's life held value to his family members and argued that the individuals that Appellant had saved and their families would also value his life. Defense counsel read-off seventeen separate mitigating circumstances that he believed "mitigate[d] the issue of punishment." (Tr. 10, 25–27). He argued that the evidence clearly showed that there was no reason to completely remove Appellant from society. Counsel concluded his closing argument by imploring the court to sentence Appellant to imprisonment for life without the possibility of parole.

¶ 29 We refuse to second-guess counsel's decision to argue that there was reason to spare Appellant's life as opposed to arguing that the mitigating evidence outweighed the aggravating circumstances. Defense counsel's argument reflects a fully informed strategic decision between potential arguable defenses. *Hancock,* 2007 OK CR 9, ¶ 110, 155 P.3d at 822 (holding that the often difficult decision of which defense to stress during closing argument is necessarily committed to the strategic judgment of defense counsel); *Sanchez v. State,* 2009 OK CR 31, ¶ 99, 223 P.3d 980, 1012 (finding defense counsel's tactical decision in closing argument objectively reasonable based on informed judgment).

[14] ¶ 30 Appellant challenges defense counsel's failure to point to the evidence that supported the seventeen mitigating circumstances. We note that counsel's act of reading the seventeen mitigating circumstances effectively summarized the defense's evidence. Nonetheless, the record reveals that counsel did not go through every piece of evidence that supported each mitigating circumstance. Counsel stated; "I'm not going to go through . . . every piece of evidence that supports each of those mitigating circumstances . . . You've heard it, you know it, you've got it." (Tr. 10, 27). We find that counsel's decision to rely upon the trial judge's recollection of the mitigating evidence to be sound trial strategy. *Long v. State,* 2003 OK CR 14, ¶ 19, 74 P.3d 105, 109 (finding failure to give closing argument at bench trial was sound trial strategy). We refuse to second guess counsel's strategic decision in this regard. *Hancock,* 2007 OK CR 9, ¶ 110, 155 P.3d at 822.

[15] ¶ 31 Appellant contends that defense counsel all but conceded that the evidence in aggravation of punishment outweighed the proffered mitigating circumstances. However, it is clear from the record that defense counsel was not conceding that the evidence in aggravation outweighed the mitigating evidence. Instead, defense counsel's argument was that even if the trial judge found the existence of one or more aggravators, this only authorized the court to consider a death sentence. This Court has previously determined that this argument is not a concession of guilt or the imposition of a death sentence. *Turrentine v. State,* 1998 OK CR 33, ¶¶ 89–90, 965 P.2d 955, 979–80. Further, such argument is considered sound trial strategy and does not amount to ineffective assistance. *Id.; Williams v. State,* 2008 OK CR 19, ¶ 136, 188 P.3d 208, 231–32; *Patton v. State,* 1998 OK CR 66, ¶ 135, 973 P.2d 270, 304.

[16] ¶ 32 Finally, Appellant claims that defense counsel encouraged the trial court to sentence Appellant to death by presenting a multitude of evidence suggesting that Appellant deserved mercy and then arguing that a death sentence was the merciful decision.

¶ 33 In *Abshier v. State,* 2001 OK CR 13, 28 P.3d 579, this Court found that defense counsel's attempt to convince the jury that "Life Without Parole" was the most extreme punishment because the appellant would have the rest of his life to think about what he had done did not constitute ineffective assistance of counsel. *Id.,* 2001 OK CR 13, ¶¶ 86–88, 28 P.3d at 599 (*overruled on other grounds by Jones v. State,* 2006 OK CR 17, ¶ 12 n. 14, 134 P.3d 150, 155 n. 14). Instead, the Court found that counsel's attempt to entice the jury into sparing the appellant's life was a reasonable trial strategy. *Id.*

¶ 34 Turning to the present case, defense counsel attempted to save Appellant's life by arguing for a sentence of life without the possibility of parole. Counsel argued that life without the possibility of parole carried greater weight than a death sentence because Appellant would have to live each and

every day knowing what he did to Green's family and his own family. Counsel argued that life without the possibility of parole constituted justice because it was the "just and adequate punishment for this crime." (Tr. 10, 28). He further argued that a death sentence was inappropriate because Appellant was not a continuing threat to society, it would end Appellant's punishment, it would harm more people, and it would not bring Trooper Green back or help his family.

[17] ¶ 35 Although this strategy was ultimately unsuccessful, that does not make it unsound or unreasonable. *Id.* We find that defense counsel's argument that a sentence of life without the possibility of parole carries greater punishment than a death sentence to be sound trial strategy.

¶ 36 Appellant cites to *Collis v. State,* 1984 OK CR 80, 685 P.2d 975, and argues that it is objectively unreasonable for defense counsel to argue that the defendant deserves the maximum punishment. In *Collis,* defense counsel argued that " 'Don Collis, or whoever committed this crime . . . should be punished to the full extent of the law' " but counsel did not argue that his client was innocent. *Id.,* 1984 OK CR 80, ¶¶ 5, 11, 685 P.2d at 976–77. This Court found that taken in context of complete closing argument, counsel's argument was objectively unreasonable because it conceded Appellant's guilt of the offense. *Id.*

¶ 37 This Court's opinion in *Collis* is both legally and factually distinguishable from the present case. *Collis* is distinguishable because it was a non-capital case. *Abshier,* 2001 OK CR 13, ¶ 57, 28 P.3d at 593. Taking defense counsel's entire closing argument in context in the present case, we do not find that counsel conceded Appellant's guilt to imposition of a death sentence. At all times during the case, defense counsel asserted that there was reason to spare Appellant's life. Counsel argued that a death sentence was inappropriate and implored the trial court to sentence Appellant to life without the possibility of parole.

¶ 38 As such, we find that Appellant has failed to overcome the presumption that counsel's closing argument fell within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Accordingly, we find that Appellant was not denied effective assistance of counsel and this assignment of error is denied.

¶ 39 In his third proposition of error, Appellant contends that prosecutorial misconduct deprived him of a fair and reliable sentencing hearing. He asserts that the prosecutor improperly impeached his mitigation witnesses.

¶ 40 Appellant failed to raise a timely objection to all but one of the instances he now challenges as improper. Thus, he has waived appellate review of the challenges for all but plain error. *Romano v. State,* 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115.

[18, 19] ¶ 41 This Court reviews claims of prosecutorial misconduct for plain error under the standard set forth in *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690, *Grissom v. State,* 2011 OK CR 3, ¶ 68, 253 P.3d 969, 992; *Sanchez v. State,* 2009 OK CR 31, ¶ 72, 223 P.3d 980, 1004; *Andrew v. State,* 2007 OK CR 23, ¶ 128, 164 P.3d 176, 202; *Glossip v. State,* 2007 OK CR 12, ¶ 81, 157 P.3d 143, 157; *Myers v. State,* 2006 OK CR 12, ¶¶ 54–55, 133 P.3d 312, 329; *McElmurry v. State,* 2002 OK CR 40, ¶ 130, 60 P.3d 4, 30–31; *Anderson v. State,* 1999 OK CR 44, ¶ 28, 992 P.2d 409, 419. In *Hogan v. State,* 2006 OK CR 19, 139 P.3d 907, we detailed the three part test for plain error.

> To be entitled to relief under the plain error doctrine, [an appellant] must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *See Simpson v. State,* 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson,* 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (*citing United States v. Olano,*

507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993)); 20 O.S.2001, § 3001.1.

Id., 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

[20] ¶ 42 Therefore, the first step of plain error review of a claim of prosecutorial misconduct is to determine whether the prosecutor's comments constitute an actual error. *See Sanchez*, 2009 OK CR 31, ¶ 72, 223 P.3d at 1004; *Myers*, 2006 OK CR 12, ¶¶ 54–55, 133 P.3d at 329. The second step is to determine whether the error is plain on the record. *Glossip*, 2007 OK CR 12, ¶ 81, 157 P.3d at 157. Only if the appellant has shown the existence of an actual error plain on the record do we turn to the third step of the analysis. *See Hogan*, 2006 OK CR 19, ¶ 44, 139 P.3d at 925 (determining that instructions were sufficient thus plain error did not occur); *Martinez v. State*, 1999 OK CR 33, ¶ 40, 984 P.2d 813, 825 (holding that plain error did not occur where there was no error in prosecutor's comments).

[21] ¶ 43 The third step is to determine whether the appellant has shown that the prosecutor's misconduct affected his substantial rights. *Glossip*, 2007 OK CR 12, ¶ 81, 157 P.3d at 157; *Hancock*, 2007 OK CR 9, ¶ 101, 155 P.3d at 820. This Court reviews the entire record to determine whether the cumulative effect of improper comments by the prosecutor prejudiced the appellant. *Romano*, 1995 OK CR 74, ¶ 54, 909 P.2d at 115. We determine whether the prosecutorial misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Hogan*, 2006 OK CR 19, ¶ 87, 139 P.3d at 935.

¶ 44 Turning to Appellant's claims of prosecutorial misconduct in the present case, we first determine whether Appellant has shown the existence of an actual error. Appellant alleges that the prosecutor impermissibly questioned three of his character witnesses regarding events that occurred well after the time period in which the witnesses knew Appellant. He cites to *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, and argues that because the witnesses were not testifying to Appellant's "current character" but his "prior honorable character," the prosecutor was prohibited from questioning them concerning events that occurred after they knew Appellant.

[22–24] ¶ 45 The State is permitted to cross-examine the defendant's witnesses at trial.

> As a general rule, any matter is a proper subject of cross examination which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness.

Lott v. State, 2004 OK CR 27, ¶ 127, 98 P.3d 318, 350. In *Dodd*, we stated:

> When the defendant calls witnesses to give opinions about his good character, the State may, in cross-examination, explore the basis for those opinions by inquiring into specific instances of the defendant's bad character, whether the character witness is aware of them, and if not, whether the witness's opinion is altered by the revelation.

Dodd, 2004 OK CR 31, ¶ 88, 100 P.3d at 1043. Thus, *Dodd* permits the State to question defense character witnesses concerning specific instances of the defendant's bad character regardless of the character witness' knowledge of the specific instance.

[25] ¶ 46 Appellant presented the testimony of Johnny Owens. Owens and Appellant were fellow firefighters. Owens testified that Appellant was very professional, a hard worker, a good firefighter and a good paramedic. Owens did not believe that the individual that he worked with was capable of murder. When defense counsel asked if Owens was aware of Appellant's drug problem, Owens indicated that he did not learn of it until after Appellant had been relieved of duty. Thereafter the prosecutor inquired if Owens was aware that in 2001, Appellant had hit a handicapped man in the head with a beer bottle and been arrested for the Marijuana and Lortab found in his pockets. He also asked Owens if he was aware that in April of 2000, Appellant started smoking methamphetamine and became so addicted that he was making it out in the country on

county roads.[8] Owens indicated that he was unaware of these circumstances. The prosecutor followed up by asking questions aimed to determine whether Owens' opinion was altered by the revelations. Owens indicated that he would not have wanted to go on an emergency run with Appellant if he had known he was abusing steroids, Lortab, and methamphetamine.

¶ 47 The prosecutor's questions to Owens were the proper subject of cross-examination. Owens' testimony as to Appellant's professionalism and general good character entitled the prosecutor to question him whether that opinion was formed with knowledge of specific instances evincing Appellant's character for unprofessionalism and violence. *Dodd,* 2004 OK CR 31, ¶ 90, 100 P.3d at 1043.

¶ 48 The prosecutor's questions to Owens were not misleading. The facts and circumstances of Appellant's drug abuse and attack on the handicapped individual had previously been introduced into evidence in the State's case-in-chief. Owens worked the same shift as Appellant at the fire department for eighteen months. They were partners for six months. The record reveals that Appellant was using illegal steroids and began to abuse prescription medication during this time period. Owens was assigned to a different shift beginning in 2000. Although Owens was not as familiar with the circumstances of Appellant's life after this time, they remained coworkers. Owens related that the firefighters in the department were like brothers. Owens was aware that Appellant had abused drugs while employed at the fire department ultimately leading to his termination. The specific instances that the prosecutor asked Owens about occurred during the time period in which Owens and Appellant were co-workers. As such, Appellant has not shown the existence of an actual error in the prosecutor's questioning of Owens.

[26] ¶ 49 Appellant presented the testimony of Jared Cheek that Appellant was a hard worker, a good paramedic, passionate about helping people and devoted to his family. Cheek did not initially believe that Appellant was capable of this type of crime. On cross-examination, the prosecutor questioned Cheek if it was appropriate for emergency responders to abuse steroids, prescription drugs, marijuana or alcohol. When Cheek responded that it was not appropriate, the prosecutor followed-up by asking Cheek if he was aware that Appellant had been fired from the fire department for bringing methamphetamine to the fire station. Cheek was unaware of this circumstance. The prosecutor asked if Cheek was aware that Appellant was using methamphetamine while working as a firefighter and a paramedic and, again, Cheek was unaware of this circumstance.

¶ 50 The prosecutor's questions to Cheek were the proper subject of cross-examination. Cheek's testimony as to Appellant's professionalism and general good character entitled the prosecutor to question him whether that opinion was formed with knowledge of specific instances evincing Appellant's character for unprofessionalism and inappropriate behavior as a first responder. *Id.,* 2004 OK CR 31, ¶ 90, 100 P.3d at 1043. As such, the prosecutor properly sought to determine whether Cheek was aware of Appellant's drug use while acting as a first responder.

¶ 51 The prosecutor's questions to Cheek were not misleading. The facts and circumstances of Appellant's drug abuse had been introduced into evidence before Cheek testified. Although Appellant did not begin to use methamphetamine until after Cheek lost contact with him at the end of 1999, Appellant used illegal steroids and began to abuse prescription medication during the time period that he worked with Cheek. Appellant continued abusing drugs and working as a first responder until he was terminated from the ambulance service on October 26, 2003. As Cheek did not find this type of behavior to be appropriate, this line of inquiry tended to contradict or rebut Appellant's alleged good character at the time. Appellant has not shown the existence of an actual error in the prosecutor's questioning of Cheek.

8. There was conflicting testimony at trial as to when Appellant began using methamphetamine. Initially, the testimony reflected that he started in April of 2000. This date was later revised to April of 2002.

[27] ¶ 52 Appellant presented the testimony of Dayna Chaffin that Appellant was very good with patients, very professional and very caring. She never thought he was capable of murder. On cross-examination, the prosecutor questioned Chaffin regarding her knowledge of Appellant. Chaffin's knowledge was limited. She worked at the hospital and only saw Appellant when he brought in a patient. She described him as a fellow healthcare worker. The prosecutor asked Chaffin if she had ever used illegal steroids, abused prescription drugs, smoked marijuana, abused alcohol or used methamphetamine while on the job and she responded in the negative. On re-direct, defense counsel asked Chaffin if the drug use listed by the prosecutor changed her testimony that Appellant was a good paramedic that cared about his patients. Chaffin indicated that it did not. On re-cross, the prosecutor asked Chaffin whether Appellant deceived her by concealing the drug use from her. Chaffin indicated that she may have been misled.

¶ 53 The prosecutor's questions to Chaffin were the proper subject of cross-examination. Chaffin's testimony as to Appellant's professionalism and general good character entitled the prosecutor to question her whether that opinion was formed with knowledge of specific instances evincing Appellant's character for unprofessionalism and inappropriate behavior while working as a healthcare worker. *Id.,* 2004 OK CR 31 ¶ 90, 100 P.3d at 1043.

¶ 54 The prosecutor's questions did not mislead Chaffin. The facts and circumstances of Appellant's drug abuse had been introduced into evidence before Chaffin testified. Although Chaffin testified that she did not see Appellant for several years, it is apparent that Appellant's drug abuse occurred during the time period that she remained familiar with him. Chaffin recounted her familiarity with Appellant through his remarriage in 2001. Appellant has not shown the existence of an actual error in the prosecutor's questioning of Chaffin.

¶ 55 Appellant also challenges the prosecutor's questioning of nine of the defense character witnesses concerning Appellant's "arrest for domestic abuse in 1998." We review Appellant's claim under the three part test set forth in *Hogan. Id.,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923. We first determine whether Appellant has shown the existence of an actual error.

[28] ¶ 56 Appellant asserts, without citation to authority, that it is improper to cross-examine character witnesses concerning an arrest that has not resulted in a conviction. Inquiry of a character witness into specific instances of conduct, not resulting in conviction, is permissible as long as the conduct precipitating the arrest impeaches the character trait offered. *See Douglas v. State,* 1997 OK CR 79, ¶¶ 32–33, 951 P.2d 651, 664–65; *State v. Gaytan,* 1998 OK CR 71, ¶¶ 2–12, 972 P.2d 356, 357–59. It is the underlying bad conduct itself that serves to test the witness' opinion as to Appellant's character. *Dodd,* 2004 OK CR 31, ¶ 89, 100 P.3d at 1043; *Douglas,* 1997 OK CR 79, ¶ 33, 951 P.2d at 665.

[29] ¶ 57 Reviewing the record in the present case, we find that the prosecutor's inquiry of the witnesses as to Appellant's arrest for domestic abuse was permissible because the conduct precipitating the arrest impeached the character trait the witnesses offered. Each of the nine witnesses testified as to Appellant's general good character. This entitled the prosecutor to question each of them as to whether that opinion was formed with knowledge of a specific instance evincing Appellant's character for violence. *Dodd,* 2004 OK CR 31, ¶ 90, 100 P.3d at 1043.

