Capital Case

Case No. _____

# In the Supreme Court of the United States

KENDRICK ANTONIO SIMPSON,
*Petitioner*,
v.
TOMMY SHARP, INTERIM WARDEN[1],
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 22nd of July, 2019

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[1] On July 15, 2019, Mr. Sharp became Interim Warden of the Oklahoma State Penitentiary. Pursuant Fed. R. Civ. P. 25(d), he is substituted as party respondent in place of Mike Carpenter.

## APPENDIX INDEX TO PETITION FOR CERTIORARI

(The following attachments are located in a separate Appendix volume)


Appendix A: *Simpson v. Carpenter*, 912 F.3d 542 (10th Cir. 2018) (Tenth Circuit opinion denying relief, Case No. 16-6191) (Dec. 27, 2018)

Appendix B: *Simpson v. Duckworth*, Case No. CIV-11-96-M, 2016 WL 3029966 (W.D. Okla. May 25, 2016) (unpub.) (federal district court opinion denying relief)

Appendix C: *Simpson v. Carpenter*, 10th Cir. No. 16-6191 (Tenth Cir. Order denying petition for rehearing) (Feb. 22, 2019)

Appendix D: *Simpson v. State*, 230 P.3d 888 (Okla. Crim. App. 2010) (state court opinion denying direct appeal D-2007-1055)

Appendix E: *Simpson v. State*, No. PCD-2007-1262 (Okla. Crim. App. Oct. 13, 2010) (unpub.) (state court opinion denying application for post-conviction relief)

Appendix F: *Simpson v. State*, No. PCD-2012-242 (Okla. Crim. App. Mar. 8, 2013) (unpub.) (state court opinion denying application for post-conviction relief)

839, 871, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (plurality opinion). These types of contracts do not "bind [the government] to ossify the law in conformity to the contracts." *Id.* Instead, under these contracts, "the Government assume[s] the risk that subsequent changes in the law might prevent it from performing, and agree[s] to pay damages in the event that such failure to perform cause[s] financial injury." *Id.*

If Montana did promise to maintain Lolo Liquor's commission rate regardless of future changes in the law, it still retained its sovereign power to change the law. That Lolo Liquor, as the recipient of that promise, is entitled to recover for damages resulting Montana's breach does not detract from that conclusion.

Because this alternative argument is baseless, Montana cannot rely on it to avoid Lolo Liquor's claim for breach of contract. Thus, this argument too does not "render [Lolo Liquor's] rights legally unenforceable," and so does not implicate the Contracts Clause. *Pure Wafer*, 845 F.3d at 953.

### C

As Lolo Liquor's ability to recover under state law remains intact, we conclude that Montana's passage of SB 153 did not impair a contractual obligation under the Contracts Clause. Lolo Liquor therefore has no claim under the Contracts Clause, and the district court did not err in granting summary judgment to Montana on this claim.

## III

In sum, we hold that Montana did not impair its contractual obligation to Lolo Liquor within the meaning of the Contracts Clause, because it did not eliminate Lolo Liquor's remedy for breach of its contract with the state. Accordingly, we affirm the district court's grant of summary judgment to Montana on Lolo Liquor's Contracts Clause claim. We address Lolo Liquor's breach-of-contract claim in a memorandum disposition filed concurrently with this opinion.

**AFFIRMED.**


**Kendrick Antonio SIMPSON, Petitioner-Appellant,**

**v.**

**Mike CARPENTER, Interim Warden,* Oklahoma State Penitentiary, Respondent-Appellee.**

**No. 16-6191**

United States Court of Appeals, Tenth Circuit.

FILED December 27, 2018

**Background:** Following affirmance of his Oklahoma conviction and death sentence for first degree murder, discharging a firearm with intent to kill, and possession of a firearm after former conviction of a felony, 230 P.3d 888, on rehearing, 239 P.3d 155, petitioner filed federal habeas petition. The United States District Court for the Western District of Oklahoma, D.C. No. 5:11-CV-00096-M, Vicki Miles-LaGrande,

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Mike Carpenter, current Interim Warden of Oklahoma State Penitentiary, is automatically substituted for Terry Royal, Warden (who was previously automatically substituted for Kevin Duckworth, Interim Warden), as Respondent in this case.

J., 2016 WL 3029966, denied the petition. Petitioner appealed.

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

(1) state appellate court's affirmance of the exclusion of expert testimony on petitioner's post-traumatic stress disorder (PTSD) was not contrary to clearly established federal law;

(2) Oklahoma's waiver rule was adequate and independent for state appellate court to rule that petitioner's *Brady* claim was procedurally barred;

(3) withheld impeaching evidence regarding prosecution witness was not material under *Brady*;

(4) state appellate court reasonably decided that jury's consideration of evidence at sentencing phase was not unfairly limited by prosecutor's closing argument;

(5) state appellate court reasonably decided that prosecutor's comments on mitigation evidence instruction did not render sentencing trial fundamentally unfair;

(6) state appellate court reasonably determined that prosecutor's extensive and recurring misconduct during closing at sentencing phase did not deny petitioner a fundamentally fair sentencing trial;

(7) state appellate court acted reasonably in deciding there was sufficient evidence to support Oklahoma's heinous, atrocious, or cruel aggravating factor; and

(8) state appellate court did not unreasonably apply *Strickland* in determining that petitioner was not prejudiced, as element of a claim of ineffective assistance, by counsel's failure to object to prosecutor's improper statements.

Affirmed.

**1. Habeas Corpus ⚿768**

Pursuant to the Anti-Terrorism and Effective Death Penalty Act (AEDPA), federal habeas court presumes the factual findings of the state court are correct, absent clear and convincing evidence to the contrary. 28 U.S.C.A. § 2254(e)(1).

**2. Habeas Corpus ⚿765.1**

Antiterrorism and Effective Death Penalty Act (AEDPA) requires that federal courts apply a difficult to meet and highly deferential standard in federal habeas proceedings; it is one that demands that state-court decisions be given the benefit of the doubt. 28 U.S.C.A. § 2254.

**3. Courts ⚿92**

**Habeas Corpus ⚿450.1, 452**

Federal habeas statute's reference to "clearly established Federal law," as determined by the Supreme Court of the United States, refers to the holdings, as opposed to the dicta, of the Court's decisions as of the time of the relevant state-court decision. 28 U.S.C.A. § 2254(d)(1).

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

**4. Habeas Corpus ⚿450.1, 452**

Federal habeas courts may not extract clearly established law from the general legal principles developed in factually distinct contexts, and Supreme Court holdings must be construed narrowly and consist only of something akin to on-point holdings. 28 U.S.C.A. § 2254(d)(1).

**5. Habeas Corpus ⚿452**

A state-court decision is "contrary to" the Supreme Court's clearly established precedent, as would warrant federal habeas relief, if it applies a rule that contradicts the governing law set forth in Supreme Court cases or if it confronts a set of facts that are materially indistinguishable from

a decision of the Court and nevertheless arrives at a result different from that precedent. 28 U.S.C.A. § 2254(d)(1).

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

**6. Habeas Corpus ⚿452**

For purposes of federal habeas review, a state court need not cite, or even be aware of, applicable Supreme Court decisions, so long as neither the reasoning nor the result of the state-court decision contradicts them. 28 U.S.C.A. § 2254(d)(1).