[30] ¶ 58 Appellant further asserts that the prosecutor's questions concerning his arrest for domestic abuse were misleading, prejudicial and in bad faith because the clear weight of the evidence at trial proved that he committed no such crime. We find that Appellant's contention is not supported by the record. The testimony at trial established that Appellant committed domestic abuse, i.e., an assault and battery against his spouse. 21 O.S.2011, § 644(C). The State first introduced testimony concerning the domestic abuse incident in its case in support of the continuing threat to society aggravating circumstance. Appellant's wife at the time of

the incident, Mary Beth Malone, testified that Appellant grabbed her arm and would not let go. The incident began when Appellant confronted Mary Beth Malone with evidence of her affair while the two were at a friend's home. Mary Beth Malone walked home and met her sister-in-law inside. Appellant arrived home soon thereafter and the confrontation began. Appellant forced his way into the home and punched a wall. Mary Beth Malone attempted to exit the front door. Appellant grabbed Mary Beth Malone's arm and refused to let her leave. Mary Beth Malone called 911 because she could not get away from Appellant. The officers that responded to the call testified at Appellant's sentencing trial. When the officers arrived they found the back door to the home busted open. They observed several people in the entry way of the home struggling. Mary Beth Malone was on the phone with the 911 dispatcher. Appellant had a hold of her wrist. She was trying to get away from Appellant but he would not let go of her. Appellant's sister was pulling on Appellant's arm directing him to let go of Mary Beth Malone. The officers commanded Appellant to release Mary Beth Malone but Appellant refused to let go. It took two police officers and Appellant's sister to forcibly remove Appellant's grasp of Mary Beth Malone. Appellant continued to resist the officers until they placed him in handcuffs. Afterwards, Mary Beth Malone's wrist was red. Appellant was not charged with the offense but was required to complete an anger management program. As such, we find that Appellant has not shown the existence of an actual error within his challenge to the prosecutor's inquiry into Appellant's arrest for domestic abuse.

[31] ¶ 59 Appellant contends that the prosecutor was "bickering" with Mary Sturdevant by stating that: "I understand, and I hope this doesn't get ugly." (App.Brf., 70). We note that the prosecutor's statement was directed to Sturdevant's unresponsive comment personally challenging the prosecutor. (Tr. 7, 50). Appellant has not provided any argument or authority to support this claim. Thus, we find that Appellant has waived appellate review of this claim pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2012). *Harmon v. State,* 2011 OK CR 6, ¶ 90, 248 P.3d 918, 946.

[32, 33] ¶ 60 Having determined that Appellant has not met the first step of plain error review in any of his challenges, we need not discuss the second and third steps. *See Hogan,* 2006 OK CR 19, ¶ 44, 139 P.3d at 925. Even if we were to erroneously ignore this precedent and find that the prosecutor's questions were an actual error plain on the record, Appellant cannot demonstrate any prejudice. Because the trial court did not find Appellant to be a "continuing threat to society", and the evidence in question was not germane to any other aggravator, Appellant cannot demonstrate any prejudice. *Dodd,* 2004 OK CR 31, ¶ 90, 100 P.3d at 1043. We find that plain error did not occur.

[34] ¶ 61 We turn to the sole instance in which Appellant raised a timely objection at trial thus preserving appellate review of the challenge. Appellant contends that the prosecutor improperly impeached defense witness, Jared Cheek, with the fact that Appellant was deceptive and good at concealing things from people. He contends that the question to Cheek was misleading because Appellant did not begin to use methamphetamine until after Cheek lost contact with Appellant. "Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such [as] to deprive the defendant of a fair trial." *Warner v. State,* 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891 (quotations and citations omitted).

¶ 62 Cheek testified that Appellant was a good paramedic. On cross-examination, Cheek testified that it was inappropriate for emergency responders to abuse steroids, prescription drugs, marijuana or alcohol. He also testified that he was unaware that Appellant had used methamphetamine while working as an emergency responder and was fired from the fire department for bringing methamphetamine to the fire station. On redirect, Appellant asked Cheek whether this litany of things that he had not known changed his opinion that Appellant was good at what he did when Cheek knew him and

Cheek responded negatively. On re-cross, the prosecutor asked Cheek if he believed that Appellant had misled or deceived him in light of the fact that Appellant was abusing prescription drugs. Cheek responded: "It raises some questions." (Tr. 7, 22). The prosecutor then asked Cheek whether Appellant was pretty good at concealing those things from his co-workers. The trial court denied Appellant's objection and Cheek responded: "That's true." (Tr. 7, 23).

¶ 63 We find that the prosecutor's question to Cheek was not improper. The matter was the proper subject of cross-examination as it tended to modify, explain, contradict or rebut Cheek's opinion that Appellant was a good paramedic. *Dodd*, 2004 OK CR 31, ¶ 88, 100 P.3d at 1043; *Lott*, 2004 OK CR 27, ¶ 127, 98 P.3d at 350. Appellant was not denied a fair sentencing trial. This assignment of error is denied.

[35] ¶ 64 In his fourth proposition of error, Appellant contends that the aggravating circumstances of murder of a peace officer in the performance of official duty and murder committed for the purpose of avoiding arrest or prosecution are unconstitutionally duplicative. He acknowledges that he raised this very claim in his direct appeal and this Court rejected it. In Appellant's original direct appeal, we found that these two aggravating circumstances will often be supported by the same or overlapping evidence but are not unconstitutionally duplicative because they are focused on different aspects of a defendant's crime. *Malone*, 2007 OK CR 34, ¶¶ 76–77, 168 P.3d at 215–16 (*citing Cooks v. Ward*, 165 F.3d 1283, 1289 (10th Cir.1998)). Therefore, *res judicata* applies and relitigation of the issue is barred. *Mitchell v. State*, 2010 OK CR 14, ¶ 46, 235 P.3d 640, 652. This assignment of error is denied.

[36] ¶ 65 In his fifth proposition of error, Appellant contends that his death sentence violates the ban on cruel and unusual punishment found in the Eighth Amendment to the United States Constitution. He does not claim that he is mentally retarded, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that he is insane, *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), or that he was under the age of 18 at the time of his offense, *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).[9] Instead, Appellant argues for the extension of *Atkins* to those individuals that were severely mentally ill at the time of the offense.

¶ 66 This Court has repeatedly rejected this Claim. *Underwood v. State*, 2011 OK CR 12, ¶ 69, 252 P.3d 221, 248; *Grant v. State*, 2009 OK CR 11, ¶¶ 59–61, 205 P.3d 1, 23–24; *Lockett v. State*, 2002 OK CR 30, ¶ 42, 53 P.3d 418, 431. The United States Supreme Court explicitly limited its holding in *Atkins* to the mentally retarded. *Atkins*, 536 U.S. at 320, 122 S.Ct. at 2251. Individuals who are not mentally retarded "are unprotected by the exemption and will continue to face the threat of execution." *Id.*

¶ 67 Appellant cites no cases from any American jurisdiction that hold that the *Atkins* rule or rationale applies to the mentally ill.[10] He has not demonstrated that there is a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally ill offenders. *See Atkins*, 536 U.S. at 312, 122 S.Ct. at 2247.[11] We expressly reject that the *Atkins* rule or rationale applies to the mentally ill.

9. Appellant is not mentally retarded. The record reflects that Appellant is, in fact, very intelligent with an intelligence quotient above 120.

10. In fact, numerous courts have expressly declined to extend the ruling in *Atkins* to the mentally ill. *See In re Neville*, 440 F.3d 220, 221 (5th Cir.2006); *Baird v. Davis*, 388 F.3d 1110, 1114–15 (7th Cir.2004); *State v. Irick*, 320 S.W.3d 284, 298 (Tenn.2010); *Mays v. State*, 318 S.W.3d 368, 379–80 (Tex.Crim.App.2010); *Johnston v. State*, 27 So.3d 11, 26–27 (Fla.2010); *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87, 96–97 (2008); *State v. Ketterer*, 111 Ohio St.3d 70, 95 at ¶ 176, 855 N.E.2d 48, 77 (2006); *State v. Johnson*, 207 S.W.3d 24, 50–51, (Mo.2006); *Matheney v. State*, 833 N.E.2d 454, 458 (Ind.2005).

11. I continue to maintain that it is not proper to adjudicate and interpret the Constitution, or statutes based upon a quasi-popularity "consensus." *See Mitchell v. State*, 2010 OK CR 14, ¶ 79 n. 17, 235 P.3d 640, 658 n. 17; *Murphy v. State*, 2002 OK CR 32, ¶ 29 n. 16, 54 P.3d 556, 567 n. 16. However, I accede to the fact that the United States Supreme Court has followed this progression of thought and thus we must apply it here.

[37] ¶ 68 Even if we were to entertain Appellant's policy arguments, Appellant has not demonstrated that his mental illness was such that it could be found to have diminished his culpability. *Lockett,* 2002 OK CR 30, ¶ 42, 53 P.3d at 431. Although there is evidence in the record which would support Appellant's contention that he suffered from some form of mental illness at the time of the offense, he has not shown that his condition was so severe that he is necessarily and categorically less morally culpable than the average murderer or that his punishment will not serve as a deterrent. *Atkins,* 536 U.S. at 318–19, 122 S.Ct. at 2251.

¶ 69 Appellant presented the testimony of Dr. Jonathan Lipman, M.D., and Dr. Antoinette McGarrahan, Ph.D. Both opined that Appellant had been mentally ill for a long time. This illness onset during Appellant's adult years as the mood disorder of depression. Appellant self-medicated with hydrocodone and methamphetamine. The hydrocodone likely dulled the pain associated with Appellant's depression and the methamphetamine likely had a mood elevating effect. However, Appellant's drug and alcohol use caused his condition to worsen. He became severely mentally ill and in need of treatment.

¶ 70 The record reveals that Appellant's mental health worsened during his incarceration. Appellant was incarcerated at Oklahoma State Penitentiary. He was treated for depression and mood swings. The officers that worked with Appellant during his incarceration at the State penitentiary did not note that he had any mental illness issues. His interactions with the staff and other inmates were appropriate. In June of 2008, Dr. McGarrahan evaluated Appellant for competency. Following this evaluation, Appellant was treated at the Oklahoma Forensic Center on two separate occasions. On both occasions, Appellant reported being paranoid of the staff and other inmates and expressed a fear that someone was going to poison his food. Appellant reported hearing a voice but did not exhibit any outward manifestation of auditory hallucinations. Appellant's very high IQ and his medical training caused problems in his assessment. One of the professionals that examined Appellant reported that Appellant conveyed his symptoms in such a fashion as to give the impression that he was listing the criteria from the diagnostic manual, however, he was unable to determine whether Appellant was mentally ill or faking mental illness. A second professional concluded that Appellant was malingering. Nonetheless, Appellant was diagnosed as "Psychotic, not otherwise specified." He benefited from the therapeutic environment at the Forensic Center and was returned to competency. Lipman and McGarrahan found that Appellant suffered from both a psychotic disorder and a mood disorder. Dr. McGarrahan evaluated Appellant during the week of the resentencing trial and determined that Appellant was doing well.

¶ 71 We note that the jury in Appellant's original jury trial rejected Appellant's insanity defense. *Malone,* 2007 OK CR 34, ¶¶ 91–92 n. 172–73, 168 P.3d at 220 n. 172–73. In reviewing the evidence, this Court likewise found that:

> While Malone may well have experienced "methamphetamine psychosis" at some point . . . no reasonable juror could have concluded, based upon the entire record in this case, that he was in such a state at the time he shot Green or that he did not deliberately intend to kill Green.

Id., 2007 OK CR 34, ¶ 42, 168 P.3d at 203. "The evidence in this case, though not uncontested, was overwhelming and clearly established that Malone knew what he was doing and deliberately chose to shoot and kill Green." *Id.,* 2007 OK CR 34, ¶ 38, 168 P.3d at 201–02.

¶ 72 The evidence at Appellant's resentencing trial, again, reflected that Appellant was conscious of what he was doing during the offense. The individuals that Appellant spoke to both immediately before and after the offense testified as to their observations of Appellant. Appellant's words and actions were logical and goal-oriented and did not suggest that Appellant was experiencing any sort of disconnect from reality. Based upon these individuals' statements Dr. Lipman believed that Appellant was conscious of what he was doing at the time and able to relate what he was doing shortly afterwards. We

also note that the circumstances of the offense were captured on the dashcam video. The video likewise supports the conclusion that Appellant was logical and goal-oriented and was not experiencing any sort of disconnect from reality.

¶ 73 The trial court considered all of Appellant's mitigating circumstances but rejected them as a basis for imposing a sentence less than death. This Court accepts the trial court's conclusion that Appellant harbored a culpability deserving of the death penalty. *Lockett,* 2002 OK CR 30, ¶ 42, 53 P.3d at 431. As such, this assignment of error is denied.

[38, 39] ¶ 74 In his sixth proposition of error, Appellant contends the combined errors in his trial denied him the right to a constitutionally guaranteed fair sentencing trial. When there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Williams v. State,* 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732; *Bechtel v. State,* 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. However, a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Ashinsky v. State,* 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209. We have not identified any error in the present case. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

MANDATORY SENTENCE REVIEW

¶ 75 In his first proposition of error, Appellant contends that his death sentence violates the state and federal constitutions because the mitigating factors outweighed the aggravating circumstances.

[40] ¶ 76 We consider this argument in conjunction with our mandatory sentence review. Pursuant to 21 O.S.2011 § 701.13(C), we must determine (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the trial court's finding of the aggravating circumstances as enumerated in 21 O.S.2011 § 701.12. *Eizember v. State,* 2007 OK CR 29, ¶ 145, 164 P.3d 208, 242.

¶ 77 Turning to the second portion of this mandate, the trial court found the existence of two (2) aggravating circumstances: (1) "the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; and (2) "the victim of the murder was a peace officer . . ., and such person was killed while in performance of official duty." 21 O.S.2001 § 701.12(5),(8). Appellant does not challenge the sufficiency of the State's evidence to support either of these aggravating circumstances. We find that the great weight of the evidence established that Appellant murdered Trooper Green for the purpose of avoiding lawful arrest and prosecution for manufacturing methamphetamine and while Green was acting as a peace officer in the performance of his official duty. *See also Malone,* 2007 OK CR 34, ¶ 72, 168 P.3d at 214 (finding that "avoid arrest or prosecution" and "peace officer . . . killed while in performance of official duty" aggravating circumstances clearly established by first stage evidence). As such, the evidence supports the trial court's finding of the aggravating circumstances as enumerated.

[41] ¶ 78 Appellant urges this Court to "independently reweigh" the evidence supporting the aggravating circumstances as well as the evidence offered in mitigation.[12] The State argues that factual substantiation of the verdict requires nothing more than the determination required by 21 O.S.2011 § 701.13(C).

[42] ¶ 79 Appellant is correct that 21 O.S. 2011. § 701.13(F) requires this Court to "ren-

12. Appellant first sought to have this Court review his sentence under 21 O.S.2011, § 701.13(F) and overrule *Rojem v. State,* 2009 OK CR 15, 207 P.3d 385. and *Coddington v. State,* 2011 OK CR 17, 254 P.3d 684, in his Reply Brief. Propositions of error advanced for the first time in a reply brief are deemed waived and forfeited for consideration. Rule 3.4(F), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2012). As this Court has a duty to conduct a mandatory sentence review whenever the death penalty is imposed, we directed the State to file a supplemental brief. Appellant and appellate counsel are notified that in the future this Court will deem waived all propositions of error advanced for the first time in a reply brief.

der its decision on the legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence." *See Stouffer v. State,* 1987 OK CR 166, ¶ 10, 742 P.2d 562, 564 (opinion on rehearing). However, this Court does not act as an independent factfinder or substitute our judgment for that of the trier of fact. In *Rojem v. State,* 2009 OK CR 15, 207 P.3d 385, we explained that:

> In Proposition VI Rojem claims that his death sentence violates the state and federal constitutions because mitigating factors outweighed the aggravating circumstances. He asks this Court to independently weigh the evidence for the death penalty and set aside the verdict. This request suggests a misunderstanding of this Court's role. In its mandatory sentence review, this Court considers whether the death penalty was imposed under the influence of passion, prejudice or any other arbitrary factor. We do not substitute our judgment for that of the jury, but review the record taking into account any circumstances which may have improperly affected the jury's verdict. . . .

Id., 2009 OK CR 15, ¶ 22, 207 P.3d at 394–95.

¶ 80 In *Coddington v. State,* 2011 OK CR 17, 254 P.3d 684, we reaffirmed this Court's deferential appellate role:

> In Proposition XVIII, Coddington asks this Court to modify his sentence under its mandatory sentence review authority. This Court is required in every capital case to determine whether the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the evidence supports the jury's findings of aggravating circumstances. 21 O.S.2001, § 701.13(C). In this proposition, Coddington asks the Court to independently weigh the evidence presented at his resentencing trial, and to conclude that it does not support a sentence of death. This is not the Court's role. In conducting our mandatory sentence review, we analyze the record for any circumstances which may have improperly affected the jury's verdict. *Rojem,* 2009 OK CR 15, ¶ 22, 207 P.3d at 395. The Court is not acting as an independent factfinder, and we do not substitute our judgment for that of the jury's.

Id., 2011 OK CR 17, ¶ 96, 254 P.3d at 717.

¶ 81 Appellant argues that *Rojem* and *Coddington* should be overruled. Relying, in part, upon Judge Cornish's writing in *Burrows v. State,* 1982 OK CR 6, 640 P.2d 533, he asserts that 21 O.S.2011, § 701.13(F) requires this Court to conduct a *de novo* review of the aggravating circumstances and mitigating circumstances to determine whether the verdict is factually substantiated, *i.e.,* without any deference to the original determiner of sentence. Appellant urges us to do something that the statute does not allow. Section 701.13(F) only authorizes this Court to review the sentence. It does not authorize or direct this Court to act as an independent factfinder or substitute our judgment for that of the trier of fact. *State v. Young,* 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955 (statutes are to be construed according to the plain and ordinary meaning of their language).

¶ 82 This Court has previously determined the nature of review afforded to Appellant's claim. In *Fisher v. State,* 1987 OK CR 85, 736 P.2d 1003, the appellant claimed that his death sentence had to be set aside because the mitigating circumstances outweighed the aggravating circumstances. *Id.,* 1987 OK CR 85, ¶ 21, 736 P.2d at 1010. The State argued for a sufficiency of the evidence standard to be applied. *Id.* The appellant quoted Judge Cornish's separate writing in *Burrows* stating: " 'Merely to find that capital punishment was factually supported or justified by the evidence does not rise to the separate and independent judgment required of the reviewing court in death penalty cases,' " and urged this Court to make a separate and independent judgment that the aggravating circumstances outweighed the mitigating factors. *Id.,* 1987 OK CR 85, ¶¶ 22–23, 736 P.2d at 1010–11, *quoting Burrows,* 1982 OK CR 6, 640 P.2d at 552–53 (Cornish, J., concurring in part and dissenting in part). We distinguished *Burrows* finding that:

> *Burrows,* however, represented a badly divided Court. In *Burrows,* Judge Bussey voted to affirm both the judgment and sentence while Judge Cornish voted to affirm the judgment, but modify the punish-

ment to life imprisonment because he felt the mitigating circumstances outweighed the aggravating circumstances. *Id.* at 552–553. Judge Brett voted to reverse the judgment on the ground of insufficient evidence to show malice aforethought, but agreed to a modification in light of the views held by his colleagues.