**7. Habeas Corpus ⚿450.1**

A state-court decision is an "unreasonable application" of Supreme Court law, as would warrant federal habeas relief, if the decision correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case. 28 U.S.C.A. § 2254(d)(1).

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

**8. Habeas Corpus ⚿450.1**

Federal habeas court undertakes the objective unreasonableness inquiry with respect to a state-court decision in view of the specificity of the governing legal rule established by Supreme Court precedent: the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. 28 U.S.C.A. § 2254(d)(1).

**9. Habeas Corpus ⚿450.1**

If a legal rule clearly established by Supreme Court precedent is specific, the range that state courts have in reaching outcomes in case-by-case determinations, for purposes of federal habeas review, may be narrow and applications of the rule may be plainly correct or incorrect. 28 U.S.C.A. § 2254(d)(1).

**10. Habeas Corpus ⚿450.1**

An unreasonable application of federal law, as would warrant federal habeas relief, is different from an incorrect application of federal law. 28 U.S.C.A. § 2254(d)(1).

**11. Habeas Corpus ⚿450.1**

A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly; that application must also be unreasonable. 28 U.S.C.A. § 2254(d)(1).

**12. Habeas Corpus ⚿766**

Claims not adjudicated on the merits in state court are entitled to no deference on federal habeas review. 28 U.S.C.A. § 2254.

**13. Habeas Corpus ⚿768**

Even in the setting where federal habeas court lacks a state court merits determination, any state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence. 28 U.S.C.A. § 2254(e)(1).

**14. Habeas Corpus ⚿452**

Although the burdens on the habeas petitioner under Antiterrorism and Effective Death Penalty Act (AEDPA) are significant, federal habeas court undertakes this review cognizant that its duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case. 28 U.S.C.A. § 2254.

**15. Habeas Corpus ⚿319.1**

A federal court may not grant an application for a writ of habeas corpus unless the petitioner has exhausted state remedies before filing his petition. 28 U.S.C.A. §§ 2254(b), 2254(c).

**16. Habeas Corpus ⇨319.1, 366**

In general, to exhaust state remedies, as required for federal habeas review, a petitioner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition; this is accomplished by providing the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. 28 U.S.C.A. §§ 2254(b), 2254(c).

**17. Habeas Corpus ⇨380.1**

A federal habeas claim is exhausted, as required for federal habeas review, only after it has been fairly presented to the state court. 28 U.S.C.A. §§ 2254(b), 2254(c).

**18. Habeas Corpus ⇨381, 383**

Fair presentation of a claim to the state court, as required to exhaust the claim for purposes of federal habeas review, requires that the substance of the federal claim was raised in state court; the petitioner need not cite book and verse on the federal constitution but the petitioner cannot assert entirely different arguments from those raised before the state court. 28 U.S.C.A. §§ 2254(b), 2254(c).

**19. Habeas Corpus ⇨381**

A claim raised in a federal habeas petition is unexhausted if the substance of the claim petitioner is arguing before the federal habeas court is different from the argument he made to the state court. 28 U.S.C.A. §§ 2254(b), 2254(c).

**20. Federal Courts ⇨3391**

A federal appellate court will not consider an issue not passed upon below.

**21. Federal Courts ⇨3391**

When a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review.

**22. Federal Courts ⇨3392**

Vague, arguable references to a point in the district court proceedings do not preserve the issue on appeal, because such perfunctory presentation deprives the trial court of its opportunity to consider and rule on an issue in any detail.

**23. Habeas Corpus ⇨381**

Federal habeas petitioner exhausted in state court his claim that the symptoms of his post-traumatic stress disorder (PTSD), specifically the tendency to overreact, prevented him from forming the requisite intent to kill, and thus, state trial court's exclusion of expert testimony regarding his PTSD diagnosis and dissociative episodes from guilt stage of his capital murder trial violated his constitutional right to present a complete defense; although petitioner offered a more refined argument than the one he made to state appellate court, the core of his PTSD claim was the same, and his assertion that appellate court's decision was unreasonable based on that court's and the trial court's misunderstanding of PTSD was not a new claim, but rather an attempt to bolster his consistently-advanced position that his PTSD diagnosis was relevant as a defense during the guilt stage of trial. 28 U.S.C.A. §§ 2254(b), 2254(c), 2254(d)(1).

**24. Habeas Corpus ⇨816**

By advancing the argument before the district court, habeas petitioner preserved for appeal his claim that state trial court violated his constitutional right to present a complete defense by excluding expert testimony regarding his post-traumatic stress disorder (PTSD) diagnosis and dissociative episodes from the guilt stage of his capital murder trial.

**25. Habeas Corpus ⚿816**

Federal habeas petitioner failed to preserve for appeal any claim that he was in a post-traumatic stress disorder (PTSD) and/or dissociative state at the time of the capital murders for which he was convicted, where petitioner argued before district court that his PTSD, combined with his drug and alcohol abuse, prevented him from forming the requisite mens rea, but nowhere did he suggest, before his argument to Court of Appeals, that he suffered from a dissociative episode at the time of the murders that rendered him unable to form the intent at all.

**26. Habeas Corpus ⚿492**

Oklahoma appellate court's decision, which affirmed trial court's exclusion of proffered expert testimony that petitioner's post-traumatic stress disorder (PTSD) made him hypervigilant and, together with his substance abuse on the night of the murders, rendered him incapable of forming the requisite mens rea for capital murder, was not contrary to clearly established federal law, and thus did not warrant federal habeas relief; state appellate court concluded petitioner's PTSD diagnosis was neither relevant to the intent element of the crime charged nor was it relevant to his defense of voluntary intoxication, and so was inadmissible under Oklahoma law, and expert failed to demonstrate any meaningful connection between PTSD and intent generally, or intoxication specifically. 28 U.S.C.A. § 2254(d)(1); 12 Okla. Stat. Ann. §§ 2401, 2702.

**27. Criminal Law ⚿661**

Although criminal defendants have the right to present a complete defense, they must still comply with a state's well-established rules of evidence.

**28. Habeas Corpus ⚿450.1, 452**

Where there is no Supreme Court case on point, there is no clearly established federal law for the purposes of Antiterrorism and Effective Death Penalty Act (AEDPA), and when a federal habeas petitioner is unable to find any clearly established Supreme Court precedent in support of his claim, habeas relief is impossible to obtain. 28 U.S.C.A. § 2254(d)(1).

**29. Criminal Law ⚿474.1**

Under Oklahoma law, when a defendant raises the defense of voluntary intoxication, an expert may properly offer his or her opinion on whether the defendant's actions were intentional. 12 Okla. Stat. Ann. § 2702.

**30. Criminal Law ⚿471**

Where the normal experiences and qualifications of laymen jurors permit them to draw proper conclusions from the facts and circumstances, expert conclusions or opinions are inadmissible under Oklahoma law. 12 Okla. Stat. Ann. § 2702.

**31. Criminal Law ⚿1991**

There are three essential elements of a *Brady* claim: (1) the prosecutor suppressed the evidence; (2) the suppressed evidence was favorable to the accused, either because it is exculpatory or because it is impeaching; and (3) prejudice ensued because the suppressed evidence was material.

**32. Criminal Law ⚿1991**

Evidence is suppressed for *Brady* purposes if the prosecution fails to disclose favorable exculpatory or impeachment evidence known either by it or the police, irrespective of the good faith or bad faith of the prosecution.