Id., 1987 OK CR 85, ¶ 22, 736 P.2d at 1010.[13] Instead of acting as an independent factfinder, we determined that "this Court will review such evidence only to the extent necessary to determine whether there was sufficient evidence from which a rational sentencer could find that the balance of aggravating and mitigating circumstances warranted a death sentence." *Id.,* 1987 OK CR 85, ¶ 25, 736 P.2d at 1011. This standard, which is analogous to *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203–04, comports with the requirements of due process and adequately ensures that the death penalty is evenly enforced. *Id.*

¶ 83 Our decisions in *Rojem* and *Coddington* are not inconsistent with *Fisher. Rojem* and *Coddington* did not extinguish this Court's statutory duty to determine the factual substantiation of the verdict and the validity of the sentence. We note that we determined that the sentence of death was factually substantiated and appropriate in both cases. *Coddington,* 2011 OK CR 17, ¶ 99, 254 P.3d at 718; *Rojem,* 2009 OK CR 15, ¶ 30, 207 P.3d at 397. Instead, both *Rojem* and *Coddington* stand for the same tenet as *Fisher.* This Court does not act as an independent factfinder and we do not substitute our judgment for that of the judge or the jury.

[43–45] ¶ 84 The reason for this deferential review is the unique, subjective nature of the trier of fact's judgment about the punishment that a particular person deserves. *See Underwood v. State,* 2011 OK CR 12, ¶ 62 n. 25, 252 P.3d 221, 246 n. 25.

"Specific standards for balancing aggravating and mitigating circumstances are not constitutionally required." *Romano v. State,* 1993 OK CR 8, ¶ 111, 847 P.2d 368, 392, *citing Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The "beyond a reasonable doubt" burden of proof analysis is not strictly applicable to the weighing process of the second stage. *Id.,* 1993 OK CR 8 at ¶ 112, 847 P.2d at 392. "While the State must prove beyond a reasonable doubt the existence of at least one of the enumerated aggravating circumstances, the determination of the weight to be accorded the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt. Instead, it is a balancing process." *Id., citing Johnson v. State,* 1987 OK CR 8, ¶ 44, 731 P.2d 993, 1005.

Eizember, 2007 OK CR 29, ¶ 149, 164 P.3d at 243. The trier of fact's "consideration of aggravators *versus* mitigators is a balancing process which is not amenable to the 'beyond a reasonable doubt' standard of proof." *Underwood,* 2011 OK CR 12, ¶ 62, 252 P.3d at 246. "[I]t is a highly subjective and largely moral judgment about the punishment that a particular person deserves." *Id.* (quotations and citations omitted). Therefore we review the evidence under § 701.13(F) only to the extent necessary to determine whether there was sufficient evidence from which a rational trier of fact could find that the balance of aggravating and mitigating circumstances warranted a death sentence.

¶ 85 Appellant acknowledges our use of the *Fisher* deferential review but argues that it is the exception rather than the rule. He contends that in *Ullery v. State,* 1999 OK CR 36, 988 P.2d 332, *Davis v. State,* 2011 OK CR 29, 268 P.3d 86, and in other instances, it did not appear that this Court used the test from *Fisher.* Although we have failed to cite to § 701.13(F) and *Fisher* in many instances, the test set forth in *Fisher* is the standard of review that this Court utilizes to determine the factual substantiation of the verdict and the validity of the sentence. *Jackson v. State,* 2006 OK CR 45, ¶ 58, 146 P.3d 1149,

13. We further note that at the time that *Burrows* was decided the statute in effect required this Court to perform a proportionality review of the sentence to that of others found guilty of murder. 21 O.S.1981, § 701.13(C)(3). This provision was repealed by 21 O.S.Supp.1986, § 701.13, and this Court determined that such a review was unnecessary under our sentencing scheme. *Foster v. State,* 1986 OK CR 19, ¶ 40, 714 P.2d 1031, 1041.

1166; *Banks v. State,* 2002 OK CR 9, ¶ 55, 43 P.3d 390, 403; *Young v. State,* 2000 OK CR 17, ¶¶ 79–80, 12 P.3d 20, 42–43; *Bernay v. State,* 1999 OK CR 37, ¶ 67, 989 P.2d 998, 1015; *Patton v. State,* 1998 OK CR 66, ¶ 114, 973 P.2d 270, 300; *Jackson v. State,* 1998 OK CR 39, ¶ 84, 964 P.2d 875, 895; *Turrentine,* 1998 OK CR 33, ¶ 86, 965 P.2d at 979; *Gilbert v. State,* 1997 OK CR 71, ¶ 83, 951 P.2d 98, 119; *Carpenter v. State,* 1996 OK CR 56, ¶¶ 48–52, 929 P.2d 988, 1000–01; *Brecheen v. State,* 1987 OK CR 17, ¶ 54, 732 P.2d 889, 899, *overruled on other grounds by Brown v. State,* 1994 OK CR 12, 871 P.2d 56.

[46] ¶ 86 This Court's use of the terms "independent review" and "weighing" are consistent with the test set forth in *Fisher. See Johnson v. State,* 2012 OK CR 5, ¶ 42, 272 P.3d 720, 733; *Davis,* 2011 OK CR 29, ¶ 233, 268 P.3d at 139; *Ullery,* 1999 OK CR 36, ¶ 46, 988 P.2d at 352–53. Under *Fisher,* we review the evidence only to the extent necessary to determine "whether there was sufficient evidence from which a rational sentencer could find that the *balance* of aggravating and mitigating circumstances warranted a death sentence." *Fisher,* 1987 OK CR 85, ¶ 25, 736 P.2d at 1011 (emphasis added). The review afforded under *Fisher* is, in fact, an independent review conducted by this Court but it impinges on the trier of fact's discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Fisher,* 1987 OK CR 85, ¶ 25, 736 P.2d at 1011 (finding test analogous to *Jackson v. Virginia* test adopted in *Spuehler*). The *Fisher* inquiry does not require this Court to ask itself whether it believes that the balance of aggravating and mitigating circumstances warranted a death sentence. *See Jackson,* 443 U.S. at 318–19, 99 S.Ct. at 2789. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to prosecution, any rational trier of fact could find that the balance of aggravating and mitigating circumstances warranted a death sentence. *Fisher,* 1987 OK CR 85, ¶ 25, 736 P.2d at 1011; *see also Jackson,* 443 U.S. at 319, 99 S.Ct. at 2789. The factfinder's role as weigher of the aggravating and mitigating circumstances is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. *See Jackson,* 443 U.S. at 319, 99 S.Ct. at 2789

[47–49] ¶ 87 We explicitly distinguish the deferential review in *Fisher* from the instance where this Court finds an aggravating circumstance invalid and reviews to determine whether the improper aggravator is harmless and the sentence of death still valid. *Myers v. State,* 2006 OK CR 12, ¶¶ 105–06, 133 P.3d 312, 336. When at least one valid aggravating circumstance remains which enables the trier of fact to give aggravating weight to the same facts and circumstances which supported the invalid aggravator, this Court conducts an "independent reweighing" of the aggravating and mitigating evidence. *Id.; Battenfield v. State,* 1998 OK CR 8, ¶ 22, 953 P.2d 1123, 1129, 953 P.2d 1123; *Malone v. State,* 1994 OK CR 43, ¶¶ 40–42, 876 P.2d 707, 718–19; *Robedeaux v. State,* 1993 OK CR 57, ¶ 71, 866 P.2d 417, 433; *Barnett v. State,* 1993 OK CR 26, ¶ 31, 853 P.2d 226, 234; *Castro v. State,* 1987 OK CR 258, ¶ 5, 749 P.2d 1146, 1148 (Opinion on Rehearing); *Stouffer,* 1987 OK CR 166, ¶ 10, 742 P.2d at 564. We have recognized that this Court's authority to independently reweigh the aggravating and mitigating circumstances originates from subsections C and F of § 701.13. *Stouffer,* 1987 OK CR 166, ¶ 10, 742 P.2d at 563. However, we do not utilize the *Fisher* test in such instance for the very reason that one of the aggravating circumstances has been found to be invalid. The *Fisher test* is unworkable in such an instance. For this Court to determine that a death sentence is valid following the invalidation of an aggravating circumstance, we must determine both that the remaining aggravating circumstances outweigh the mitigating circumstances and the weight of the improper aggravator is harmless. *Myers,* 2006 OK CR 12, ¶ 106, 133 P.3d at 337. To find an improper aggravator to be harmless error, the Court must be able to determine from the record that the elimination of the improper aggravator cannot affect the balance beyond a reasonable doubt. *Id.* This review is consistent with the rule announced by the Unit-

ed States Supreme Court in *Brown v. Sanders,* 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006). *Id.,* 2006 OK CR 12, ¶¶ 105–06, 133 P.3d at 337. Therefore, we independently reweigh the aggravating and mitigating circumstances only in the instance that we determine that an aggravating circumstance is invalid.

[50] ¶ 88 Turning to the record in the present case, we found that both aggravating circumstances found by the trier of fact were valid. As such, we do not independently reweigh the aggravating and mitigating circumstances pursuant to *Myers.* Instead, we review the present case under the test set forth in *Fisher.* Taking the evidence in the present case in the light most favorable to the prosecution, we find that a rational trier of fact could find that the balance of aggravating and mitigating circumstances warranted a death sentence.

¶ 89 At the resentencing trial, the State presented evidence nearly identical to the evidence which it had introduced in the first stage of the trial. The evidence revealed that Appellant fell asleep in the front seat of his sister's car while manufacturing methamphetamine on the side of a rural county road. At the request of the local newspaper delivery person, Trooper Green stopped to see if Appellant needed assistance. Green observed the components of the methamphetamine lab on the ground around the car. He attempted to place Appellant under arrest. Green had one handcuff on Appellant's wrist, when Appellant decided to fight the officer to avoid going back to jail. In the ensuing struggle, Appellant obtained Green's service weapon and held Green at gunpoint.

[51] ¶ 90 Due to Appellant's statements and the dashcam video, the circumstances of this offense are far more certain than many offenses. Although little of the offense can be visually discerned from the dashcam video, the auditory portion of the video is illuminating.[14] After Appellant got control of the gun and had Green facedown on the ground, Green told Appellant that he could run and leave him if he wanted. Green explained to Appellant that he had children and pleaded with him "[i]n the name of Jesus Christ." (Tr. 5B, 975). A lengthy dialogue occurred wherein Appellant repeatedly asked Green where the handcuff keys were at and threatened him with death if the keys were not located. Appellant also asked Green where he dropped his gun. Throughout the dialogue, Green continued to plead for Appellant not to harm him as neither man could find the keys. Green finally volunteered that there were more keys in his patrol unit. However, Appellant stated, "I don't need to know." (Tr. 5B, 999). Green recognized Appellant's thought process and began to audibly pray. Green's prayer was interrupted when Appellant shot him in the back of the head. Appellant did not comment or make any sound. Eleven seconds later, Appellant shot Green in the back of the head for a second time. Appellant cleaned up the meth lab, put the components in the car, and drove away. Appellant confessed to his meth-making comrades that he killed Green after the Trooper had caught him making methamphetamine.

¶ 91 The evidence at resentencing further revealed that Appellant did not act on a whim but had thought out his actions prior to shooting Green. Appellant told his meth-making comrades that he would kill police officers to avoid going back to jail. In the weeks preceding Trooper Green's discovery of Appellant's methamphetamine lab, Appellant had twice been arrested and bonded out of jail. Appellant was arrested for possession of methamphetamine on November 10, 2003. He was arrested for conspiracy to manufacture methamphetamine on December 21, 2003. Following these arrests, Appellant told Tyson Anthony that:

> He said he couldn't go back to jail. If he went back to jail he wouldn't get back out

14. Although the trial court did not find the existence of the continuing threat aggravating circumstance, the trier of fact was free to consider the dashcam video in its determination of Appellant's sentence because it represented the circumstances of the offense. It is a settled principle of United States Supreme Court jurisprudence that the sentencer should consider the circumstances of the offense in deciding whether to impose the death penalty. *Tuilaepa v. California,* 512 U.S. 967, 977–78, 114 S.Ct. 2630, 2637–38, 129 L.Ed.2d 750 (1994).

and that he would shoot them before he went back to jail ... He said "kill them." (Tr. 3, 12–13). Appellant made similar statements to Tammy Sturdevant, James Rosser and Jamie Rosser. On the night that Appellant shot Green, Appellant borrowed a pistol from Anthony in case he got pulled over. After the offense, Appellant explained to Tyson Anthony and James Rosser that he shot the Trooper because he did not want to go back to jail.

¶ 92 Appellant presented 49 witnesses in mitigation. Through these witnesses Appellant presented testimony in support of his mitigating circumstances: Appellant was suffering from severe yet treatable mental illness that had been present for a very long time (depression and/or a mood disorder); he was born with both a predisposition towards mental illness and substance abuse; he was both severely mentally ill and under the influence of one or more illegal substances at the time of the crime; he was not being treated for either mental illness or substance abuse at the time of the crime; he is currently being treated for psychosis, not otherwise specified, a mood disorder, and depression; he has posed no threat to anyone in the past several years; he has been a model inmate in the penal setting as well as a model patient in the therapeutic setting; he was born into a troubled household detached from good role models and full of both physical and emotional abuse; he witnessed neglect, alcoholism, illicit drug use, and sexual promiscuity by his parental figures while growing up; he worked hard throughout his life to build a stable home life but failed at each turn because of mental illness, addictions, and/or the infidelity of his marital partner; he adopted and raised three children, one of whom served honorably in the U.S. military; he was an emergency medical technician and paramedic that personally saved many lives; he was an above average paramedic who often performed compassionate acts that were not required of him by his job responsibilities; he tried to protect his sisters from danger or ridicule; he has children who love and care for him very much and who will still gain great meaning from his life; he was and continues to be an excellent father to his children; receipt of a death sentence will devastate the innocent lives of his children and grandchildren; he has other family members who love and care for him and who still gain great meaning and value from his life; and he has consistently expressed remorse for not only killing Trooper Green but also for the great damage that act has done to the Green family, others who loved Trooper Green and his own family. Appellant also presented evidence that he had returned to being the caring, compassionate man that he was before the drug abuse.

¶ 93 Much of Appellant's mitigating evidence was conflicting. The State examined Appellant's witnesses and introduced evidence concerning the numerous positive factors in Appellant's life. Appellant, as a teenager, attended church; he had the benefit of one-on-one guidance concerning life decisions from his youth leader; he excelled in sports and was a State champion in track; he had the benefit of a coach that counseled him about life decisions; he had steady employment and a blossoming career; he had a good relationship with his employer; he graduated high school, attended college and studied criminal justice; he had an above average IQ, received medical training, and became a paramedic; he had the benefit of educators that cared for his well-being; his emergency medicine instructor offered to be his instructor for life; he had a loving mother; he had caring co-workers and friends; he had a friend that grew-up in similar circumstances that was willing to help him succeed; and he had the opportunity to utilize community resources like counseling. The State also presented evidence that Appellant began abusing drugs before the negative events of his adult life had occurred. As such, a rational trier of fact could have reasonably rejected Appellant's predisposition theory and concluded that Appellant's personal choices as an adult led him to kill Trooper Green.

¶ 94 As the mitigating evidence was conflicting and the great weight of the evidence supported the existence of the two aggravating circumstances, we find that there was sufficient evidence from which a rational trier of fact could find that the balance of aggrava-

ting and mitigating circumstances warranted a death sentence. Proposition One is denied.

¶ 95 We find the sentence of death to be factually substantiated and appropriate. 21 O.S.2011, § 701.13(F). Under the record before this Court, we cannot say the trier of fact was influenced by passion, prejudice, or any other arbitrary factor contrary to 21 O.S.2011 § 701.13(C). in finding that the aggravating circumstances outweighed the mitigating evidence. We affirm the sentence of death. 21 O.S.2011, § 701.13(E). Accordingly, finding no error warranting reversal or modification, this appeal is denied.

DECISION

¶ 96 The Sentence of death is hereby ***AFFIRMED.*** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

C. JOHNSON, J., A. JOHNSON, J., and LEWIS, P.J.: concur.

SMITH, V.P.J.: concur in results.

2012 OK CIV APP 112

In the Matter of the Application of Steven Charles HARVEY To Change His Name, Petitioner/Appellant.

No. 110,048.

Released for Publication by Order of the Court of Civil Appeals of Oklahoma, Division No. 1.

Court of Civil Appeals of Oklahoma, Division No. 1.

Nov. 20, 2012.

Background: Applicant who was in process of undergoing sexual/gender change petitioned to have his name changed. The District Court, Oklahoma County, Bill Graves, J., denied petition and applicant's motion for new trial. Applicant appealed.

Holding: The Court of Civil Appeals, Kenneth L. Buettner, P.J., held that there is no fraud in identifying oneself by a traditionally male or female name while having the DNA of the other sex, for purposes of statute requiring the granting of a petition for change of name that is sustained by sworn evidence unless a finding is made that the change is sought for a fraudulent or illegal purpose or that a material allegation is false.

Reversed and remanded with directions.

Names ⇦20

There is no fraud in identifying oneself by a traditionally male or female name while having the DNA of the other sex, for purposes of statute requiring the granting of a petition for change of name that is sustained by sworn evidence unless a finding is made that the change is sought for a fraudulent or illegal purpose or that a material allegation is false. 12 Okl.St.Ann. § 1634.

Appeal from the District Court of Oklahoma County, Oklahoma; Honorable Bill Graves, Judge.

REVERSED AND REMANDED WITH DIRECTIONS.

Tim N. Cheek, D. Todd Riddles, Gregory D. Winningham, Cheek Law Firm, P.L.L.C., Oklahoma City, Oklahoma, for Petitioner/Appellant.

KENNETH L. BUETTNER, Presiding Judge.