**33. Habeas Corpus ⚿422**

Oklahoma's waiver rule was an adequate and independent ground for state appellate court to rule that federal habeas petitioner's *Brady* claim, that the prosecution suppressed impeachment evidence against a state sentencing-stage witness, was procedurally barred because the misconduct happened at trial, the legal basis for the claim was available on direct appeal and on the first post-conviction application, and the factual basis for the claim was available and could have been ascertained through the exercise of reasonable diligence; appellate court relied only on its state procedural rule to conclude that petitioner's *Brady* claim was waived. 22 Okla. Stat. Ann. § 1089(D).

**34. Habeas Corpus ⚿422**

Under the doctrine of "procedural default," claims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a federal habeas court.

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

**35. Habeas Corpus ⚿403**

To be "adequate," under the procedural default doctrine in federal habeas cases, the state procedural ground must be strictly or regularly followed and applied evenhandedly to all similar claims.

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

**36. Habeas Corpus ⚿422**

A state procedural rule is "independent," under the procedural default doctrine in federal habeas cases, if it relies on state law, rather than federal law, as the basis for decision.

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

**37. Habeas Corpus ⚿404**

A state prisoner may obtain federal habeas review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.

**38. Habeas Corpus ⚿405.1, 407**

To establish "cause" to excuse a procedurally defaulted claim, a federal habeas petitioner must show that some objective factor external to the defense impeded his efforts to comply with the state's procedural rule; such objective factors include a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable.

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

**39. Habeas Corpus ⚿409**

To obtain federal habeas review of a procedurally defaulted claim, a petitioner must show actual prejudice resulting from the errors of which he complains.

**40. Habeas Corpus ⚿401**

A petitioner may obtain review of a procedurally defaulted claim by showing that a fundamental miscarriage of justice would occur if the merits of a claim are not addressed in the federal habeas proceeding.

**41. Habeas Corpus ⚿409**

Prejudice, within the compass of the cause and prejudice requirement for reviewing a procedurally defaulted *Brady* claim on federal habeas review, exists when the suppressed evidence is material for *Brady* purposes.

**42. Criminal Law ⚿1992**

Suppressed evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

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

**43. Criminal Law ⚿1992**

In evaluating the materiality of withheld evidence in connection with a *Brady* claim, the court does not consider each piece of withheld evidence in isolation; rather, the court reviews the cumulative impact of the withheld evidence, its utility to the defense as well as its potentially damaging impact on the prosecution's case.

**44. Criminal Law ⚿1992**

The court evaluates the materiality of withheld evidence, for purposes of a *Brady* claim, in light of the entire record in order to determine if the omitted evidence creates a reasonable doubt that did not otherwise exist.

**45. Criminal Law ⚿1999**

Withheld impeaching evidence that prosecution witness, who testified at penalty stage of defendant's capital murder trial that defendant tried to hire him to kill surviving victim and assault and threaten witnesses and was utterly remorseless, was affiliated with same gang the victims belonged to and the rival of defendant's gang, that witness had additional criminal convictions, and that he had made nearly identical jailhouse statements about a defendant in an unrelated criminal trial, was not material under *Brady*; only wholly new information withheld was witness's gang affiliation and the alleged similarities between jailhouse statements, and there was substantial additional evidence supporting the continuing threat aggravator that witness's testimony addressed, including that defendant had gunned down three men in a moving car because one of them had punched him in a club nearly an hour earlier.

**46. Habeas Corpus ⚿688, 749**

District court properly denied habeas petitioner's motion for discovery and an evidentiary hearing seeking additional impeachment evidence as to prosecution witness, who testified at the penalty stage of defendant's capital murder trial that petitioner tried to hire him to kill surviving victim and assault and threaten witnesses and was utterly remorseless, since petitioner could not show that the jury would have given him a sentence less than death even with the additional impeachment evidence against the witness, in light of the strength of the additional witness supporting death sentence. 28 U.S.C.A. § 2254(e)(2).

**47. Habeas Corpus ⚿843**

Court of Appeals reviews a district court's denial of a motion for discovery or an evidentiary hearing in a federal habeas case for abuse of discretion.

**48. Habeas Corpus ⚿753**

Generally speaking, federal habeas review is limited to the record that was before the state court that adjudicated the claim on the merits.

**49. Habeas Corpus ⚿742**

If the federal habeas petitioner did not fail to develop the factual basis for his claim in state court, a federal habeas court should analyze whether an evidentiary hearing is appropriate or required under pre-Antiterrorism and Effective Death Penalty Act (AEDPA) standards, under which petitioner is entitled to an evidentiary hearing if (1) the facts were not adequately developed in state court, so long as that failure was not attributable to the petitioner, and (2) his allegations, if true and not contravened by the existing factual

record, would entitle him to habeas relief. 28 U.S.C.A. § 2254(e)(2).

**50. Habeas Corpus ⚿688**

A federal habeas petitioner is entitled to discovery if he establishes good cause, which is established where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief.

**51. Sentencing and Punishment ⚿1702, 1780(2, 3)**

The Constitution requires that a jury cannot be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death, and this is true regardless of whether the preclusion results from the jury instruction itself or from prosecutorial argument, but prosecutorial misrepresentations are not to be judged as having the same force as an instruction from the court and must be considered in the context in which they are made.

**52. Sentencing and Punishment ⚿1780(3)**

When evaluating whether a jury was unconstitutionally precluded from considering mitigating evidence during capital sentencing proceedings, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

**53. Habeas Corpus ⚿508**

State appellate court's decision, that jury's consideration of the evidence at sentencing phase of petitioner's capital murder trial was not unfairly limited by the prosecutor's closing argument that made nine separate statements which either generally defined mitigating evidence as reducing moral culpability or blame or specifically compared petitioner's mitigating factors to that definition, was not unreasonable and thus did not warrant federal habeas relief; jury received constitutionally sound jury instructions, including one specifically identifying the categories of evidence offered in mitigation, and petitioner offered extensive evidence on each of those topics. 28 U.S.C.A. § 2254(d).

**54. Sentencing and Punishment ⚿1780(2)**

A prosecutor may comment on the weight that should be accorded to the mitigating factors weighed during capital sentencing, he cannot preclude the jury from giving effect to the mitigating evidence or suggest that the jury was not permitted to consider the factors.

**55. Criminal Law ⚿1980**

Prosecutors are representatives of the government and servants of the law, and their obligation is not to win a case, but to see that justice shall be done.

**56. Criminal Law ⚿1981**

It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one, and there is no place in the law for those who would do otherwise.

**57. Habeas Corpus ⚿770**

State appellate court adjudicated on the merits petitioner's claim, that prosecutor made improper comments during closing at sentencing phase of his capital murder trial that rendered his trial so fundamentally unfair as to deprive him of due process, and thus, Antiterrorism and Effective Death Penalty Act (AEDPA) deference applied on federal habeas review; although appellate court never specified which statements it considered appropriate advocacy and which it deemed

bordering upon impropriety, the Oklahoma standard the court applied, under which it would not grant relief based on prosecutorial misconduct unless prosecutor's argument was so flagrant and so infected the trial to render it fundamentally unfair, was the same as the federal standard. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

**58. Habeas Corpus ⇐766**

When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed on federal habeas review that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. 28 U.S.C.A. § 2254.