¶ 1 Petitioner/Appellant Steven Charles Harvey (Harvey) filed a Petition for Change of Name in the District Court of Oklahoma County. Harvey sought to have his name changed from "Steven Charles Harvey" to "Christie Ann Harvey," because he was in the process of undergoing sexual/gender change. Harvey's Petition alleged that he did not seek to have his name changed for any illegal or fraudulent purpose or to delay or hinder creditors. The trial court denied Harvey's Petition. Harvey filed a Motion for New Trial, which the trial court overruled.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICKY RAY MALONE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. PCD-2011-248**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

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

LUMPKIN, JUDGE:

Petitioner, Ricky Ray Malone, filed his Original Application for Post-Conviction Relief in Death Penalty Case, along with a Motion for Evidentiary Hearing and Discovery on September 14, 2012.[1] Petitioner was tried by jury and convicted of First Degree Murder (21 O.S.2001, § 701.7) in the District Court of Comanche County, Case Number CF-2005-147. In accordance with the jury's recommendation, the trial court imposed a sentence of death. This Court affirmed Petitioner's conviction, but reversed the sentence and remanded the case for resentencing. *Malone v. State*, 2007 OK CR 34, 168 P.3d 185. Thereafter, Petitioner waived his right to jury trial and a resentencing trial was held before the Honorable Mark R. Smith, District Judge. The trial court found the existence of two (2) aggravating circumstances: (1) "the murder was

[1] Petitioner initiated this post-conviction proceeding in 2011 and the case was given a corresponding case number. As his application for post-conviction relief was not due until ninety (90) days from the filing of his reply on direct appeal and counsel were given several extensions of time on both direct appeal and in this proceeding for good cause shown, the application for post-conviction relief was not filed until this date in 2012. 22 O.S.2011, § 1089(D)(1).

committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; and (2) "the victim of the murder was a peace officer . . ., and such person was killed while in performance of official duty." 21 O.S.2001, § 701.12. The trial court further found that the aggravating circumstances outweighed the mitigating circumstances presented and sentenced Petitioner to death. This Court affirmed Petitioner's sentence of death in *Malone v. State*, 2013 OK CR 1, --- P.3d ---.

Petitioner raises five grounds for relief in his application. Within these grounds, Petitioner seeks to address issues relating both to his original jury trial and appeal as well as the resentencing trial. After granting sentencing relief in the original appeal, this Court dismissed Petitioner's initial post-conviction filing. *Malone v. State*, unpub. dispo., PCD-2005-662 (Okla. Cr. Oct. 2, 2007). As such, we treat the present application as his original post-conviction application for both the guilt stage of his jury trial as well as the resentencing trial. *Hanson v. State*, 2009 OK CR 13, ¶¶ 16-17, 206 P.3d 1020, 1028. We review each claim from the perspective of the time at which it should have been raised in accordance with 22 O.S.2011, § 1089. *Id.*

The narrow scope of review available under the amended Post-Conviction Procedure Act is well established. *See Harris v. State*, 2007 OK CR 32, ¶ 2, 167 P.3d 438, 441; *Browning v. State*, 2006 OK CR 37, ¶ 2, 144 P.3d 155, 156; *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Murphy*, 2005 OK CR 25, 3, 124 P.3d at

1199. The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. *Id.* Accordingly, claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata*. *Id.*

The only issues authorized by the post-conviction statute are those that "[w]ere not and could not have been raised in a direct appeal," and which "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22 O.S.2011, § 1089(C). The statute further requires that an application state "specific facts explaining as to each claim why it was not or could not have been raised in a direct appeal and how it supports a conclusion that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." *Id.*

The capital post-conviction statute recognizes that a ground for post-conviction relief "could not have been previously raised if: (1) it is a claim of ineffective assistance of trial counsel involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal; (2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel." 22 O.S.2011, § 1089 (D)(4)(b). The statute also contemplates the adjudication of any post-conviction claim for which the "legal basis" was not "recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court or an appellate court of this State, or

is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of this State." 22 O.S.2011, § 1089 (D)(9). The post-conviction statute directs this Court to review Petitioner's post-conviction application and determine: (1) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist; (2) whether the applicant's grounds were or could have been previously raised; and (3) whether relief may be granted under this act. 22 O.S.2011, § 1089(D)(4)(a).

I.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

Petitioner raises two separate grounds claiming that trial counsel rendered ineffective assistance in the first stage of his original jury trial. An appellant must raise all available claims of ineffective assistance of trial counsel on direct appeal or the claim is waived. *Davis v. State*, 2005 OK CR 21, ¶¶ 4-6, 123 P.3d 243, 244. A claim of ineffective assistance of trial counsel is appropriate for post-conviction review only if it has a factual basis that could not have been ascertained through the exercise of reasonable diligence on or before the time of the direct appeal. 22 O.S.2011, § 1089(D)(4)(b)(1).

In Proposition Three, Petitioner contends that his Constitutional Due Process rights were violated when he was deprived of a fair and impartial jury. He claims that the trial court should have *sua sponte* excused juror KNA for implied bias due to the similarities of her life experiences and the facts giving rise to the trial. As this claim could have been raised in the original direct

appeal, the issue is therefore waived. *Coddington v. State*, 2011 OK CR 21, ¶ 7, 259 P.3d 833, 836; 22 O.S.2011, § 1089(C)(1). Parallel with this claim, Petitioner contends that trial counsel provided ineffective assistance for failing to challenge KNA for cause. As the factual basis for this ineffective assistance of trial counsel claim could have been ascertained through the exercise of reasonable diligence on or before his original direct appeal, this claim is not appropriate for post-conviction review. 22 O.S.2011, § 1089(D)(4)(b)(1).

In Proposition Four, Petitioner contends that trial counsel rendered ineffective assistance by failing to present evidence concerning Petitioner's head injuries and his family history of both drug abuse and mental illness in the guilt stage of his jury trial. In fact, Petitioner raised a claim of ineffective assistance of trial counsel based upon this same evidence in his original direct appeal. See *Malone*, 2007 OK CR 34, ¶¶ 95, 101, 111, 168 P.3d at 221-29. As the factual basis for this ineffective assistance of trial counsel claim could have been ascertained through the exercise of reasonable diligence on or before his original direct appeal, the claim is not appropriate for post-conviction review. 22 O.S.2011, § 1089(D)(4)(b)(1).

In conjunction with his claim in Proposition Four, Petitioner further attempts to argue with this Court's determination that the trial court's failure to replace the bracketed phrase "Specify Specific Mens Rea" with the applicable specific intent ("malice aforethought") in the jury instruction upon the defense of voluntary intoxication was harmless beyond a reasonable doubt. *Malone*, 2007 OK CR 34, ¶¶ 25-42, 168 P.3d at 197-203. He argues that this error

could not be harmless and further claims that the trial court failed to instruct the jury concerning the elements of second degree murder.[2] However, "[p]ost-conviction review does not afford defendants the opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings." *Trice v. State*, 1996 OK CR 10, ¶ 11, 912 P.2d 349, 353. Appellate counsel's presentation of the issue in the direct appeal was not deficient, and further argument on post-conviction would not change the outcome of the proceedings. *Id.* We refuse to reconsider our determination that this error was harmless.

The issue of ineffective assistance of trial counsel was raised and denied in Petitioner's original direct appeal, therefore, that decision is *res judicata.* Petitioner's claim of ineffective assistance of trial counsel is parsed and the claims within Propositions Three and Four are deemed waived. *Bryan v. State*, 1997 OK CR 69, ¶ 4, 948 P.2d 1230, 1235 (Lumpkin, J., concurring in results); *See Murphy*, 2005 OK CR 25, ¶ 3, 124 P.3d at 1199 "[C]laims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata.*"). As such, we refuse to review the merits of the claims and the propositions are denied.

II.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON DIRECT APPEAL OF JURY TRIAL

In Proposition Two, Petitioner claims that he received ineffective assistance of appellate counsel on direct appeal of his original jury trial.

[2] We note that this assertion is contrary to the record. (O.R. III, 529).

Petitioner seeks to excuse his waiver of the claims raised in Propositions Three and Four by alleging that appellate counsel rendered ineffective assistance by failing to raise these issues on direct appeal of his jury trial.

A claim of ineffective assistance of appellate counsel may be raised for the first time on post-conviction. 22 O.S., 2011, § 1089 (D)(4)(b)(2). All post-conviction claims of ineffective assistance are reviewed under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835; *Harris*, 2007 OK CR 32, ¶ 3, 167 P.3d at 441; *Davis*, 2005 OK CR 21, ¶ 5, 123 P.3d at 245; *See Smith v. Robbins*, 528 U.S. 259, 287, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000).

The *Strickland* test requires a petitioner to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835-836, *citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Petitioner must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms. *Id.; Robbins*, 528 U.S. at 286-87, 120 S.Ct. at 764-65.

However, the Court need not determine whether counsel's performance was deficient before examining the alleged prejudice suffered by the petitioner

as a result of the alleged deficiencies. *Id.*, 466 U.S. at 697, 104 S.Ct. at 2069. To demonstrate prejudice a petitioner must show that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's unprofessional errors. *Id.*, 466 U.S. at 698, 104 S.Ct. at 2070. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, --- U.S. ---, 131 S.Ct. 770, 790, 792, 178 L.Ed.2d 624 (2011). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 270.

First, Petitioner claims that appellate counsel rendered ineffective assistance by failing to raise the biased juror claim set forth in Proposition Three. Reviewing this claim under the *Strickland* analysis, we find that Petitioner has neither shown that counsel's performance was constitutionally deficient nor demonstrated that counsel's omission of the issue prejudiced him. "[W]hen a defendant claims that he received ineffective assistance of appellate counsel because his counsel, although filing a merits brief, failed to raise a particular claim . . . it is difficult to demonstrate that counsel was incompetent. *Robbins*, 528 U.S. at 287-88, 120 S.Ct. at 765-66. "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.*, *citing Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of

counsel be overcome." *Id.*, *quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). We note that appellate counsel filed a merits brief in Petitioner's original direct appeal containing claims which required Petitioner's death sentence to be reversed and remanded for resentencing. *Malone*, 2007 OK CR 34, ¶¶ 121-22, 168 P.3d at 232-33. Given this evidence of effective representation, we find that Petitioner has not overcome the presumption of effective assistance and shown that appellate counsel's omission of this issue constitutes deficient performance. *Coddington*, 2011 OK CR 21, ¶ 4, 259 P.3d at 836.

We further find that Petitioner has not shown that there is a reasonable probability that the outcome of his appeal would have been different but for appellate counsel's omission of the biased juror claim in Proposition Three. Bias may be inferred or implied where, even though a juror denies any partiality, the juror has a personal connection to the parties or the circumstances of the trial. *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996); *See Hawkins v. State*, 1986 OK CR 58, ¶ 4, 717 P.2d 1156, 1157; *See also* 22 O.S.2011, § 660. Implied bias may also be found on the basis of similarities between the juror's experiences and the facts giving rise to the trial. *Id.*; *See Hawkins*, 1986 OK CR 58, ¶ 4, 717 P.2d at 1157 (inferring bias in driving under the influence trial where juror's spouse was employed as county deputy in same county and juror's father died in alcohol related incident); *Tibbetts v. State*, 1985 OK CR 43, ¶ 8, 698 P.2d 942, 945-46 (inferring bias in kidnapping and rape trial where juror's son-in-law was employed with

prosecuting law enforcement agency and juror's daughter was recent victim of sex related crime). However, the implied bias doctrine should not be invoked lightly and should rarely apply. *Id.*

Turning to the record in the present case, there is not a reasonable probability that the outcome of the appeal would have been different had appellate counsel asserted that prospective juror KNA was impliedly biased in Petitioner's direct appeal. The record reveals that prospective juror KNA was married to a welder in the military. She unequivocally stated on more than one occasion that she could give equal consideration to all three punishment options. When the prosecutor asked how she felt about the death penalty, she responded that it was a punishment and that if it came down to it she would base her opinion on the evidence. After admitting that she did in fact believe in the death penalty, KNA candidly admitted that her belief was based on certain events like the bombing and her cousin's death in the Geronimo bank robbery in 1983. KNA expressed that she would not have any difficulty sitting on Petitioner's case because "I was only a year old, so wasn't really there when it happened . . . ." (JT. 1, Tr. 2, 429). She had never been to any of the court proceedings involving the case. KNA further expressed that the bank robbery was a separate case with different people. This Court fails to see a connection between the facts of the present offense and the bank robbery that occurred approximately 20 years before it. We further find that KNA's life experiences and the facts of Petitioner's case are clearly dissimilar. Invocation of the implied bias doctrine is inappropriate under these circumstances. As such,

Petitioner has not demonstrated that counsel's omission of this issue from his brief on direct appeal of the original jury trial constituted ineffective assistance.

Second, Petitioner claims that appellate counsel rendered ineffective assistance by failing to raise the issue set forth in Proposition Four in his brief on direct appeal of the original jury trial. Petitioner contends that appellate counsel should have challenged trial counsel's failure to present evidence concerning Petitioner's head injuries and his family history of both drug abuse and mental illness in the guilt stage of his original jury trial.

Reviewing the record, we find that Petitioner did in fact raise a claim of ineffective assistance of trial counsel based upon this same evidence in his brief on direct appeal of his original jury trial. See *Malone*, 2007 OK CR 34, ¶¶ 95, 101, 111, 168 P.3d at 221-29. Although Petitioner's claim was that trial counsel was ineffective for failing to present this evidence in the second stage of the trial, the present claim has the same underlying set of facts. As such, the claim is parsed and deemed waived. *Bryan*, 1997 OK CR 69, ¶ 4, 948 P.2d 1230, 1235 (Lumpkin, J., concurring in results); *See Murphy*, 2005 OK CR 25, ¶ 3, 124 P.3d at 1199).

Even if this Court were to review this claim of ineffective assistance of appellate counsel, Petitioner is not entitled to relief. We find that Petitioner has neither shown that counsel's performance was constitutionally deficient nor demonstrated that counsel's omission of the issue prejudiced him.

As noted above, appellate counsel filed a merits brief in Petitioner's original direct appeal containing claims which required Petitioner's death

sentence to be reversed and remanded for resentencing. *Malone*, 2007 OK CR 34, ¶¶ 121-22, 168 P.3d at 232-33. Given this evidence of effective representation, we find that Petitioner has not overcome the presumption of effective assistance and shown that appellate counsel's omission of the present issue constitutes deficient performance. *Robbins*, 528 U.S. at 287-88, 120 S.Ct. at 765-66; *Coddington*, 2011 OK CR 21, ¶ 4, 259 P.3d at 836.

We further find that Petitioner has not shown a reasonable probability that the outcome of his appeal would have been different had appellate counsel on direct appeal of the original jury trial challenged trial counsel's failure to present evidence of Petitioner's head injuries and family history of both drug abuse and mental illness in the first stage of the trial. Petitioner has not provided any argument or authority establishing that evidence of Petitioner's head injuries and family history of both drug abuse and mental illness was relevant to the issue of guilt and thus admissible in the first stage of his jury trial. 12 O.S.2011, § 2104; *See Postelle v. State*, 2011 OK CR 30, ¶ 36, 267 P.3d 114, 132 (discussing evidence's lack of relevance in first stage of proceedings but relevance in second stage of trial). Even if we were to find that this evidence was admissible in the first stage of the trial, the evidence is not such as to establish a reasonable probability of a different outcome. The evidence in Petitioner's jury trial "was overwhelming and clearly established that [Petitioner] knew what he was doing and deliberately chose to kill Green." *Malone*, 2007 OK CR 34, ¶ 38, 168 P.3d at 201-02. Petitioner's history of head injuries at the age of nine or ten years old, his parents use of alcohol and

marijuana while Petitioner was growing up, his sisters' use of methamphetamine, and the numerous individuals in Petitioner's family with depression or emotional issues does not carry such weight as would overcome the evidence of Petitioner's actions and words before, during and after the offense. The evidence revealed that Petitioner's actions were "logical and goal oriented and did not suggest that [he] was experiencing any sort of disconnect from reality," "brain impairment," or was in a state of voluntary intoxication to the extent that he was unable to form the specific intent of malice aforethought. *Id.*, 2007 OK CR 34, ¶¶ 37-42 168 P.3d at 201-03. As such, Petitioner has not demonstrated prejudice from appellant counsel's omission of this issue in his direct appeal.

As Petitioner has not shown that appellate counsel's omission of the issues set forth in Propositions Three and Four constitutes ineffective assistance of appellate counsel, Petitioner's claim within Proposition Two cannot serve to excuse his waiver of these claims. Petitioner's claims within Propositions Three and Four are waived and we refuse to review the merits of the claims.

III.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON DIRECT APPEAL OF RESENTENCING TRIAL

In Proposition Two, Petitioner further claims that he received ineffective assistance of appellate counsel on direct appeal of his resentencing trial. We review Petitioner's claim of ineffective assistance of appellate counsel under the

analysis set forth in *Strickland*. *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835; *Harris*, 2007 OK CR 32, ¶ 3, 167 P.3d at 441; *Davis*, 2005 OK CR 21, ¶ 5, 123 P.3d at 245.[3]

Although Petitioner alleges that appellate counsel on direct appeal of the resentencing trial rendered ineffective assistance in the heading of this proposition, nowhere within the body of the proposition does Petitioner set forth or allege how appellate counsel rendered ineffective assistance. As such, we find that he has neither demonstrated constitutionally deficient performance nor shown prejudice from appellate counsel's representation of him on direct appeal of his resentencing trial. *Smith v. State*, 1998 OK CR 20, ¶ 8, 955 P.2d 734, 738 ("Conclusory allegations, standing alone, will never support a finding that an attorney's performance was deficient."); *Hatch v. State*, 1996 OK CR 37, ¶ 57, 924 P.2d 284, 296 (finding that Court will not grant relief based upon bald allegations or suspicions).

We further note that resentencing appellate counsel was not permitted to raise issues surrounding the conviction phase of the original jury trial in the direct appeal of the resentencing trial. *Hanson*, 2009 OK CR 13, ¶ 16-17, 206 P.3d at 1028 (finding that on direct appeal of resentencing this Court will only review errors occurring during resentencing). Therefore, resentencing appellate counsel could not have rendered ineffective assistance in failing to raise any of

[3] We admonish counsel of the ability to waive allegations of error by failing to adhere to this Court's rules. *See* Rules 3.5(A)(5) and 9.7(A)(3)(g), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013).

the ineffective assistance of counsel claims that Petitioner has set forth in the present application. For all the above stated reasons, we deny Proposition Two.

IV.

NOTICE OF ALLEGED INCOMPETENCY

In Proposition One, post-conviction counsel asserts that Petitioner is presently incompetent to proceed in this matter and requests that Petitioner's case be held in abeyance until he is restored to competency. We find that the request to hold this proceeding in abeyance should be denied.