**59. Habeas Corpus ⇐769**

Even when a state court fails either to mention the federal basis for the claim or cite any state or federal law in support of its conclusion, federal habeas court presumes the state court reached a decision on the merits, and thus Antiterrorism and Effective Death Penalty Act (AEDPA) deference applies; this presumption that a may be overcome when there is reason to think some other explanation for the state court's decision is more likely, or when the claim was rejected due to sheer inadvertence. 28 U.S.C.A. § 2254(d).

**60. Habeas Corpus ⇐766**

The petitioner bears the burden of showing a claim was not adjudicated on the merits in state court, as would preclude applying Antiterrorism and Effective Death Penalty Act (AEDPA) deference on federal habeas review. 28 U.S.C.A. § 2254(d).

**61. Criminal Law ⇐2077**

A prosecutor's misconduct will warrant a new trial only where the improper statements so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amend. 14.

**62. Habeas Corpus ⇐508**

An assessment on federal habeas review as to whether prosecutor's alleged improper statements during sentencing phase of capital murder trial so infected the trial with unfairness as to make the resulting conviction a denial of due process, requires an examination of the entire proceedings, including the strength of the evidence against the petitioner at both the guilt and sentencing stages of trial, and the court also considers any cautionary steps, such as instructions to the jury, offered to counteract improper remarks and counsel's failure to object to the comments. U.S. Const. Amend. 14.

**63. Habeas Corpus ⇐508**

Ultimately, federal habeas court considers the jury's ability to judge the evidence fairly in light of the prosecutor's conduct, when reviewing federal habeas claim that prosecutor's improper statements during sentencing phase of capital murder trial so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amend. 14.

**64. Habeas Corpus ⇐497**

Given the nature of prosecutorial misconduct claims, federal habeas court evaluates the prejudicial impact of any improper comments individually and collectively.

**65. Habeas Corpus ⇐508**

In death-penalty cases, federal habeas court reviews whether the prosecutor's improper comments as a whole so infected the trial with unfairness as to render the sentencing fundamentally unfair in light of the heightened degree of reliability demanded in a capital case, and thus violated due process. U.S. Const. Amend. 14.

**66. Habeas Corpus ⚿508**

State appellate court acted reasonably in holding that the prejudicial impact of prosecutor's comments during the closing arguments of the penalty stage of petitioner's capital murder trial, in which prosecutor improperly construed mitigation evidence instruction as limited to evidence that reduced moral culpability or blame and then specifically argued petitioner's mitigation evidence did not, individually or cumulatively, render the sentencing trial so fundamentally unfair as to violate due process, and thus federal habeas relief was not warranted; although the comments were improper and pervasive, the evidence of petitioner's guilt was overwhelming, the state presented powerful aggravating evidence, and the jury was not precluded from considering petitioner's mitigating evidence. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

**67. Constitutional Law ⚿4745**
**Sentencing and Punishment ⚿1780(2)**

Although prosecutor's arguments at sentencing phase of defendant's capital murder trial, which characterized defendant's post-traumatic stress disorder (PTSD) diagnosis as an insult to all legitimate people with PTSD and legitimate veterans, strayed into inappropriate personal opinion, and prosecutor's separate comments suggesting the defense should be ashamed for relying on defendant's family support and mental health improperly denigrated defendant's mitigating evidence, none of these comments, separately or cumulatively, rose to the level necessary to have deprived defendant of a fundamentally fair sentencing proceeding, as would have violated due process; the state presented significant evidence in aggravation. U.S. Const. Amend. 14.

**68. Sentencing and Punishment ⚿1780(2)**

Prosecutors are given a wide latitude of argument and may properly comment on the weight that should be accorded to the mitigating factors at the sentencing phase of a capital murder trial, as well as information about the defendant, his character, and the circumstances of his offense made known to the jury throughout the bifurcated trial, but it is improper for a prosecutor to make an argument based purely on personal opinion.

**69. Constitutional Law ⚿4745**
**Sentencing and Punishment ⚿1780(2)**

Prosecutor's statement during argument in sentencing phase of capital murder trial, in which prosecutor said that defendant's family would go to the penitentiary to see him but the victims could go to the cemetery, was an improper comment designed to stir the jurors' emotions and elicit sympathy for the victims, but this single reference to the plight of the victims, as compared to defendant, did not render the sentencing trial fundamentally unfair, as would have violated due process, considering the extensive aggravating evidence presented to the jury. U.S. Const. Amend. 14.

**70. Sentencing and Punishment ⚿1780(2)**

It is prosecutorial misconduct for the prosecution to compare the plight of the victim with the life of the defendant in prison during argument in sentencing phase of capital murder trial.

**71. Constitutional Law ⚿4745**
**Sentencing and Punishment ⚿1780(2)**

Although prosecutor's statement during closing at sentencing phase of defendant's capital murder trial, that justice for

the victims and their families, as well as the jurors' civic duty demanded a death sentence, crossed the bounds of permissible argument, this statement, on its own, did not deprive defendant of a fundamentally fair sentencing proceeding, as would have violated due process, in view of the overwhelming evidence of defendant's guilt, evidence of aggravating factors supporting the death sentence, and the general content of the instructions to the jury. U.S. Const. Amend. 14.

**72. Sentencing and Punishment ⚿1780(2)**

Although a prosecutor's appeal to justice and civic duty is not always improper during argument in sentencing phase of capital murder trial, urging the jury to impose a death sentence on the grounds of civic duty is inappropriate.

**73. Habeas Corpus ⚿508**

State appellate court's determination that prosecutor's extensive and recurring misconduct during closing at sentencing phase of petitioner's capital murder trial, which included statements such as that justice for the victims and their families, as well as the jurors' civic duty demanded a death sentence, did not deny petitioner a fundamentally fair sentencing trial, and thus did not violate due process, was a reasonable application of the cumulative-error doctrine, and thus did not warrant federal habeas relief; evidence of petitioner's guilt was overwhelming, the State presented significant evidence in support of the aggravating factors, and the jury was properly instructed as to its ability to consider mitigating evidence and to impose a sentence less than death. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

**74. Constitutional Law ⚿4629**

Individual, harmless prosecutorial errors can add up to make a trial fundamentally unfair in the aggregate, and thus violate due process. U.S. Const. Amend. 14.

**75. Constitutional Law ⚿4744(1)**
**Sentencing and Punishment ⚿1625, 1788(9)**

A defendant can challenge the jury's finding of a capital sentence aggravator in two ways: first, a defendant can bring a sufficiency of the evidence claim under *Jackson v. Virginia*, and second, defendants can challenge an aggravating circumstance as unconstitutionally vague in violation of under process under the Eighth and Fourteenth Amendments. U.S. Const. Amends. 8, 14.

**76. Constitutional Law ⚿4744(2)**

It violates the Fourteenth Amendment's guarantee of due process if a jury sentences a defendant to death based on an aggravator, even though there was insufficient evidence for any rational juror to have concluded the aggravator was met; because state law defines aggravators, this question turns on state law. U.S. Const. Amend. 14.

**77. Constitutional Law ⚿4744(1)**
**Sentencing and Punishment ⚿1616**

It violates the Eighth and Fourteenth Amendments for death sentences to be arbitrarily imposed, and as a consequence, if an aggravating circumstance is so vague it could apply to any and every murder, then sentencing a defendant to death because that aggravator was met violates the Constitution. U.S. Const. Amends. 8, 14.

**78. Habeas Corpus ⚿816**

Habeas petitioner failed to preserve for appeal his claim that Oklahoma's heinous, atrocious, or cruel aggravating factor in its capital murder scheme was unconstitutionally vague under the Eighth Amendment, where petitioner did not raise an Eighth Amendment challenge to the ag-

gravator in the district court, but instead argued only that there was insufficient evidence to support the aggravator, in violation of the Due Process Clause. U.S. Const. Amends. 8, 14.

**79. Sentencing and Punishment ⚿1788(7, 9)**

Court of Appeals reviews the sufficiency of the evidence supporting an aggravating factor under a capital murder scheme under the rational fact-finder standard announced in *Jackson v. Virginia*, which requires an appellate court to determine, after reviewing the evidence presented at trial in the light most favorable to the government, whether any rational trier of fact could have found the aggravating circumstance existed beyond a reasonable doubt.

**80. Sentencing and Punishment ⚿1788(9)**

To assess the sufficiency of the evidence supporting an aggravating factor under a capital murder scheme, Court of Appeals first determines the elements of the offense and then examines whether the evidence suffices to establish each element.

**81. Sentencing and Punishment ⚿1788(9)**

When Court of Appeals reviews the sufficiency of the evidence in capital cases, aggravating factors operate as the functional equivalent of an element of a greater offense.

**82. Sentencing and Punishment ⚿1652**

The substantive elements of an aggravating factor necessary to impose the death penalty are a matter of state substantive law.

**83. Habeas Corpus ⚿508**

State appellate court acted reasonably in deciding there was sufficient evidence to support the jury's finding that murder victim experienced conscious physical suffering as defined by Oklahoma law, and so Oklahoma's heinous, atrocious, or cruel aggravating factor applied to support petitioner's death sentence, and thus, federal habeas relief was not warranted on petitioner's claim that his due process rights were violated due to lack of evidence supporting the aggravator; although victim did not expressly state he was in pain, and neither coroner who performed autopsy nor surviving victim testified as to how long victim was conscious or whether he appeared to be in pain, he was shot four times, but was conscious long enough to perceive that he had been shot and to fear further injury, and he was aware of his injuries and struggled to breathe as his lungs filled with blood. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

**84. Habeas Corpus ⚿508, 770**

Review, under Antiterrorism and Effective Death Penalty Act (AEDPA), of the sufficiency of the evidence supporting an aggravating factor in a capital murder case adds an additional degree of deference, and the question becomes whether the state court's conclusion that the evidence was sufficient constituted an unreasonable application of the *Jackson v. Virginia* standard. 28 U.S.C.A. § 2254(d).

**85. Criminal Law ⚿1881**

To establish an ineffective assistance of counsel claim, defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. U.S. Const. Amend. 6.

**86. Criminal Law ⚿1882**

When evaluating whether counsel's performance was deficient, as element of a claim of ineffective assistance, the question is whether the representation amounted to incompetence under prevailing profession-

al norms, not whether it deviated from best practices or most common custom. U.S. Const. Amend. 6.

**87. Criminal Law ⚿1871, 1884**

Judicial review of whether counsel's performance was deficient, as element of a claim of ineffective assistance, is highly deferential, and the court strongly presumes that an attorney acted in an objectively reasonable manner and that an attorney's challenged conduct might have been part of a sound trial strategy. U.S. Const. Amend. 6.

**88. Criminal Law ⚿1870**

Court reviewing a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the specific facts of the case viewed as of the time of counsel's conduct. U.S. Const. Amend. 6.

**89. Criminal Law ⚿1883**

To demonstrate prejudice, as element of a claim of ineffective assistance, defendant must show 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. U.S. Const. Amend. 6.

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

**90. Habeas Corpus ⚿486(1), 773**

Review of a claim of ineffective assistance of counsel under both Antiterrorism and Effective Death Penalty Act (AEDPA) and *Strickland* is highly deferential, and when the two apply in tandem, review is doubly so. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

**91. Habeas Corpus ⚿486(1)**

When the Antiterrorism and Effective Death Penalty Act (AEDPA) applies to a habeas petitioner's claim of ineffective assistance of counsel, the question is not whether counsel's actions were reasonable, but, rather, the question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

**92. Criminal Law ⚿1891**

Under *Strickland*, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S. Const. Amend. 6.

**93. Criminal Law ⚿1960**

When a petitioner alleges ineffective assistance of counsel stemming from a failure to investigate mitigating evidence at a capital-sentencing proceeding, federal habeas court evaluates the totality of the evidence, both that adduced at trial, and the evidence adduced in habeas proceedings, and in doing so, the court reweighs the evidence in aggravation against the totality of available mitigating evidence, considering the strength of the State's case and the number of aggravating factors the jury found to exist, as well as the mitigating evidence the defense did offer and any additional mitigating evidence it could have offered, and when conducting this reweighing analysis, the court must consider not just the mitigation evidence that petitioner claims was wrongfully omitted, but also what the prosecution's response to that evidence would have been. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

**94. Criminal Law ⚿1960**

Prejudice is established, on a claim of ineffective assistance of counsel stemming from a failure to investigate mitigating evidence at a capital-sentencing proceeding, if a defendant can show a reasonable

probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S. Const. Amend. 6.

**95. Habeas Corpus ⚿486(5)**

State appellate court did not unreasonably apply *Strickland* in concluding petitioner was not prejudiced by any deficiency by counsel in investigating and presenting mitigating evidence of petitioner's traumatic childhood at sentencing stage of his capital murder trial, thus precluding federal habeas relief; counsel's mitigation case relied heavily on paranoia petitioner exhibited after he was shot when he was 16, additional mitigation evidence petitioner wanted presented, that by 16 he had dropped out of school, impregnated two different women, sold drugs, committed burglaries, and routinely carried a firearm, would have painted him as living a lawless life contrary to the norms and expectations of society and also furthered the State's argument relative to the continuing threat aggravator. U.S. Const. Amend. 6.

**96. Criminal Law ⚿1950**

For counsel's failure to request a lesser-included offense instruction to constitute deficient performance, defendant must have been entitled to such an instruction based on the evidence presented at trial. U.S. Const. Amend. 6.

**97. Courts ⚿97(1)**

The availability of a lesser included offense instruction in a state criminal trial is a matter of state law.

**98. Criminal Law ⚿795(2.10)**

Under Oklahoma law, a trial court must instruct the jury on lesser-included offenses when the lesser-included offense or the defendant's theory of the case is supported by any evidence in the record.

**99. Homicide ⚿1454**

In a homicide case brought under Oklahoma law, the trial court must instruct the jury on every degree of homicide where the evidence would permit the jury rationally to find the accused guilty of the lesser offense and acquit him of the greater.

**100. Homicide ⚿546**

A jury instruction on second-degree depraved mind murder is warranted under Oklahoma law only when the evidence reasonably supports the conclusion that the defendant committed an act so imminently dangerous to another person or persons as to evince a state of mind in disregard for human life, but without the intent of taking the life of any particular individual.

**101. Homicide ⚿1456**

The evidence presented at defendant's capital murder trial did not support a lesser-included offense instruction on second-degree depraved mind murder because no reasonable jury could have concluded that defendant lacked the specific intent to kill; evidence revealed that defendant threatened to "chop up" an individual who had earlier punched defendant at a club and his companions, testimony equated "chopping up" with shooting them with an assault rifle, defendant ordered his companion to follow the individual's car, and that when the vehicle was in range, defendant fired as many as 20 rounds into it with an assault rifle, knowing that three people were in the targeted car.