Post-conviction counsel acknowledges that in *Fisher v. State*, 1992 OK CR 79, 845 P.2d 1272, this Court determined whether a petitioner's present competency was a relevant issue in a capital post-conviction proceeding. *Id.*, 1992 OK CR 79, ¶¶ 13-14, 845 P.2d at 1276. In *Fisher*, counsel for the petitioner challenged the petitioner's competence during post-conviction proceedings before the district court and this Court. *Id.*, 1992 OK CR 79, ¶¶ 13-14, 845 P.2d at 1276-77. In rejecting the claim, we determined that the existence of a doubt as to the petitioner's competency in a capital post-conviction proceeding should not serve as a basis to halt the proceedings. *Id.*, 1992 OK CR 79, ¶ 17, 845 P.2d at 1277.[4] *Fisher* is still the rule of law as to allegations of current incompetency during appellate proceedings. *See Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 19 n.5, 157 P.3d 749, 757 n.5.

[4] I reiterate that the ABA Criminal Justice Mental Health Standards are not the law. Instead, the Oklahoma Legislature determines the substantive and procedural law for this state. *Fisher v. State*, 1992 OK CR , ¶¶ 1-2, 845 P.3d 1272, 1278 (Lumpkin, V.P.J., concurring in results).

Nonetheless, post-conviction counsel invites this Court to reconsider its decision in *Fisher*. Counsel sets forth two reasons why *Fisher* should be overruled and Petitioner's case be held in abeyance.

First, counsel speculates that this Court will not review any new claim formulated after Petitioner becomes competent to assist counsel.[5] However, we refuse to offer an anticipatory ruling on this circumstance as the issue or issues are not properly before us. *See, Murphy v. State*, 2006 OK CR 3, ¶ 1, 127 P.3d 1158; *Canady v. Reynolds*, 1994 OK CR 54, ¶ 9, 880 P.2d 391, 394 ("[A]bsent statutory authority, this Court c[an] not issue an opinion in any matter not at issue before it."). However, we note that under the specific provisions of 22 O.S.2011, § 1089(D)(8)(b), a petitioner may file a successive application for post-conviction relief when "the claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application . . . because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date."

Second, post-conviction counsel argues that she is unable to provide constitutionally effective assistance because Petitioner is unable to rationally and effectively assist her in these proceedings. We disagree.

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[5] We note that during the resentencing proceedings, Petitioner was determined to be incompetent. He was treated at the Oklahoma Forensic Center and returned to competency. Dr. Antoinette McGarrahan, Ph.D., evaluated Petitioner during the week of the resentencing trial and determined that Petitioner was doing well. Petitioner did not raise any issue with respect to his competency on direct appeal. *Malone v. State*, 2013 OK CR 1, -- P.3d --.

Two recent opinions of the United States Supreme Court help guide our determination on this issue. In *Martinez v. Ryan*, -- U.S. --, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), the Supreme Court refused to find a constitutional right to counsel in initial-review collateral proceedings. *Id.*, 132 S.Ct. at 1319-20. In *Ryan v. Gonzalez*, --- U.S. ---, 133 S.Ct. 696, --- L.Ed.2d ---- (2013), the Supreme Court determined that federal habeas corpus petitioners do not possess either a constitutional or a statutory right to competence. *Id.*, 133 S.Ct. at 701-02. The Court further addressed the connection between the constitutional right to competence and the constitutional right to counsel.

> the assertion that the right to counsel implies a right to competence is difficult to square with our constitutional precedents. The right to counsel is located in the Sixth Amendment. ("In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.") If the right to counsel carried with it an implied right to competence, the right to competence at trial would flow from the Sixth Amendment. But "[w]e have repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process,'" not the Sixth Amendment. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (*quoting Medina v. California*, 505 U.S. 437, 453, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (emphasis added); *see also Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) ("[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial" (*citing Pate v. Robinson*, 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966))).

Id., 133 S.Ct. at 703. Recognizing that "the benefits flowing from the right to counsel *at trial* could be affected if an incompetent defendant is unable to communicate with his attorney," the Court clarified that ""we have never said that the right to competence *derives* from the right to counsel." *Id.* (emphasis

in original). Even so, the Supreme Court determined that a habeas petitioner's mental incompetency would not eviscerate the statutory right to counsel in federal habeas proceedings. *Id.*, 133 S.Ct. at 704. The Court reasoned that counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence because "[a]ttorneys are quite capable of reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their clients' assistance." *Id.*, 133 S.Ct. at 704-05. The Supreme Court further reasoned that not all petitioners have an incentive to obtain relief as quickly as possible, in particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. *Id.*, 133 S.Ct. at 709.

We note the similarities between the present case and *Ryan v. Gonzalez.* As in federal habeas corpus proceedings, a petitioner in a capital post-conviction proceeding does not possess a constitutional or statutory right to competence. Oklahoma Statutes do not provide for the determination of competency at the present stage of the proceedings. The procedure for the Determination of Competency is codified at 22 O.S.2011, § 1175.1, *et seq.* "Competency" is defined as the "present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense." 22 O.S.2011, § 1175.1(1). "Criminal proceeding" is defined as "every stage of a criminal prosecution after arrest and before judgment, including, but not limited to, interrogation, lineup, preliminary hearing, motion dockets,

discovery, pre-trial hearings and trial." 22 O.S.2011, § 1175.1(4). These definitions provide for competency determinations through trial, but not beyond trial. Nothing in the plain language of the statutes requires that a petitioner be competent during capital post-conviction proceedings.

Also, as in federal habeas corpus proceedings, the right to counsel in a capital post-conviction proceeding in Oklahoma is a statutory right. The right to counsel in a capital post-conviction proceeding originates from the amended Capital Post-Conviction Act, itself. *See* 22 O.S.2011, § 1089(B). We note that there is no requirement of competence for a capital post-conviction petitioner under the Capital Post-Conviction Procedure Act. Section 1089(B) provides that: 'The Oklahoma Indigent Defense System shall represent all indigent defendants in capital cases seeking post-conviction relief upon appointment by the appropriate district court after a hearing determining the indigency of any such defendant." This provision does not mention competence to assist counsel; it merely grants indigent petitioners under a sentence of death a statutory right to be represented by appointed counsel in a proceeding under § 1089. Nothing in the plain language of the statute requires that an indigent state prisoner under a sentence of death be competent to assist counsel before his post-conviction action may proceed.

Further we find that the reasoning this Court applied in *Fisher* is consistent with the Supreme Court's reasoning in *Ryan v. Gonzalez*. In *Fisher*, we reasoned that since convicted defendants, like parties to appellate litigation in-general, do not participate in appeal proceedings, mental incompetence

rarely affects the fairness or accuracy of appellate decisions. *Fisher*, 1992 OK CR 79, ¶ 16, 845 P.2d at 1277. Considering that counsel can generally provide effective representation to a capital post-conviction petitioner regardless of the petitioner's competence we therefore find that current competency is not required to protect the statutory right to counsel under the amended Capital Post-Conviction Procedure Act.

We reaffirm that the determination of current competency is not available in capital post-conviction proceedings. As in *Fisher*, we explicitly distinguish the issue of petitioner's present competency during post-conviction proceedings from the circumstance that a condemned prisoner abandons his appeal. *Id.*, 1992 OK CR 79, ¶ 14, 845 P.2d at 1276. A condemned prisoner must be deemed "competent" to abandon his appeals. *Id., citing Rees v. Payton*, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966). We further distinguish the present issue from the requirement of sanity to be executed. *Id.*; *See* 22 O.S.2011, §§ 1005 - 1008. In those circumstances, sanity/competency is required and procedures are in place for the determination of the issue. *See Allen v.* State, 2011 OK CR 31, 265 P.3d 754; *Grasso v. State*, 1993 OK CR 33, 857 P.2d 802.

Applying this analysis to the present case, we find that post-conviction counsel has made this Court aware of the concerns regarding Petitioner's competency as set forth in *Fisher*. Because there is no requirement of competence in a capital post-conviction proceeding, we refuse to address the

question of the incompetency of Petitioner and deny the request to hold this proceeding in abeyance.

V.

ACCUMULATION OF ERROR

In Proposition Five, Petitioner contends he should be afforded post-conviction relief due to the cumulative impact of errors identified in this application and in his direct appeal brief. Petitioner raised a claim of cumulative error on direct appeal and that claim was denied. Therefore further consideration of this claim is barred by *res judicata.* Having found no merit to any of the claims raised herein, there is no basis for granting post-conviction relief and therefore the claim is denied.

VI.

EVIDENTIARY HEARING AND DISCOVERY

Filed simultaneously with the Application for Post-Conviction Relief is a Motion for Evidentiary Hearing and Discovery on Post-Conviction Claims. Petitioner requests this Court grant an evidentiary hearing and discovery on his post-conviction claims. For purposes of the motion, Petitioner incorporates the exhibits included in the Appendix of Exhibits in Support to Application for Post-Conviction Relief and seeks permission to bring forth other evidence as needed to further support the issues raised in the application.

This Court presumes compliance with the district court's orders concerning discovery at the time of trial unless the contrary is shown. Rule 9.7(D)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18,

App. (2013). Requests for discovery may rebut this presumption only by "affidavits, describing as particularly as possible the material sought to be discovered, and why such material was not supplied at the time of trial." *Id.* If these affidavits "raise a substantial question of compliance with earlier discovery orders, and the material being sought would have resulted in a different outcome at trial, this Court may direct a response from the opposing party showing cause why a discovery order should not be issued." *Id.* Petitioner has not alleged or identified any specific non-compliance with prior orders for discovery, and has not shown how additional discovery is necessary to the presentation of his post-conviction claims. The request to conduct discovery is therefore denied.

A post-conviction applicant is not entitled to an evidentiary hearing unless the application for hearing and supporting affidavits "contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). If this Court determines that the requirements of section 1089(D) of Title 22 have been met and issues of fact must be resolved, it shall issue an order remanding to the district court for an evidentiary hearing. Rule 9.7(D)(6). Upon review of Petitioner's application and supporting materials, we conclude he has not made this clear and convincing showing. His request for an evidentiary hearing is therefore denied.

DECISION

After carefully reviewing Petitioner's Application for Post-Conviction Relief and Application for Evidentiary Hearing, we conclude: (1) there exists no controverted, previously unresolved factual issues material to the legality of Petitioner's confinement; (2) grounds for review which are properly presented have no merit; and (3) the current post-conviction statutes warrant no relief. 22 O.S. 1089 (D)(4)(a)(1) / 22 O.S. 1089 (D)(2) / 22 O.S. 1089(D)(3). Accordingly, Petitioner's Application for Post-Conviction Relief and Motion for Evidentiary Hearing and Discovery are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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NO RESPONSE NECESSARY FROM THE STATE

OPINION BY LUMPKIN, J.
LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR IN RESULT

PA

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICKY RAY MALONE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. PCD-2014-969**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION DENYING SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF, MOTION FOR EVIDENTIARY HEARING, AND MOTION TO SEAL

LUMPKIN, VICE PRESIDING JUDGE:

Petitioner, Ricky Ray Malone, filed his Successive Application for Post-Conviction Relief in Death Penalty Case, Motion for Evidentiary Hearing and Motion to Seal Portion of Application for Post-Conviction Relief and Related Attachment on November 13, 2014. Petitioner was tried by jury and convicted of First Degree Murder (21 O.S.2001, § 701.7) in the District Court of Comanche County, Case Number CF-2005-147. In accordance with the jury's recommendation, the trial court imposed a sentence of death. This Court affirmed Petitioner's conviction, but reversed the sentence and remanded the case for resentencing. *Malone v. State*, 2007 OK CR 34, 168 P.3d 185. Thereafter, Petitioner waived his right to jury trial and a resentencing trial was held before the Honorable Mark R. Smith, District Judge. The trial court found the existence of two (2) aggravating circumstances: (1) "the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; and (2) "the victim of the murder was a peace officer . . ., and

such person was killed while in performance of official duty." 21 O.S.2001, § 701.12. The trial court further found that the aggravating circumstances outweighed the mitigating circumstances presented and sentenced Petitioner to death. This Court affirmed Petitioner's sentence of death in *Malone v. State*, 2013 OK CR 1, 293 P.3d 198.

On September 14, 2012, Petitioner filed his Original Application for Post-Conviction Relief in Death Penalty case along with a Motion for Evidentiary Hearing and Discovery.[1] This Court denied Petitioner's application. *Malone v. State*, unpub. dispo., PCD-2011-248 (Okla. Cr. April 23, 2013).

Petitioner raises three grounds for relief in his successive application. There is no constitutional right to post-conviction review. *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 402-03, 121 S.Ct. 1567, 1573, 149 L.Ed.2d 608 (2001). Instead, the State Legislature has created the mechanism for post-conviction relief within 22 O.S.2011, §§ 1080–1089.7. Section 1089 governs post-conviction proceedings where the defendant is under a sentence of death. The narrow scope of review available under the amended Post-Conviction Procedure Act is well established. *See Harris v. State*, 2007 OK CR 32, ¶ 2, 167 P.3d 438, 441; *Browning v. State*, 2006 OK CR 37, ¶ 2, 144 P.3d 155, 156; *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. The Post-Conviction Procedure Act was neither designed nor intended to provide

[1] After granting sentencing relief in Petitioner's original appeal, this Court dismissed Petitioner's initial post-conviction filing. *Malone v. State*, unpub. dispo., PCD-2005-662 (Okla. Cr. Oct. 2, 2007). We treated the application filed on September 14, 2012, as his original post-conviction application for both the guilt stage of his jury trial as well as the resentencing trial. *Hanson v. State*, 2009 OK CR 13, ¶¶ 16-17, 206 P.3d 1020, 1028.

applicants another direct appeal. *Murphy*, 2005 OK CR 25, 3, 124 P.3d at 1199. The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. *Id.* The only issues authorized by the post-conviction statute are those that "[w]ere not and could not have been raised in a direct appeal," and which "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22 O.S.2011, § 1089(C). Claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata*. *Smith v. State*, 2010 OK CR 24, ¶ 7, 245 P.3d 1233, 1236; *Murphy*, 2005 OK CR 25, 3, 124 P.3d at 1199.

The scope of review afforded subsequent applications for post-conviction relief is even narrower. *See* 22 O.S.2011, § 1089(D)(8). "A subsequent application for post-conviction relief shall not be considered, unless it contains claims which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable." Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Unless the claim could not have been presented previously in a timely application for post-conviction relief because the factual basis for the claim was not available or ascertainable through the exercise of reasonable diligence on or before that date, the claim is waived and we do not grant relief. *Smith*, 2010 OK CR 24, ¶ 5, 245 P.3d at 1236.

In Proposition One, Petitioner contends that trial counsel rendered ineffective assistance. He asserts that trial counsel failed to investigate and present evidence at the sentencing trial concerning the sexual abuse he suffered as a child and the resulting trauma. He further asserts that appellate counsel rendered ineffective assistance in failing to challenge trial counsel's omission. Petitioner provides this Court with affidavits and evidentiary materials to support his claim. We note that Petitioner has not shown that these claims were not available or ascertainable through the exercise of reasonable diligence on or before the filing of his original application for post-conviction relief. Recognizing that he has waived these claims, Petitioner seeks to excuse his failure to timely raise the issue by asserting that the failure was the result of post-conviction counsel's ineffective assistance. 22 O.S.2011, § 1089(C)(1), (D)(8).

The United States Supreme Court has refused to find that a criminal defendant has a Constitutional right to counsel and hence, the effective assistance of counsel, in any proceeding beyond direct appeal. *Martinez v. Ryan*, -- U.S. --, 132 S.Ct. 1309, 1319-20, 182 L.Ed.2d 272 (2012); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012). Instead, the right to counsel in a capital post-conviction proceeding in Oklahoma comes from the Amended Capital Post-Conviction Act, itself. *See* 22 O.S.2011, § 1089(B) ("The Oklahoma Indigent Defense System shall represent all indigent defendants in capital cases seeking post-conviction relief upon appointment by the appropriate district court after a hearing determining the indigency of any such

defendant."). This Court has determined that complaints concerning the performance of counsel during capital post-conviction proceedings, raised at the first available opportunity, are reviewed under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Hale v. State*, 1997 OK CR 16, ¶¶ 9-10, 934 P.2d 1100, 1102-03.

The *Strickland* test requires a petitioner to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Smith*, 2010 OK CR 24, ¶ 19, 245 P.3d at 1239, *citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Petitioner must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms. *Id.*

However, the Court need not determine whether counsel's performance was deficient before examining the alleged prejudice suffered by the petitioner as a result of the alleged deficiencies. *Id.*, 466 U.S. at 697, 104 S.Ct. at 2069. To demonstrate prejudice a petitioner must show that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's unprofessional errors. *Id.*, 466 U.S. at 698, 104 S.Ct. at 2070. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 270.

Reviewing Petitioner's claim under the *Strickland* analysis, we find that Petitioner has not shown that he was denied the effective assistance of post-conviction counsel. At the center of Petitioner's challenge is his assertion that "the entire truth" was unveiled after his resentencing trial. (Pet. 18, 23). He, now, claims that his mother, her boyfriends, and his stepfather sexually abused him. Petitioner asserts that trial counsel should have investigated and presented evidence concerning his sexual abuse trauma at trial in an effort to mitigate his punishment. He argues that post-conviction counsel rendered ineffective assistance when counsel failed to challenge appellate counsels' omission to challenge trial counsels' failure.

The record on appeal reveals that trial counsel retained mental health professionals qualified to identify sexual abuse trauma. Counsel had forensic psychologist, Antoinette McGarrahan, Ph.D., and psychiatrist, Jonathan Lipman, M.D., assess Petitioner. *Malone*, 2013 OK CR 1, ¶¶ 69-70, 293 P.3d at 217. Counsel had McGarrahan and Lipman testify at the sentencing trial concerning Petitioner's substance abuse, mental health and family history. *Malone*, 2013 OK CR 1, ¶¶ 69-70, 293 P.3d at 217. McGarrahan testified that during her interview with Petitioner she had asked him about sexual abuse but that Petitioner denied being the victim of sexual abuse.