**102. Homicide ⚿1458**

Defendant's right under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, to have the jury instructed on a lesser-included offense supported by the evidence was satisfied at his capital murder trial when the jury was instructed on both first-degree murder as well as the

lesser-included offense of first-degree manslaughter by misdemeanor under Oklahoma law, which charge defendant conceded technically applied to the evidence at hand.

**103. Criminal Law ⚿1944**

Defense counsel was deficient, as element of a claim of ineffective assistance, in failing to object to prosecutor's improper statements during closing argument at penalty phase of capital murder trial, which addressed defendant's moral culpability, denigrated the evidence in mitigation, compared the victims' deaths to defendant's incarceration, and called for the death penalty as a civic duty. U.S. Const. Amend. 6.

**104. Habeas Corpus ⚿486(5)**

State appellate court did not unreasonably apply *Strickland* in determining that petitioner was not prejudiced, as element of a claim of ineffective assistance, by counsel's failure to object to prosecutor's improper statements during closing argument at penalty phase of capital murder trial, which addressed defendant's moral culpability, denigrated the evidence in mitigation, compared the victims' deaths to defendant's incarceration, and called for the death penalty as a civic duty, thus precluding federal habeas relief; the appellate court reasonably determined the misconduct did not deprive petitioner of a fundamentally fair sentencing trial. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

**105. Criminal Law ⚿1948**

Defense counsel is not expected to object to legally accurate jury instructions. U.S. Const. Amend. 6.

**106. Habeas Corpus ⚿461**

Cumulative error analysis by federal habeas court is an extension of harmless error and conducts the same inquiry as for individual error, focusing on the underlying fairness of the trial.

**107. Habeas Corpus ⚿461**

Cumulative error analysis by federal habeas court 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.

**108. Habeas Corpus ⚿461**

Only actual constitutional errors are considered when reviewing a case for cumulative error in a federal habeas case.

**109. Habeas Corpus ⚿461**

To determine the harmlessness of the cumulative error, federal habeas courts look to see whether the petitioner's substantial rights were affected, and a petitioner's substantial rights are affected when the cumulative effect of the errors had a substantial and injurious effect or influence in determining the jury's sentence.

**110. Habeas Corpus ⚿508**

It was not unreasonable for state appellate court to conclude that any errors during sentencing phase of petitioner's capital murder trial, including prosecutor's improper arguments, as well as counsel's deficient performance in failing to object to those arguments, in failing to investigate and present further mitigating evidence regarding petitioner's upbringing, and in failing to object the heinous, atrocious, and cruel aggravator jury instruction, were harmless beyond a reasonable doubt, individually and cumulatively, thus precluding federal habeas relief; jury was presented with copious amounts of aggravating evidence, overwhelming evidence of guilt, and proper instructions from the trial court. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

**Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:11-CV-00096-M)**

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

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

Before LUCERO, HOLMES, and McHUGH, Circuit Judges.

McHUGH, Circuit Judge.

Kendrick Simpson is a state prisoner in Oklahoma. After a bifurcated proceeding, the jury convicted Mr. Simpson of two counts of first-degree murder and sentenced him to death. He now appeals the district court's denial of his petition for federal habeas relief under 28 U.S.C. § 2254. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we affirm.

## I. BACKGROUND

### A. *Factual History*

**[1]** Pursuant to the Anti-Terrorism and Effective Death Penalty Act (AEDPA), we presume the factual findings of the Oklahoma Court of Criminal Appeals (OCCA) are correct, absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Schriro v. Landrigan*, 550 U.S. 465, 473–74, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). We therefore state the facts surrounding the murders as found by the OCCA on direct appeal:

> On the evening of January 15, 2006, Jonathan Dalton, Latango Robertson and [Mr. Simpson] decided to go to Fritzi's hip hop club in Oklahoma City. Prior to going to the club, the three drove in [Mr.] Dalton's white Monte Carlo to [Mr. Simpson's] house so that [Mr. Simpson] could change clothes. While at his house, [Mr. Simpson] got an assault rifle[,] which he brought with him.[1] Before going to Fritzi's, the men first went to a house party where they consumed alcohol and marijuana. When they left the party, [Mr. Simpson] put the assault rifle into the trunk of the Monte Carlo, which could be accessed through the back seat.
>
> The three arrived at Fritzi's between midnight and 1:00 a.m. on January 16. Once inside, they went to the bar to get a drink. [Mr. Simpson] and [Mr.] Dalton also took a drug called "Ecstasy." After getting their drinks, [Mr.] Dalton and [Mr.] Robertson sat down at a table while [Mr. Simpson] walked around. When [Mr. Simpson] walked by London Johnson, Anthony Jones and Glen Palmer, one of the three apparently said something to him about the Chicago Cubs baseball cap that he was wearing. [Mr. Simpson] went back to the table and told [Mr.] Dalton and [Mr.] Robertson that some guy had given him a hard time about his cap. At some point, [Mr. Simpson] approached [Mr.] Johnson, [Mr.] Jones and [Mr.] Palmer again. During this encounter, [Mr. Simpson] told them that he was going to "chop" them up.[2] After making this threat, [Mr. Simpson] walked away. He returned a short time later and walked up to Palm-

1. There was testimony that this weapon was an AK-47 or SKS assault rifle.

2. [Mr.] Johnson testified at trial that this meant to him that [Mr. Simpson] was going to shoot at them with a "chopper[,]" which was an AK-47.

er. [Mr. Simpson] extended his hand and said, "We cool." [Mr.] Palmer hit [Mr. Simpson] in the mouth knocking him to the floor. [Mr. Simpson] told [Mr.] Dalton and [Mr.] Robertson that he wanted to leave and the three of them left the club.

Out in the parking lot, [Mr. Simpson], [Mr.] Dalton and [Mr.] Robertson went to [Mr.] Dalton's Monte Carlo. Before leaving, they talked with some girls who had come out of the club and were parked next to them. The girls told the men to follow them to a 7-[Eleven] located at NW 23rd Street and Portland. When they arrived at the store, [Mr. Simpson], [Mr.] Dalton and [Mr.] Robertson backed into a parking space toward the back door and the girls pulled in next to the pumps. While the men were sitting in the Monte Carlo, they saw [Mr.] Johnson, [Mr.] Jones and [Mr.] Palmer drive into the parking lot in [Mr.] Palmer's Chevy Caprice. They recognized [Mr.] Palmer as the person who had hit [Mr. Simpson] at Fritzi's. [Mr.] Dalton told [Mr. Simpson] to "chill out" but [Mr. Simpson] was mad and wanted to retaliate against [Mr.] Palmer. When [Mr.] Palmer drove out of the parking lot onto 23rd Street and merged onto I-44, [Mr. Simpson] told [Mr.] Dalton to follow them.

While they were following the Chevy, [Mr. Simpson], who was sitting in the front passenger seat, told [Mr.] Robertson, who was sitting in the back seat, to give him the gun. He told [Mr.] Robertson that if he had to get the gun himself, there was going to be trouble. [Mr.] Robertson reached through the back seat into the trunk and retrieved the gun for [Mr. Simpson]. [Mr.] Dalton followed the Chevy as it exited the interstate onto Pennsylvania Avenue. He pulled the Monte Carlo into the left lane beside the Chevy as they drove on Pennsylvania Avenue and [Mr. Simpson] pointed the gun out his open window and started firing at the Chevy.

When the Chevy was hit with bullets, [Mr.] Palmer was driving, [Mr.] Jones was sitting in the front passenger seat and [Mr.] Johnson was in the back seat. [Mr.] Johnson heard about twenty rapid gun shots and got down on the floor of the car. He did not see the shooter but noticed a white vehicle drive up beside them. The Chevy jumped the curb and hit an electric pole and fence before coming to a stop. [Mr.] Palmer and [Mr.] Jones had been shot. [Mr.] Jones had been shot in the side of his head and torso and was unconscious. [Mr.] Palmer had been shot in the chest. He was initially conscious and able to talk but soon lost consciousness when he could no longer breathe. [Mr.] Johnson tried to give both [Mr.] Jones and [Mr.] Palmer CPR but was unsuccessful. He flagged down a car that was driving by and asked the driver to get help. Both [Mr.] Palmer and [Mr.] Jones died at the scene from their gunshot wounds.

After he fired at the Chevy, [Mr. Simpson] said, "I'm a monster. I just shot the car up." He added, "They shouldn't play with me like that." [Mr.] Dalton kept driving until they reached a residence in Midwest City where he was staying. They dropped the gun off and switched cars, and then [Mr.] Dalton, [Mr.] Robertson and [Mr. Simpson] went to meet some girls they had talked to at Fritzi's.

*Simpson v. State* (*Simpson I*), 230 P.3d 888, 893–94 (Okla. Crim. App. 2010) (footnotes in original).

### B. *Procedural History*

#### 1. State Court Proceedings

a. *Criminal trial and sentencing*

The State of Oklahoma charged Mr. Simpson with the first-degree murders of

Glen Palmer and Anthony Jones and with discharging a firearm with intent to kill London Johnson. *Id.* at 893.[3] The prosecution sought a penalty of death for each murder.

Prior to trial, Dr. Phillip Massad, a clinical psychologist, evaluated Mr. Simpson's mental condition. Mr. Simpson disclosed to Dr. Massad that, when Mr. Simpson was sixteen years old, a friend ambushed and shot him for refusing to kill a government witness scheduled to testify in the friend's criminal trial. Mr. Simpson suffered five gunshot wounds and spent two months hospitalized and comatose. Even after his release from the hospital, Mr. Simpson was readmitted frequently for treatment of complications arising from infections. He endured sixteen surgeries over a seven-month period, and feared his attackers would return to kill him. Dr. Massad concluded Mr. Simpson suffered from Post-Traumatic Stress Disorder (PTSD) as a result of the shooting.

Mr. Simpson's counsel notified the court he intended to present evidence of Mr. Simpson's PTSD and to call Dr. Massad as an expert witness on that topic. The defense planned to elicit testimony from Dr. Massad that Mr. Simpson suffered from PTSD and that this condition affected his ability to form the intent of malice aforethought required for a first-degree murder conviction. The State moved to exclude Dr. Massad from testifying at the guilt stage of trial. At a hearing on the matter, defense counsel represented that Dr. Massad would testify it was "possible that the PTSD affected [Mr. Simpson] to the extent that he was not able to form the specific intent" to kill, and that, because of his PTSD, Mr. Simpson would have "magnified in his own mind the threat" the victims presented. Trial Mot. Hr'g Tr. at 18 (Sept. 19, 2007). As the State notes, however, Dr. Massad's psychological report "never indicate[d] that [Mr. Simpson's PTSD] prevent[ed] him from forming an intent to kill" or from "know[ing] what he was doing was wrong." *Id.* at 11–12. The trial court granted the State's motion, holding that Oklahoma law precludes testimony that a defendant could not have formed the specific intent to commit a crime, except in the context of an intoxication or insanity defense, neither of which had been advanced by Mr. Simpson at that time.

The jury rendered its decision finding Mr. Simpson guilty of the first-degree murders of Mr. Palmer and Mr. Jones.[4] In the ensuing penalty stage, the State alleged four aggravating factors it claimed warranted a sentence of death:

> 1. [Mr. Simpson], prior to the time of sentencing, was convicted of a felony involving the use or threat of violence to [another] person [ ("Prior Violent Felony Aggravator") ];
>
> 2. [Mr. Simpson] knowingly created a great risk of death to more than one person [ ("Risk of Multiple Deaths Aggravator") ];
>
> 3. The murder was especially heinous, atrocious, or cruel [ ("HAC Aggravator") ];
>
> 4. At the present time there exists a probability that [Mr. Simpson] would commit criminal acts of violence that would constitute a continuing threat to society [ ("Continuing Threat Aggravator") ].

**3.** The State also charged Mr. Simpson with possession of a firearm after a former felony conviction, to which he pleaded guilty.

**4.** The jury also found Mr. Simpson guilty of discharging a firearm with intent to kill Mr. Johnson.

Trial R. vol. 1 at 44. Mr. Simpson asserted three factors in mitigation: (1) his age,[5] (2) his mental state (PTSD diagnosis), and (3) his family support.

i. Aggravating evidence presented at sentencing

The State moved to incorporate all the evidence presented during the guilt stage and—after determining the evidence would be relevant to the HAC Aggravator, the Continuing Threat Aggravator, and the Risk of Multiple Deaths Aggravator—the court granted the motion.

In addition, Mr. Simpson stipulated that he had previously received a seven-and-a-half-year prison sentence for armed robbery, and the victim of that crime, Hung Pham, appeared in support of the State's case in aggravation. Mr. Pham testified that Mr. Simpson and two other men forced themselves into Mr. Pham's home at gunpoint. Mr. Pham provided compelling details, stating that Mr. Simpson shoved the gun in Mr. Pham's face, forced him inside, and beat him in the face and back with the gun. After taking Mr. Pham's wallet, Mr. Simpson pulled Mr. Pham into a bathroom closet, forced him to kneel on the floor, and demanded all of his money. When Mr. Pham replied that he did not have any more money, Mr. Simpson shot Mr. Pham in the head and left with Mr. Pham's wallet. Mr. Pham remembers the encounter vividly, "[b]ecause . . . [Mr. Simpson] hit my face, everything, he hurt me a lot. I remember forever." Trial Tr. vol. 7 at 96–97.

The State also relied on the testimony of Roy Collins, a jailhouse informant who had temporarily shared a cell with Mr. Simpson. Hoping to leverage a deal with the district attorney's office for his own early release, Mr. Collins asked Mr. Simpson about the murders. Mr. Collins testified that Mr. Simpson admitted to the altercation at Fritzi's, seeing the victims at the 7-Eleven, following them, and then firing the assault rifle into their car. Mr. Collins further stated that Mr. Simpson expressed no remorse for the murders and even tried to hire Mr. Collins to kill Mr. Johnson, the surviving victim, and to assault two pregnant women listed as State witnesses. Mr. Collins also testified that Mr. Simpson would smile and laugh when talking about the murders and that Mr. Simpson thought he was a "gangster[ ]" like "Tupac or Biggie Small." *Id.* at 47. Mr. Collins reported that Mr. Simpson "couldn't believe the victims' families were crying" because, according to Mr. Simpson, the victims "were gangbangers, that's the life they lived, that's the life they chose." *Id.* at 54–55. Mr. Collins also indicated that he could tell Mr. Simpson was a member of the Bloods gang because "[h]e's got red ink all over his neck." *Id.* at 58–59.