Trial counsel also had sociologist David Musick, Ph.D., investigate Petitioner's family history. Musick interviewed numerous members of

Petitioner's extended family. Musick reported that Petitioner and his sisters informed him that their Mother engaged in sexual activities with numerous men in their presence when they were growing up. Counsel introduced Musick's report and had Musick testify at the sentencing trial concerning the effects of childhood trauma.

Trial Counsel further presented the testimony of Petitioner's closest relatives and friends, who related that Petitioner's stepfather mentally and, on occasion, physically abused Petitioner and his sisters. In addition, Petitioner's twin sisters explained that once they had reached adulthood, their stepfather had inappropriately touched them. Petitioner's older sister testified that on one occasion their stepfather had tried to touch her when she was seventeen years old. In contrast, Petitioner's relatives and friends universally agreed that Petitioner had a loving and supportive relationship with his mother, had never said a negative word about her, and had been greatly affected by her death.

Trial counsel also presented evidence concerning Petitioner's treatment at the Oklahoma Forensic Center. *Id.*, 2013 OK CR 1, ¶¶ 69-70, 293 P.3d at 217. Dr. Satwant Tandon, M.D., testified concerning Petitioner's diagnosis and treatment. He related that Petitioner and his aunt both reported that Petitioner had not been sexually abused. Counsel similarly presented evidence concerning Petitioner's mental health during his period of incarceration. Psychiatric nurse, Cindy Baugh, explained that she had treated Petitioner for two to three years. Baugh testified that Petitioner denied being the victim of sexual abuse.

We refuse to find that trial and appellate counsel rendered ineffective assistance under the circumstances of this case. *Strickland*, 466 U.S at 687, 104 S.Ct. at 2064. If Petitioner was sexually abused as a child, those facts were known to him at the time of trial. His decision to not disclose that information to the defense experts, mental health professionals or either of his two defense teams effectively foreclosed trial counsel from discovering and presenting such evidence at the resentencing trial. However, Petitioner's claims of childhood sexual abuse are suspect as he actively denied such fact to numerous individuals during the course of his case. Therefore, we find that post-conviction counsel's omission to challenge trial and appellate counsels' effectiveness in this regard constituted reasonably effective assistance under prevailing professional norms. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065.

We further find that Petitioner has not demonstrated that post-conviction counsel's omission of the issue prejudiced him. In light of the aggravating and mitigating circumstances presented at trial, there is not a reasonable probability that the outcome of the proceeding would have been different absent counsels' omission. *Id.*, 466 U.S at 698, 104 S.Ct. at 2070; *See Malone*, 2013 OK CR 1, ¶¶ 68-72, 88-95, 293 P.3d at 216-18, 222-24 (discussing aggravating circumstances and evidence presented in mitigation). Proposition One is denied.

In Proposition Two, Petitioner contends that defense counsels' advice to waive his right to have a jury determine his punishment at the resentencing trial was constitutionally unreasonable and constituted ineffective assistance.

Petitioner admits that he raised this issue on direct appeal but requests that this Court reconsider his claim and further asserts that counsels' advice was unreasonable in light of the issues surrounding his competency.[2] We find that Petitioner's claim is not properly before the Court.

Post-conviction review is neither a second appeal nor an opportunity for a petitioner to re-raise or amend propositions of error already raised on direct appeal. *Hooper v. State*, 1998 OK CR 22, ¶ 4, 957 P.2d 120, 123. "The doctrine of *res judicata* does not allow the subdividing of an issue as a vehicle to relitigate at a different stage of the appellate process." *Davis v. State*, 2005 OK CR 21, ¶ 17, 123 P.3d 243, 248.

> Just because post-conviction counsel has the benefit of reviewing appellate counsel's brief on direct appeal, and with the benefit of hindsight, envisions a new method of presenting the arguments is not a legal basis for disregard of the procedural bar. In other words, "post-conviction review does not afford defendants the opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings."

Turrentine v. State, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989, *quoting Trice v. State*, 1996 OK CR 10, ¶ 11, 912 P.2d 349, 353. Because Petitioner's claim was raised and decided on direct appeal, it is barred by *res judicata*. As Petitioner has not shown why the argument was not previously raised, we find that the

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[2] In concluding that Petitioner had not overcome the presumption that trial counsel's performance fell within the wide range of reasonable professional assistance we determined that "the defense team did not try to influence [Petitioner] one way or the other" but that "the decision to waive jury trial was solely [Petitioner's] decision." *Malone*, 2013 OK CR 1, ¶¶ 20, 26, 293 P.3d at 207, 209. Petitioner benefitted from the therapeutic environment at the Forensic Center and was returned to competency. *Id.*, 2013 OK CR 1, ¶ 70, 293 P.3d at 217. At the hearing held on Petitioner's waiver of his right to have a jury determine his punishment, the trial court thoroughly determined that Petitioner's waiver was knowing and voluntary. *Id.*, 2013 OK CR 1, ¶ 20 n. 5, 293 P.3d at 207 n.5.

portion of his argument which he had not heretofore presented is waived. *Id.*; *Patton v. State*, 1999 OK CR 25, ¶ 18, 989 P.2d 983, 989.

In Proposition Three, Petitioner contends he should be afforded post-conviction relief due to the cumulative impact of errors identified in his direct appeal, in his original application for post-conviction relief, and in this application. Petitioner raised claims of cumulative error on direct appeal and in his original application for post-conviction relief. Those claims were denied. *Malone*, 2013 OK CR 1, ¶ 74, 293 P.3d at 218; *Malone v. State*, unpub. dispo., PCD-2011-248 (Okla. Cr. April 23, 2013). Therefore *res judicata* bars further consideration of those claims. *Patton*, 1999 OK CR 25, ¶ 18, 989 P.2d at 989. Having found no merit to any of the claims raised herein, there is no basis for granting post-conviction relief and therefore the instant claim is denied.

Filed simultaneously with the Application for Post-Conviction Relief is a Motion for Evidentiary Hearing. For purposes of the motion, Petitioner incorporates the exhibits included in his Appendix of Attachments to the Successive Application for Post-Conviction Relief and seeks permission to bring forth other evidence as needed to further support the issues raised in the application.

A post-conviction applicant is not entitled to an evidentiary hearing unless the application for hearing and supporting affidavits "contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief."

Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). If this Court determines that the requirements of section 1089(D) of Title 22 have been met and issues of fact must be resolved, it shall issue an order remanding to the district court for an evidentiary hearing. Rule 9.7(D)(6). Upon review of Petitioner's application and supporting materials, we conclude he has not made this clear and convincing showing. His request for an evidentiary hearing is therefore denied.

Petitioner also filed his Motion to Seal Portion of Application for Post-Conviction Relief and Related Attachment simultaneously with his Application for Post-Conviction Relief. Petitioner requests this Court withdraw from the public record and maintain under seal those portions of his application and appendix which reference childhood sexual abuse and incest.

The Oklahoma Public Records Act requires that all court records shall be considered public records and be subject to the provisions of the Oklahoma Public Records Act unless the records fall within a statutorily prescribed exception in the Act or are otherwise identified by statute as confidential. *Nichols v. Jackson*, 2001 OK CR 35, ¶ 10, 38 P.3d 228, 231; 51 O.S.Supp.2014, § 24A.30. This Court interprets the provisions of the Oklahoma Public Records Act to ensure compliance with constitutionally guaranteed rights. *Id.*, 2001 OK CR 35, ¶ 11, 38 P.3d at 231-32.

Initially, we note that Petitioner has failed to comply with the provisions of the Oklahoma Open Records Act. Title 51 O.S.Supp.2012, § 24A.29 requires that any party seeking to file protected materials place such materials in a

sealed manila envelope clearly marked with the caption and case number as well as the word "CONFIDENTIAL." As a result of Petitioner's failure to comply with the provisions of § 24A.29, the materials which are the subject of his motion were filed and made available for public inspection and copying.

Petitioner asserts that this Court should withdraw the documents because they are akin to the juvenile records which 10A O.S.2011, § 1-6-107 makes confidential. Section 1-6-107 provides that the reports required by 10A O.S.2011, § 1-2-101 as well as all other information acquired pursuant to the Oklahoma Children's Code shall be confidential and may only be disclosed as provided by the Code, applicable state or federal law, regulation, or court order. Section 1-2-101 sets forth both the general and specific duties for individuals to report child abuse or neglect for any child under the age of eighteen (18) years old to the Department of Human Services.

Reviewing the documents which Petitioner requests sealed, we find that the documents are neither reports of child abuse or neglect to the Department of Human Services nor other information acquired pursuant to the Oklahoma Children's Code. As such, we find that § 1-6-107 does not require their confidentiality.

Petitioner further asserts that this Court should withdraw the documents because the sensitive and private nature of the information disclosed in the documents outweighs the public's interest in access to the documents. Since this Court's opinion in *Nichols*, the Oklahoma Legislature has made provision for the sealing of a court record based upon a compelling privacy interest.

Section 24A.30 of the Open Records Act provides that "[i]f confidentiality is not required by statute, the court may seal a record or portion of a record only if a compelling privacy interest exists which outweighs the public's interest in the record."

In the present case, we find that Petitioner has not established that § 24A.30 requires sealing of any portion of the record. Petitioner has not forwarded any argument other than to assert that the circumstances set forth in the subject documents are "sensitive and private." As Petitioner challenges his sentence of death, we find that the public's interest in the subject documents is great. Petitioner attempted to mitigate his punishment and introduced as evidence a considerable amount of sensitive and private information concerning his childhood and his familial relationships at his sentencing trial. He, now, requests that this Court grant him a new sentencing trial claiming that trial counsel should have introduced into evidence the very circumstances he seeks to withdraw from the record. Under these circumstances, we find that he has not established a compelling privacy interest which outweighs the public's interest in the documents which he has requested sealed. His request to withdraw and seal a portion of his application and appendix is therefore denied.

DECISION

After carefully reviewing Petitioner's Application for Post-Conviction Relief, Motion for Evidentiary Hearing, and Motion to Seal, we conclude: (1) there exists no controverted, previously unresolved factual issues material to

the legality of Petitioner's confinement; (2) grounds for review which are properly presented have no merit; and (3) the current post-conviction statutes warrant no relief. 22 O.S. 1089 (D)(4)(a) / 22 O.S. 1089 (D)(2) / 22 O.S. 1089(D)(3). Accordingly, Petitioner's Application for Post-Conviction Relief and Motion for Evidentiary Hearing and Motion to Seal are **DENIED**. 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.

ATTORNEY FOR PETITIONER

ROBERT S. JACKSON
ATTORNEY AT LAW
925 NW 6TH STREET
OKLAHOMA CITY, OK 73106

NO RESPONSE NECESSARY FROM THE STATE

OPINION BY LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

PA

THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

IN RE: THE MENTAL HEALTH OF RICKY RAY MALONE, DOC 505362

CASE NO.: MH-2016-11

ORDER

This matter comes on for trial this 26th day of October, 2017. Mr. Malone appears by and through counsel of record, Mr. Robert Jackson and Ms. Sarah Jernigan, and his appearance is waived for good cause. The State appears through the Pittsburg County District Attorney, Mr. Chuck Sullivan.

This Court has been advised that the parties have reached an agreement as to the evidence to be presented in this matter regarding the question of Mr. Malone's present competency and/or sanity[1] to be executed. The parties are prepared to submit the matter to the Court based upon the agreed evidence. The parties have also announced they are in agreement as to the legal conclusions the evidence presented establishes: by the preponderance or greater weight of the evidence, Mr. Ricky Ray Malone, DOC 505362, is presently incompetent and/or insane to be executed.

Being advised in the premises, this Court, therefore, enters the following findings of fact and conclusions of law:

1. Mr. Ricky Ray Malone was convicted of First Degree Murder and sentenced to death

[1] Oklahoma, per its statutory language, uses the word "insane" to describe a person not competent to be executed. *See* 22 O.S. § 1005.

on June 16, 2005, in the District Court of Comanche County, Oklahoma, Case No. CF-2005-147. The Oklahoma Court of Criminal Appeals reversed the death sentence and remanded for re-sentencing in Case No. D-2005-600 on August 31, 2007. On November 1, 2010, Mr. Malone was again sentenced to death following a bench re-sentencing trial in the District Court of Comanche County. The death sentence was affirmed by the Oklahoma Court of Criminal Appeals in Case No. D-2010-1084 on January 11, 2013, and Mr. Malone's Application for Post Conviction Relief in Case No. PCD-2011-248 was denied on April 23, 2013.

2. Kevin Duckworth, then Interim Warden of the Oklahoma State Penitentiary, has found good reason to believe Mr. Malone is insane. Pursuant 22 O.S. §§ 1005-1008, Warden Duckworth initiated the sanity and/or competency proceedings herein on June 24, 2016, by notifying Mr. Farley Ward, then District Attorney of Pittsburg County, that he had good reason to believe Mr. Malone had become insane.

3. The parties stipulate to the contents and authenticity of the June 24, 2016 letter from Warden Duckworth to Mr. Farley Ward, and such letter is admitted without objection as Court's Exhibit 1.

4. On August 1, 2016, then Assistant District Attorney, Mr. Chuck Sullivan, petitioned this Court to set this matter for jury trial in accord with the procedure contained at 22 O.S. § 1005.

5. Mr. Malone has a documented history of serious mental illness.

6. During re-sentencing proceedings subsequent to his original trial, the District Court of Comanche County found sufficient evidence to twice send Mr. Malone to a state mental hospital, the Oklahoma Forensic Center at Vinita, for treatment and restoration of competency (June 30, 2008 and November 12, 2009). During these times, he was evaluated by various mental health experts, all of whom recognized signs of serious mental illness. After treatment, the parties ultimately stipulated to Mr. Malone's competency to proceed in the case and waived a jury trial as to competency. However, the competency evaluators noted that "should he become medication and/or treatment noncompliant or should he use alcohol or illicit substances, that would need to be re-evaluated."

7. Mr. Malone was twice evaluated by psychiatrist, Dr. Raphael Morris, M.D. Dr. Morris is a licensed, board certified psychiatrist who is both qualified and experienced in the evaluation of individuals' legal competency for execution. He is qualified to offer expert opinion as to the same.

8. By agreement and without objection, Dr. Morris's reports of September 18, 2014, and February 19, 2016, are admitted into evidence as Court's Exhibits 2 and 3, respectively. The parties stipulate that Dr. Morris would testify in conformity with his written reports and that the same may be considered as evidence of Mr. Malone's present incompetence and/or insanity to be executed in this proceeding.

9. Dr. Morris has found Mr. Malone seriously mentally ill as suffering from

Schizophrenia and found him presently incompetent to be executed. For example, Dr. Morris opined in his September 18, 2014 Report that:

> "Mr. Malone did not at the time of his re-sentencing and does not now, demonstrate the requisite rational understanding of his legal predicament. He cannot rationally weigh the relative strength of evidence in his case due to grandiose and paranoid delusions involving the prison, the legal system, Government and at times even his attorneys. Even more significant is his inability to hold a logical conversation outside of pontificating on his delusion material, his role in society, his God-like qualities and his ability to be in different places. He has delusions that he has been resurrected and cannot be killed. These symptoms all interfere with his capacity to rationally understand that he is facing a death sentence and why the state plans to execute him."

Court's EXH 2 at 36.

10. In his most recent Report of February 19, 2016, Dr. Morris concluded Mr. Malone's condition is worsening. Court's EXH 3. Dr. Morris stood by all conclusions in his prior Report and emphasized: "It has become increasingly clear from my most recent evaluation that Mr. Malone remains incompetent to be executed, because as described, the symptoms of his illness interfere with his capacity to rationally understand that he is facing a death sentence and why the state plans to execute him." Court's EXH 3 at 7.

11. The Oklahoma Department of Corrections confirms Dr. Morris's diagnosis, although the Department expresses no opinion as to Mr. Malone's present competence/sanity. Oklahoma State Penitentiary (OSP) records list Mr. Malone's diagnosis as Schizophrenia, Paranoid Type, as far back as November, 2010. And, this remains his working psychiatric diagnosis at OSP.

12. Likewise, OSP found Mr. Malone to be experiencing continued worsening of his mental health conditions, resulting in the need for involuntary psychotropic medication. On June 22, 2016, and July 13, 2016, the Oklahoma Department of Corrections Medication Review Committee approved the involuntary administration of psychotropic medications, because, *inter alia*, Mr. Malone's mental health had decompensated to the extent that there posed a risk of harm to himself and that he was unable to care for himself such that his health and safety were endangered.

13. The parties stipulate to the content and authenticity of the Department of Corrections's Medication Review Committee Reports completed on June 22, 2016, and July 13, 2016. The same are admitted without objection as Court's Exhibits 4 and 5, respectively. The parties further stipulate that such reports may be considered as evidence of Mr. Malone's present incompetence and/or insanity to be executed in this proceeding.

14. Most recently, Mr. Malone was evaluated by Dr. Scott Orth, Psy.D., a licensed psychologist, who is employed by the Oklahoma Department of Mental Health and Substance Abuse Services as the Director of Forensic Psychology at the Oklahoma Forensic Center in Vinita, OK. Dr. Orth's evaluation was conducted pursuant this Court's Agreed Order for Competency Evaluation, which was entered on March 24, 2017. The purpose of the evaluation was to obtain a current opinion as to Mr. Malone's competence to be executed. Dr. Orth conducted the evaluation on May 30,

2017, and he prepared a written report of his evaluation, which is dated June 5, 2017. In summary, Dr. Orth found that Mr. Malone's current mental state renders him presently insane and/or incompetent to be executed.

15. By agreement and without objection, Dr. Orth's report of June 5, 2017, is admitted into evidence as Court's Exhibit 6. The parties stipulate that Dr. Orth would testify in conformity with his written report and that the same may be considered as evidence of Mr. Malone's present incompetence and/or insanity to be executed in this proceeding.

16. The parties stipulate that Dr. Morris and Dr. Orth conducted their evaluations of Mr. Malone's present sanity to be executed and found him insane and/or incompetent to be executed under the legal tests for insanity set forth in *Bingham v. State*, 169 P.2d 311 (Okla. Crim. App. 1946) and *Ford v. Wainwright*, 477 U.S. 399 (1986).[2]

17. The available evidence demonstrates, by a preponderance or greater weight of the evidence, that Mr. Malone is presently insane and/or incompetent to be executed according to the governing legal standards in *Bingham v. State*, 169 P.2d 311 (Okla. Crim. App. 1946) and *Ford v. Wainwright*, 477 U.S. 399 (1986).

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[2] In *Ford*, Justice Powell in his concurring opinion announced that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. 399, 422. Later in *Panetti v. Quaterman*, 551 U.S. 930, 933 (2007), the Supreme Court confirmed Justice Powell's concurrence to be the appropriate standard governing competency to be executed challenges, but clarified that the prisoner must have a *rational understanding* of their impending fate.

18. Oklahoma law, the Eighth Amendment to the United States Constitution, and the Due Process clause of the Fourteenth Amendment to the United States Constitution forbid the execution of incompetent and/or insane persons. *Bingham v. State*, 169 P.2d 311 (Okla. Crim. App. 1946); *Ford v. Wainwright*, 477 U.S. 399 (1986).

19. Pursuant the foregoing constitutional and statutory provisions, the Court finds that infliction of capital punishment on Mr. Malone at the present time would be a violation of state and federal law.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that upon the evidence submitted by agreement of the parties and for good cause shown, Ricky Ray Malone, DOC 505362, is deemed presently insane and/or incompetent to be executed according to the governing legal standards in *Bingham v. State*, 169 P.2d 311 (Okla. Crim. App. 1946) and *Ford v. Wainwright*, 477 U.S. 399 (1986). Mr. Malone may not be executed while he is incompetent. Within a reasonable period of time, Mr. Malone shall be transported by the Oklahoma Department of Corrections to the Oklahoma Forensic Center in Vinita, Oklahoma, where he will be confined for treatment in accordance with 22 O.S. §§ 1007, 1008.

This Court further orders that the Department of Corrections shall make available upon request all of its records pertaining to Mr. Malone (including incarceration, medical and mental health records) to the Oklahoma Department of Mental Health and Substance Abuse Services, the Oklahoma Office of the Attorney General, the Pittsburg County District

Attorney's Office and counsel for Mr. Malone. The Oklahoma Department of Mental Health and Substance Abuse Services shall provide counsel for Mr. Malone and the Oklahoma Office of the Attorney General updated records regarding Mr. Malone's mental health and medication compliance once per quarter.

IT IS SO ORDERED this 26th day of October, 2017.

JUDGE OF THE DISTRICT COURT

COUNTY OF PITTSBURG } ss
STATE OF OKLAHOMA
I, CINDY LEDFORD, Court Clerk in and for Pittsburg County State of Oklahoma do hereby certify that the within and foregoing is a full, true and correct copy of the original as the same appears on file and record in my office in witness whereof, I hereunto set my hand and affix the seal of said court.
This ____ day of ____ 20____
CINDY LEDFORD Court Clerk
By ____ Deputy

Approved:

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JORDAN MICHAEL HEATHCO,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2013-547**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Jordan Michael Heathco, was tried by jury and convicted of First Degree Murder (Count I) (21 O.S.Supp.2009, § 701.7(A)) and Shooting with Intent to Kill (Count II) (21 O.S.Supp.2007, § 652) in the District Court of Kiowa County, Case Number CF-2011-1. The jury recommended as punishment imprisonment for life without the possibility of parole in Count I and imprisonment for life in Count II. The trial court sentenced accordingly and ordered the sentences to run consecutively.[1] It is from this judgment and sentence that Appellant appeals.

FACTS

On January 4, 2011, at approximately 2:00 p.m., Appellant arrived for work at the liquor store on Highway 9 in Hobart, Oklahoma. Appellant's grandmother, Glenda Lyde, owned the store. Appellant had helped Lyde operate the store since his grandfather had passed away 6 years prior.

[1] Pursuant to 21 O.S.Supp.2009, § 13.1, any person convicted for first degree murder or shooting with intent to kill shall be required to serve not less than 85% of any sentence of imprisonment imposed prior to becoming eligible for consideration for parole.

APPENDIX I

Appellant had longstanding issues with depression, anger, substance abuse, and alcohol abuse and had been prescribed medication for these conditions. Without his medication, Appellant would become angrier and angrier at the smallest perceived slights. Appellant drank approximately 2 to 4 liters of alcohol every day. Despite this, the liquor store's customers knew Appellant as a cheerful and friendly person. He had a positive relationship with many of them.

Appellant relieved Lyde at the liquor store. Before she left, Lyde gave Appellant the inventory order sheet for the day. Appellant appeared unhappy with Lyde's order but did not voice his displeasure to his grandmother. Lyde asked Appellant to call in the order and left for the evening. After Lyde left, Appellant's distress over the order sheet got the better of him. He informed regular customer, John Carpenter, that his grandmother was not doing the sheet correctly and exclaimed "F grandma, I want to choke her." Appellant took a half-pint bottle of Bacardi and slammed it on the counter. He opened the bottle and drank it down. Carpenter stayed for a time and attempted to calm Appellant, but he remained angry.

As the afternoon wore on, Appellant returned to his normal self. He visited with his childhood friend, Rebecca Monday, and frequent customer, Matthew Dean. Monday observed that Appellant was intoxicated but otherwise acted normal. After Monday left, Appellant's friend, Jose Salazar, arrived. Salazar came into the store after he got off of work and hung out with Appellant.

Appellant's father, Michael Heathco, visited the store. Appellant and his sister had argued over her dog at lunch. A few days earlier, Appellant had related that he had gotten into it with a telemarketer that would not quit calling the store. Michael Heathco wanted to speak with Appellant as to whether he was taking his medication. Heathco visited with Salazar but decided to wait until Appellant got home to speak with him.

Matthew Dean had planned a gathering of family and friends at his home in Hobart that evening. Appellant had previously invited Dean to lunch. On Dean's second visit to the liquor store that day, he invited Appellant to attend the family gathering. After Dean left, Appellant asked Salazar to go with him to the get-together and Salazar agreed.

After closing the store, Appellant drove to Lyde's home and dropped off the store's deposit. Lyde noticed that Appellant had been drinking and confronted him. Lyde informed Appellant that he could not be drunk while working at the liquor store. Appellant asked Lyde if she wanted the keys to the store but she declined. Appellant then returned home, grabbed two packs of cigarettes, and informed his father that he was going out.

Salazar rode with Appellant from the liquor store to the gathering at Dean's home. He did not go inside either Appellant's or Lyde's homes but waited in Appellant's truck. Appellant acted normal throughout this entire period of time.

When Appellant and Salazar arrived at the gathering, Dean welcomed them inside his house. Dean's fiancée, Tiffany Guoladdle, and their three

children were inside the home. Tina Guoladdle, Sean Zotigh and their two children were also already there. Appellant and Salazar took seats at the dining room table. Tiffany Guoladdle watched the children in the bedroom. Soon thereafter, Benjamin Wagner arrived with his aunt, Sophia Cordova, her husband, James, and their two children. Appellant knew Tina Guoladdle, Sean Zotigh, and James Cordova from the liquor store but had not been formally introduced to Benjamin Wagner. After the two were introduced, Wagner joked that Appellant would not need to I.D. him at the store any longer.

Everyone engaged in casual conversation and listened to music. Appellant appeared normal and was cheerful. James Cordova spoke with Appellant concerning a problem that Appellant had with the window in his truck. Wagner sat at the dining table across from Appellant. Some of the women sat around the computer desk. Appellant had brought a bottle of Seagram's 7 with him to the gathering and shared it with the others. They passed it from person to person. The bottle was passed around three separate times. Appellant drank heavily during each pass. When the bottle got to Wagner, he asked Appellant if he could remove the plastic spout from the top of the bottle. Appellant handed Wagner his knife. James Cordova chastised both Wagner and Appellant for having the weapon while drinking alcohol. Cordova told Appellant to put the knife away and he complied. Cordova then went into the kitchen.

Salazar cockily asked Wagner "are you a Kweeton?" (a Native American last name from that area). Wagner replied: "No, man. I'm Zotigh. I'm Benjamin.

I'm Benjamin." He shook Salazar's hand. Salazar maintained a hard attitude. Wagner goofily stated "I'm Ben for real, yeah - - oh no. "I'm a - - how about my bang (phonetic), how about my bang (phonetic)." Wagner asked Salazar: "ha, you Kiowa?" Salazar responded in the Kiowa language stating "No. I'm Mexican." Wagner stated "Oh, he's talking Kiowa" and asked Appellant "you from here?" Appellant stated, "Yeah." Although no one else in the room found that this exchange was extraordinary, Salazar noticed that it visibly upset Appellant.

Wagner and Sophia Cordova were sitting next to each other singing along with the music. Salazar asked Wagner "Where you from?" Wagner replied "Cali. Long Beach. Third in line. Third in line." Appellant drew a Glock 40 caliber handgun from his left pocket, chambered a round, and shot Wagner three times. Appellant stood up and walked towards Wagner. When Wagner stood up and took two steps, Appellant shot Wagner twice more. Wagner fell face down on the floor.

Appellant stepped back and pointed the gun at Matthew Dean. Dean was still seated at the table. Appellant walked towards Dean and put the gun in his face. Dean believed that Appellant intended to kill him. He moved his head to one side and shoved Appellant's arm out of the way just as Appellant fired the gun. Then, Dean jumped from his seat and pulled on the gun in an attempt to take it away from Appellant. Salazar also grabbed Appellant's arm and hand. The two men wrestled the gun away from Appellant. The magazine fell on the table. Dean took the gun and threw it under a bush in the front yard.

Appellant exited the house and left in his truck. He drove to the Kiowa County Sheriff's Office. He asked for the Sheriff and then the Undersheriff by name. When they were unavailable he confessed "I've killed some people" to jail trustee, Donny Chancellor, and Dispatcher, Carol Bauer. Bauer took Appellant into custody. Deputy Sean Buffington later interviewed Appellant. Appellant informed Buffington "I did it, didn't I"?

After Appellant shot Wagner, Tina Guoladdle ran into the bedroom and called 911. Emergency medical workers quickly responded to the home and tried to save Wagner's life. They transported Wagner to the hospital where he was pronounced dead. The Medical Examiner's Office determined that Wagner had died from multiple gunshot wounds.

I.

In his first proposition of error, Appellant challenges the form of the verdict the trial court provided to the jury. He contends that the verdict form was incomplete because it omitted a blank for the jury to check to return a simple verdict of not guilty. He argues that this omission operated as a directed verdict.

Appellant acknowledges that he waived appellate review of this issue for all but plain error when he failed to object to the verdict form at trial. *Powell v. State*, 1995 OK CR 37, ¶ 35, 906 P.2d 765, 775-76; *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693; *Kite v. State*, 1973 OK CR 76, ¶ 11, 506 P.2d 946, 949. Plain error review is codified at 12 O.S.2011, § 2104(D). This statutory provision permits this Court to "tak[e] notice of plain errors affecting

substantial rights although they were not brought to the attention of the [trial] court." To be entitled to relief under the plain error doctrine, an appellant must prove: 1) the existence of an actual error (*i.e.*, deviation from a legal rule); 2) the error is plain or obvious; and 3) the error affected his or her substantial rights. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *Simpson*, 1994 OK CR 40, ¶¶ 2, 11, 23, 876 P.2d at 693-95. "If these elements are met, this Court will correct plain error only if the error 'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise represents a 'miscarriage of justice.'" *Id.*, *quoting Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. We review Appellant's claim of error pursuant to this framework.

Our statutes do not recognize a plea of not guilty by reason of insanity, instead, the defense of insanity is tendered under a plea of not guilty. Title 22 O.S.2011, § 513 only permits four kinds of pleas to an Indictment or Information, namely: (1) Guilty, (2) Not Guilty, (3) *Nolo Contendere*, and (4) Former Judgment of Conviction or Acquittal. All matters of fact tending to establish a defense other than those listed within § 513 may be given in evidence under the plea of not guilty. 22 O.S.2011, § 519. The legal defense of insanity is recognized throughout our statutes. 21 O.S.2011, § 152(4); 22 O.S.2011, §§ 914, 925, 1161(A)(1). An act committed by a person in a state of insanity cannot be punished as a public offense. 22 O.S.2011, § 1161(A)(1). The defense of insanity may be raised either singly or in conjunction with some other defense. 22 O.S.2011, § 1161(A)(2). To properly raise the defense the defendant must file notice with the court no later than thirty (30) days after

formal arraignment. 22 O.S.2011, § 1176(A). Therefore, when in any criminal action the defense of insanity is interposed, the defendant necessarily stands upon a plea of not guilty.

The defense of insanity is analogous to a confession and avoidance. *Adair v. State*, 1911 OK CR 296, 6 Okl.Cr. 284, 297, 118 P. 416, 422, *overruled in part on other grounds by Tittle v. State*, 1929 OK CR 359, 44 Okl.Cr. 287, 295-96, 280 P. 865, 868; *See e.g. State v. Quigley*, 199 A. 269, 271 (Me. 1938). It does not deny a single allegation in the Indictment or Information but seeks to justify or excuse it. *Id.*, 6 Okl.Cr. at 291, 297, 118 P. at 419, 422; *See e.g. Quigley*, 199 A. at 271 (Me. 1938). However, as a defendant that interposes the defense of insanity stands upon a plea of not guilty, every material allegation in the Indictment or Information is at issue at the time of trial. 22 O.S.2011, § 518.

When a jury acquits a defendant on the ground of insanity, the jury has a clear duty to state in their verdict that they find the defendant not guilty on account of insanity. 22 O.S.2011, §§ 914, 925, 1161(A)(3). In contrast, the verdict upon a plea of not guilty is either "guilty" or "not guilty." 22 O.S.2011, § 914. Therefore, in a case where the defendant has properly raised the defense of insanity, our statutes plainly require that the verdict form should provide the jury with both the option of determining the defendant "Not Guilty" and the option of determining the defendant "Not Guilty by reason of insanity." 22 O.S.2011, §§ 1161(A)(3), 1165.[2]

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[2] Section 1161(A)(3) provides:

The record in the present case reveals that the District Court modified the basic verdict form to include the language "by reason of insanity" following the pre-printed "Not Guilty" blank. *See* Inst. No. 10-14, OUJI-CR(2d) (Supp.2013).[3] Thus, the verdict form did not provide the jury with a pre-printed blank for a simple "Not Guilty" verdict. Although there was no directed verdict in the present case, we find that the trial court's modification of the verdict form constituted an actual error. *Gilson v. State*, 2000 OK CR 14, ¶ 44, 8 P.3d 883, 904. Based on the language of our statutes, the error was plain and obvious and affected a substantial right. Thus, it constitutes plain error. *Simpson*, 1994 OK CR 40, ¶¶ 10-12, 26, 876 P.2d at 694-95, 699.

> When in any criminal action by indictment or information the defense of insanity is interposed either singly or in conjunction with some other defense, the jury shall state in the verdict, if it is one of acquittal, whether or not the defendant is acquitted on the ground of insanity. When the defendant is acquitted on the ground that the defendant was insane at the time of the commission of the crime charged, the person shall not be discharged from custody until the court has made a determination that the person is not presently dangerous to the public peace and safety because the person is a person requiring treatment as defined in Section 1-103 of Title 43A of the Oklahoma Statutes.

Section 1165 provides:

> The provisions of the article on trials, in respect to the duty of the court upon questions of law, and of the jury upon questions of fact, and the provisions in respect to the charge of the court to the jury, upon the trial of an indictment or information, apply to the questions of insanity.

[3] The Oklahoma Uniform Jury Instruction Committee has not formulated a verdict form for the District Courts to use when a defendant interposes the defense of insanity, but instead has drafted a "Form of Verdict instruction [that] simply informs the jury of its duty under 22 O.S.1991, § 914." Committee Comments, Inst. No. 8-34, OUJI-CR(2d) (Supp.2013) ("If you acquit the defendant on the ground of insanity, the verdict must read, 'We, the jury, upon our oath, find the defendant not guilty by reason of insanity.'"). We refer this issue to the Oklahoma Uniform Jury Instruction Committee for its review.

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Having determined that plain error occurred, we review to determine whether the error was harmless. *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (holding "plain error is subject to harmless error analysis. . . ."). As set forth in *Hogan* and *Simpson*, we will correct plain error only if the error seriously affect the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. Error in the form of the verdict submitted to the jury does not fall within the very limited class of structural errors which necessarily render a trial fundamentally unfair. *See United States v. Davila*, 133 S.Ct. 2139, 2149, 186 L.Ed.2d 139 (2013); *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999); *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Instead, error in the form of the verdict is subject to harmless error review. *Gilson*, 2000 OK CR 14, ¶ 44, 8 P.3d at 904; *see also Ellis v. Ward*, 2000 OK CR 18, ¶¶ 3-4, 13 P.3d 985, 986 (holding error in instructions subject to harmless error review.). Under the facts of this case, we conclude that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

We note that the District Court's modification of the basic verdict form conformed to Appellant's defense at trial. Appellant's sole defense was insanity. Defense counsel argued in closing argument that Appellant was legally insane when he committed the acts against Wagner and Dean. He explicitly informed the jurors: "There's not even a not guilty verdict on this . . . because we've

confessed to you that our only verdict we are seeking in this case is not guilty by reason of insanity."

The evidence of Appellant's guilt was such that no rational trier of fact could have returned a simple verdict of acquittal. Appellant wholly admitted at trial that he had shot and killed Benjamin Wagner. He further admitted that he pointed the gun at Matthew Dean and discharged it. Accordingly, we find beyond a reasonable doubt that the complained error did not contribute to the jury's verdict. Proposition One is denied.

II.

In his second proposition of error, Appellant challenges the sufficiency of the evidence. In evaluating the sufficiency of the evidence this Court does not "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (quotations and citation omitted). "Instead, 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." *Id.*; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

Appellant contends that the State failed to meet its burden of proving sanity. Oklahoma law exempts from criminal responsibility those who, at the time of the crime, are incapable of knowing the wrongfulness of their act. *Ullery v. State*, 1999 OK CR 36, ¶ 34, 988 P.2d 332, 348; 21 O.S.2011, § 152(4)

However, criminal defendants are presumed sane. *Id.*; *Cheney v. State*, 1995 OK CR 72, ¶ 39, 909 P.2d 74, 85. Thus, the defendant has the burden of raising a reasonable doubt of his sanity at the time of the crime. *Id.; Manous v. State*, 1987 OK CR 239, ¶ 4, 745 P.2d 742, 744. The *M'Naghten* rule is the test for sanity in Oklahoma. *Pugh v. State*, 1989 OK CR 70, ¶ 5, 781 P.2d 843, 844.

> A person is insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not know that his/her acts or omissions are wrong and is unable to distinguish right from wrong with respect to his/her acts or omissions. A person is also insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not understand the nature and consequences of his/her acts or omissions.

Id., 1989 OK CR 70, ¶ 3, 781 P.2d at 843-44; Inst. No. 8-32, OUJI-CR(2d)(Supp.2013). If the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the State to prove the defendant's sanity beyond a reasonable doubt. *Ullery*, 1999 OK CR 36, ¶ 34, 988 P.2d at 348. The jury determines whether the State has met this burden. *Id.*

Reviewing the record in the present case, we find that Appellant raised a reasonable doubt as to his sanity. Appellant presented testimony from several witnesses establishing that he had a long history of mental health issues. Appellant also presented the testimony of David Tiller, M.D., who diagnosed Appellant with schizophrenia. After interviewing Appellant concerning the events on the night in question, Tiller opined Appellant suffered a delusion that his life was in danger which caused him to be legally insane. Tiller believed that

Appellant had decompensated and was having auditory hallucinations. Appellant informed Tiller that he was in fear of his life after Wagner stated "I'm going to cap your ass" and demonstrated to Tiller how Wagner moved his hands underneath the table. Although Appellant did not explain why he had the handgun in the first place, he claimed that he started shooting to protect himself. Tiller stated that the events that Appellant related did not actually occur, but explained that they were Appellant's reality. Thus, the State was required to prove Appellant's sanity beyond a reasonable doubt.

The test set forth in *Jackson v. Virginia* is the proper standard for determining the sufficiency of the evidence of sanity. *Moore v. Duckworth*, 443 U.S. 713, 714, 99 S.Ct. 3088, 3089, 61 L.Ed.2d 865 (1979). Therefore, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found Appellant was sane beyond a reasonable doubt.

All of the evidence suggested that Appellant was able to distinguish right from wrong. Both Tiller and the State's expert witness, Robert Morgan, Ph.D., opined that Appellant was able to distinguish right from wrong at the time of the offenses. Accordingly, the issue is whether Appellant was suffering from such a disability of reason or disease of the mind that he did not understand the nature and consequences of his acts when he shot and killed Wagner and shot the firearm at Dean.

Reviewing the evidence in the light most favorable to the State, we find that any rational trier of fact could have found that Appellant was able to

understand the nature and consequences of his acts when he committed the charged offenses. Dr. Morgan opined that Appellant suffered from depression, anxiety and alcohol abuse but was not legally insane when he committed the offenses. Morgan did not believe that Appellant had suffered a valid hallucination, psychosis or a psychotic event. Thus, the jury had conflicting expert opinions as to Appellant's sanity. It is within the exclusive province of the trier of fact to determine the weight and credibility to be given to the testimony of a witness, reconcile the testimony concerning the motives of the witnesses, weigh the evidence, and resolve conflicts in that evidence. *Plantz v. State*, 1994 OK CR 33, ¶ 43, 876 P.2d 268, 281.

We find that the jury rationally resolved the conflict in the expert witness testimony. Appellant's disclosures to the mental health experts were inconsistent. Morgan noted that the validity indicators on certain tests that the defense experts had given to Appellant indicated that he had exaggerated his symptoms for hallucinations and delusions. He further noted that Appellant had not stated that Benjamin Wagner had a gun when he interviewed him but made this statement to Dr. Tiller a couple of weeks later. Tiller wholly admitted this fact and further admitted that Appellant had been inconsistent in his reporting to him.

Appellant's mental health history corroborated Morgan's opinion that Appellant was sane. Appellant was thirty one years old. He had received mental health treatment since he had been a teenager and had gone to inpatient treatment on three separate occasions. Throughout that period of time,

Appellant's diagnosis consistently remained as mood disorder (depression), intermittent explosive disorder (anger issues) and alcohol abuse. He was prescribed antidepressant and antianxiety medications. Appellant had never been treated for delusions, hallucinations or psychosis. Appellant neither reported nor did the treating professionals note that he had any hallucinations, delusions, or psychosis during his three inpatient stays. Dr. Tiller agreed that there was not any evidence of hallucinations or delusions within Appellant's mental health records.

Appellant's ability to function within the community also corroborated Morgan's opinion. Morgan testified that, if left untreated, an individual suffering from hallucinations or delusions would have trouble functioning in society. It would be difficult for such an individual to maintain a job. The individual's problems would be quite apparent to co-workers, supervisors and anybody in the public with whom they interacted. The evidence established that Appellant had helped his grandmother, Glenda Lyde, operate the family liquor store for the 6 years preceding the offenses. Appellant helped Lyde with the inventory order sheet and interacted with the store's customers. Appellant had a positive relationship with many of the customers. They knew Appellant as a cheerful and friendly person.

Morgan's opinion was further corroborated by the testimony of the individuals that observed Appellant in the hours immediately prior to the offenses. Because she was his grandmother, Lyde knew that Appellant had longstanding mental health issues. She also knew that he took a bottle home

from the liquor store every night. On the day in question, Appellant came into the store and relieved Lyde at 2:00 p.m. Appellant was unhappy with Lyde's inventory order sheet but did not voice his displeasure to his grandmother. Lyde left Appellant to call in the order and close down the store that night. She testified that she would not have left Appellant in charge of the store that day if she had any concerns.

John Carpenter knew Appellant from his weekly visits to the liquor store. He visited the store shortly after 2:20 p.m. on the day in question. Carpenter noticed that Appellant was upset about an inventory sheet. Appellant stated: "F grandma, I want to choke her" and motioned as if he was choking someone with a sheet around the neck. Appellant took a half-pint bottle of Bacardi and slammed it on the counter. He opened the bottle and drank it down. Carpenter stayed for a time and attempted to calm Appellant but he remained angry.

Rebecca Monday had known Appellant her entire life. She visited the liquor store that day and observed that Appellant was intoxicated but otherwise acted perfectly normal. Appellant was able to communicate and transact business with her. He admitted that he had drank an entire bottle of liquor. Monday had seen Appellant intoxicated on other occasions, had spoken with him when he appeared suicidal in the past, and was familiar with his mannerisms. Monday did not have any concerns with the way that Appellant was acting that day.

Matthew Dean knew Appellant from his visits to the liquor store. He visited with Appellant on two separate occasions that day. On the second

occasion, he invited Appellant to attend a gathering at his home. Dean did not observe anything out of the ordinary about Appellant.

Jose Salazar and Appellant were friends. On the day in question, Salazar visited Appellant at the liquor store and stayed with him awhile. When Dean invited Appellant to come to his house, Appellant invited Salazar to come with him. Salazar testified that he did not observe anything unusual about Appellant. He had normal conversations with Appellant. Appellant appeared normal and acted professional with the liquor store's customers that day.

Appellant's father, Michael Heathco, visited the liquor store because he was concerned that Appellant was off of his medication. Michael Heathco related that Salazar was present at the store and he did not observe anything about Appellant that could not wait until he came home that evening.

After closing the store, Appellant drove to Lyde's home and dropped off the deposit. Lyde noticed that Appellant had been drinking and confronted him. Lyde informed Appellant that he could not be drunk while working at the liquor store. Appellant asked Lyde if she wanted the keys to the store but she declined. Lyde did not observe anything about Appellant's person that concerned her, beyond the intoxication, and let him leave. When Appellant returned home, he informed his father that he was going out. Michael Heathco did not confront Appellant or prevent him from leaving the home.

Salazar rode with Appellant from the liquor store to Lyde's home but did not go inside. He rode with Appellant to his home, but, again did not go inside.

Then, Salazar rode with Appellant to the gathering at Dean's home. Salazar testified that Appellant acted normal throughout this entire period of time.

Once inside Dean's home, Appellant spoke with both Dean and Salazar. Dean did not notice anything out of the ordinary about Appellant's person. Tina Guoladdle, Sean Zotigh and James Cordova also knew Appellant from the liquor store. All three observed Appellant when he first arrived. Appellant did not act any different than he usually did. Guoladdle testified that Appellant appeared his regular cheerful self. Cordova had a polite friendly conversation with Appellant concerning the operation of his truck window when he first arrived. Appellant shared his bottle of Seagram's 7 with everyone at the party. The bottle was passed around three separate times. Appellant drank heavily during each pass of the bottle.

Salazar testified that everything appeared normal with Appellant up until the moment that Wagner, Appellant, and Salazar traded exchanges about heritage and affiliation. Salazar noted that Appellant appeared to become upset at something Wagner had said. After Wagner stated "Cali. Long Beach. Third in line. Third in line," Appellant drew the handgun from his left pocket, chambered a round, and repeatedly fired it at Wagner.

Morgan's opinion was further corroborated by the testimony of those who interacted with Appellant following the shooting. Immediately after the offenses, Appellant drove to the Kiowa County Sheriff's office. He asked for both the Sheriff and the Undersheriff by name. When they were unavailable he confessed "I've killed some people" to jail trustee, Donny Chancellor, and

Dispatcher, Carol Bauer. Notably, Appellant did not claim that he acted in self-defense. Both Bauer and Chancellor observed that Appellant was intoxicated. Bauer took Appellant into custody. Deputy Sean Buffington later interviewed Appellant. Appellant informed Buffington "I did it, didn't I"? Buffington also observed indicators that Appellant was intoxicated.

Dr. Tiller did not examine Appellant until after he had been in the jail for 11 months. Appellant was not treated for schizophrenia or psychosis during this period of time. Bauer regularly interacted with Appellant in the jail. She noted that Appellant was a good inmate and did not cause any problems. Dr. Morgan did not observe any signs of hallucination, delusions or psychosis during his observations of Appellant throughout the proceedings.

Appellant's disclosures to Tiller failed to explain his attack on Matthew Dean. Tiller did not relate any hallucination or delusion which Appellant suffered as to Dean. Instead, he simply testified that Appellant's attempt to shoot Dean was part of the delusion involving Wagner.

Reviewing the evidence in the light most favorable to the State, we find that any rational trier of fact could have found that Appellant was sane beyond a reasonable doubt. Proposition Two is denied.

III.

In his third proposition of error, Appellant challenges the sufficiency of the evidence supporting his conviction in Count II for Shooting with Intent to Kill. We review Appellant's claim to determine 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 offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19, 99 S.Ct. at 2789; *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-204. The essential elements of the crime of Shooting with Intent to Kill, as instructed in the present case, are:

First, intentional and wrongful;

Second, discharging a firearm;

Third, with the intent to kill any person.

Inst. No. 4-4, OUJI-CR(2d) (Supp.2012). In reviewing the sufficiency of the evidence, this Court accepts all reasonable inferences and credibility choices that tend to support the trier of fact's verdict. *Roldan v. State*, 1988 OK CR 219, ¶ 8, 762 P.2d 285, 286-87.

Taking the evidence in the present case in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the crime of Shooting with Intent to Kill beyond a reasonable doubt. We note that Appellant, through defense counsel, admitted at trial that he pointed a firearm and discharged that firearm at Matthew Dean. On appeal, Appellant now argues that the firearm inadvertently discharged during a struggle over possession of it. We find that it was reasonable for the jury to infer from all the facts and circumstances that Appellant intentionally discharged the handgun with the intent to kill Dean. *Robinson v. State*, 2011 OK CR 15, ¶ 18, 255 P.3d 425, 432; *Hogan v. State*, 2006 OK CR 19, ¶ 22, 139 P.3d 907, 919.

All of the individuals that attended the gathering testified that they observed Appellant repeatedly shoot Benjamin Wagner with a handgun. Tina Guoladdle ran into the bedroom to called 911 and did not observe what followed. Jose Salazar and Sean Zotigh provided a general description of the events. They both related that Appellant pointed the gun at Matthew Dean, Dean grabbed the weapon, and the gun discharged. However, Dean testified in detail as to how he avoided being shot. Dean related that he remained in his seat because he was scared and confused. Appellant turned and stuck the gun in his face. Dean believed that Appellant was trying to kill him, too. He explained that he moved his head and shoved Appellant's arm out of the way as Appellant fired the gun. Then, he got up from his seat and started pulling on Appellant in an attempt to get the gun.

Sophia Cordova, likewise, detailed the events. She testified that Appellant continued to fire the gun at Wagner until Wagner fell to the floor. Cordova related that she was nearby and went to Wagner's side. She saw Appellant turn and step towards Dean. He pointed the gun right at Dean. Appellant pulled the trigger and fired the weapon, but Dean had redirected the weapon. Cordova remained at Wagner's side and the shot narrowly missed her. Cordova observed Dean and Appellant tussle over the gun.

James Cordova also provided a detailed description of the events. He testified that Appellant turned and pointed the gun at Dean. Appellant put the gun within 6 inches of Dean's face. Cordova saw Dean lunge at the gun before

his attention was drawn to his young son. Cordova, next, observed Dean and Salazar grab the gun and take it away from Appellant.

Reviewing the evidence in the present case in the light most favorable to the prosecution, we find that any rational trier of fact could have found that Appellant committed the charged offense beyond a reasonable doubt. Proposition Three is denied.

IV.

In his fourth proposition of error, Appellant contends that he was denied the effective assistance of counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112-13, 4 P.3d 702, 730-31 (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). Unless the appellant makes both showings, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Ryder v. State*, 2004 OK CR 2, ¶ 85, 83 P.3d 856, 875 (*quoting Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064).

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 (*citing Strickland*, 466 U.S. at

697, 104 S.Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Bland*, 2000 OK CR 11, ¶ 112, 4 P.3d at 730-31. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

Appellant contends that defense counsel rendered ineffective assistance when counsel failed to investigate and use evidence establishing that Appellant never received the IAAP HANDBOOK OF PSYCHOLOGY that he had requested from his aunt. He argues that this evidence was critical to overcome the implication that Appellant read the book to learn how to fake an insanity defense. Reviewing the record, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to use the asserted evidence.[4]

The State cross-examined Dr. Tiller at trial regarding the information that he had reviewed in reaching his opinion on sanity. Tiller testified that he had reviewed some of Appellant's mail. He was also aware that Appellant enjoyed reading and had read a lot of books during the time that he had been in the jail. Tiller affirmed that it was his understanding that Appellant had read CRIME AND PUNISHMENT, some philosophy books, and books on applied psychology during his time in the jail. The State implied some ulterior motive in

[4] We note that the District Court reached the same conclusion but within the context of Appellant's Motion for New Trial.

Appellant's desire to read the psychology book but Tiller stated that there could be any number of reasons why Appellant wanted to read a psychology book.

In redirect, defense counsel clarified Tiller's knowledge of the circumstances. Tiller explained that Appellant had written a letter to his aunt asking for the psychology book. Tiller acknowledged that he did not know if Appellant had ever received the book.

In recross-examination, the State questioned Tiller regarding Appellant's letter exclaiming that the book CRIME AND PUNISHMENT was one of his new favorites and explaining the book's portrayal of psychological problems, including hallucinations, delusions, and insanity. Tiller was thoroughly familiar with the book and agreed that it dealt with the very symptoms with which he had diagnosed Appellant.

In rebuttal, the State introduced testimony from Dr. Morgan that a general psychology book would provide information concerning abnormal behaviors and mental illness. Then, in closing argument, the Prosecutor argued that Appellant wanted to read the psychology book because he wanted to gather information to help with his defense. He further argued that Appellant had fabricated the symptoms that had led to his diagnosis as schizophrenic and wanted to use the book to research the symptoms for mental illness involving auditory and visual hallucinations.

The record on appeal reveals that Appellant did not receive a copy of the IAAP HANDBOOK OF PSYCHOLOGY. Following trial, Appellant filed his Motion for New Trial. Appellant's aunt, Barbara Bell, testified at the hearing held on the

motion. She related that Appellant had requested that she send him a copy of the IAAP HANDBOOK OF PSYCHOLOGY but that she had not sent the book to him because it had been too expensive. Appellant's Mother, Barbara Heathco, testified as to Appellant's hearsay statement made after the trial to the effect that he had never received the book.

However, we find that the evidence which Appellant developed at the hearing was not favorable to his position. Bell identified the letter in which Appellant requested the IAAP HANDBOOK OF PSYCHOLOGY. In the letter, Appellant also requested copies of the following books: THE MANUFACTURE OF MADNESS; EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS; PORTABLE NIETZSCHE; THE DEVIL'S NOTEBOOK; SECRET LIFE OF A SATANIST; THE HISTORY OF THE DEVIL AND THE IDEA OF EVIL; and PSYCHOLOGY OF THE UNCONSCIOUS. Bell further identified the letter that she wrote back to Appellant informing him that she had not been able to obtain the book IAAP HANDBOOK OF PSYCHOLOGY from his most recent list because it was too expensive. Bell did not indicate in the letter that she was unable to find the other books that he had listed.

Overall, the evidence and argument concerning Appellant's desire for the applied psychology book were not significant. The jury was not misled as to Appellant's study of psychology while in the jail. The State's elicitation of evidence and argument on the topic were both brief. The evidence concerning Appellant's interest in psychology made up a very small part of the totality of the evidence concerning his sanity. As Appellant has not shown a reasonable probability that the outcome of the trial would have been different had defense

counsel used the evidence developed at the motion hearing, we find that counsel's failure to use the evidence did not amount to ineffective assistance. Proposition Four is denied.

DECISION

The judgment and sentences of the District Court are hereby **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KIOWA COUNTY
THE HONORABLE RICHARD B. DARBY, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR IN RESULT
LEWIS, P.J.: CONCUR IN RESULT

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JOHNSON, JUDGE, CONCURRING IN RESULT:

I concur in the decision to affirm Counts 1 and 2. I cannot join, however, in the majority's plain error analysis in Proposition 1. We explained our plain error review in *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. For relief under the plain error doctrine, a defendant must show: (1) error; (2) that is plain; and (3) that affects substantial rights. *Id.* Under the third element of plain error, the burden is on the defendant to show that the obvious error affected substantial rights. In other words, the defendant must show that the error was prejudicial and affected the outcome of the district court proceedings. It is in this analysis that a reviewing court considers the prejudicial impact or harmlessness of the alleged error. Conducting a separate harmless error analysis after finding the existence of the three elements of plain error—as the majority does in this case—does not comport with traditional plain error review. *See United States v. Olano,* 507 U.S. 725, 734-35, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). For this reason, I concur in result.

I am authorized to state that Judge Lewis joins this opinion concurring in result.