Finally, the prosecution presented victim impact statements from Rosalind Jones, the mother of Anthony Jones, and Tiarra Palmer, the sister of Glen Palmer.

ii. Mitigating evidence presented at sentencing

The defense called six witnesses in mitigation: Dr. Massad, to testify about Mr. Simpson's PTSD diagnosis; Evan Gatewood, to impeach Mr. Collins; and Mr. Simpson's mother, grandmother, aunt, and ex-girlfriend, to testify about Mr. Simpson's upbringing and family support. The vast majority of the mitigating evidence focused on the ambush and shooting of Mr. Simpson and his long road to recovery. The witnesses indicated that family members visited Mr. Simpson every day in the hospital and that his mother believed "[h]e was on his dying bed." *Id.* at 153.

5. Mr. Simpson was twenty-five at the time of the shooting.

Dr. Massad testified that Mr. Simpson reported being "paranoid hostile" and hypervigilant as a result of having been shot. *Id.* at 190–92. Dr. Massad also testified at length about the basis of his diagnosis that Mr. Simpson suffered from PTSD and about the typical symptoms of the disorder. He explained that people suffering from PTSD "might be hypersensitive and overreact" to common situations. *Id.* at 166. Additionally, such a person could be "hypervigilant," constantly on "alert and watchful for danger," and could experience "exaggerated startle response[s] and other symptoms." *Id.* at 167. Dr. Massad further opined that drugs or alcohol could exacerbate this hypersensitivity and paranoia because they can "increase the likelihood that [a person] would react or overreact." *Id.*

Mr. Simpson's aunt highlighted examples of this paranoia and hypersensitivity in her testimony, noting Mr. Simpson was constantly terrified the men who had shot him would return and finish the job. He was "paranoid and scared" to the point he refused to open the door when people came to visit, and he moved out of his mother's house because it was too close to the site of the shooting. *Id.* at 205–06.

Most of the testimony from Mr. Simpson's family focused on the family's love and support of Mr. Simpson. They gave limited detail about his childhood, characterizing him as a good child with a relatively normal upbringing. There was also testimony that Mr. Simpson's grandmother was primarily responsible for raising him, while his teenaged, single mother was finishing high school. The witnesses reported that Mr. Simpson's father was not involved in his upbringing and that Mr. Simpson dropped out of school in the eighth grade. The overall theme of the testimony was that Mr. Simpson had a good family who loved and supported him, but could not provide all the guidance required in raising him and his two siblings. Mr. Simpson's grandmother, mother, aunt, and ex-girlfriend all testified they would continue to support Mr. Simpson and would visit him in prison, if his life was spared.

Following the sentencing trial, the jury found all four aggravating factors by special verdict and recommended a sentence of death for each murder. The court adopted the jury's recommendation and sentenced Mr. Simpson to death.

b. *Appellate and post-conviction proceedings*

Mr. Simpson appealed his convictions and sentences, alleging a variety of errors in both the guilt and sentencing stages of his trial. On direct appeal, the OCCA affirmed Mr. Simpson's convictions and death sentences as to both Mr. Palmer and Mr. Jones. *Simpson I*, 230 P.3d at 907. Although the OCCA struck the HAC Aggravator for the death of Mr. Jones, it concluded no constitutional error had occurred and no relief was warranted because the jury had not considered any evidence admitted solely due to the erroneous inclusion of that aggravating factor. *Id.* at 902–03.

Simultaneous with his direct appeal, Mr. Simpson filed an application for post-conviction relief and an application for an evidentiary hearing on whether he had received ineffective assistance of trial counsel. *Simpson v. State* (*Simpson II*), No. PCD-2007-1262 (Okla. Crim. App. Oct. 13, 2010) (unpublished). The OCCA denied both applications.

Three years later, Mr. Simpson filed a second state application for post-conviction relief, coupled with another application for an evidentiary hearing, in order to exhaust claims presented in his federal habeas petition. Again, the OCCA denied both appli-

cations. *See Simpson v. State* (*Simpson III*), No. PCD-2012-242 (Okla. Crim. App. Mar. 8, 2013) (unpublished).

### 2. Federal Court Proceedings

Mr. Simpson sought federal post-conviction relief by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, a motion for discovery, and a motion for an evidentiary hearing. *See Simpson v. Duckworth* (*Simpson IV*), No. CIV-11-96-M, 2016 WL 3029966, at *1 (W.D. Okla. May 25, 2016) (unpublished). The district court denied his petition and motions, but granted a Certificate of Appealability ("COA") on two of the eighteen grounds for relief: (1) the trial court's alleged improper exclusion of Mr. Simpson's PTSD evidence from the guilt stage of the trial and (2) an alleged *Brady* [6] violation, whereby prosecutors withheld impeachment evidence as to Mr. Collins. This court subsequently granted a COA on five additional issues: (1) whether alleged prosecutorial misconduct denied Mr. Simpson a fundamentally fair sentencing proceeding; (2) whether a jury instruction and prosecutorial statements unduly limited jury consideration of mitigating evidence; (3) whether the HAC aggravating factor determination as to Mr. Palmer was unconstitutional and unreasonable; (4) whether trial counsel was ineffective for failing to investigate, prepare, and present lay witnesses, failing to request a second-degree murder instruction, failing to object to improper prosecutorial arguments, failing to object to the HAC instruction, and failing to object to the jury instruction limiting consideration of mitigating evidence; and (5) whether there was "cumulative error, limited to errors in the grounds on which a certificate of appealability has been granted." [7] Case Management Order dated December 1, 2016.

## II. STANDARD OF REVIEW

**[2]** AEDPA requires that we apply a "difficult to meet and highly deferential standard" in federal habeas proceedings under 28 U.S.C. § 2254; it is one that "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal quotation marks omitted). When a petitioner includes in his habeas application a "claim that was adjudicated on the merits in State court proceedings," a federal court shall not grant relief on that claim unless the state-court decision:

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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

**[3, 4]** Section 2254(d)(1)'s reference to "clearly established Federal law, as determined by the Supreme Court of the United States," "refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of

6. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

7. Mr. Simpson filed a motion for modification of his COA, requesting appellate review of the trial court's ruling limiting mitigation testimony from De'Andrea Lagarde. We previously evaluated the merits of this claim and found it did not "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Mr. Simpson presents no compelling reason to depart from our previous holding on this issue, and we deny his motion.

the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "Federal courts may not extract clearly established law from the general legal principles developed in factually distinct contexts, and Supreme Court holdings must be construed narrowly and consist only of something akin to on-point holdings." *Fairchild v. Trammell* (*Fairchild I* ), 784 F.3d 702, 710 (10th Cir. 2015) (internal quotation marks omitted).

**[5, 6]** Under § 2254(d)(1), a state-court decision is "contrary to" the Supreme Court's clearly established precedent if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [that] precedent." *Williams*, 529 U.S. at 405–06, 120 S.Ct. 1495. A state court need not cite, or even be aware of, applicable Supreme Court decisions, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam).

**[7–11]** A state-court decision is an "unreasonable application" of Supreme Court law if the decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams*, 529 U.S. at 407–08, 120 S.Ct. 1495. We undertake this "objective[ ] unreasonable[ness]" inquiry, *id.* at 409, 120 S.Ct. 1495, in view of the specificity of the governing rule: "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations," *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). Conversely, "[i]f a legal rule is specific, the range may be narrow" and "[a]pplications of the rule may be plainly correct or incorrect." *Id.* And "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410, 120 S.Ct. 1495. As a result, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly"; "that application must also be unreasonable." *Id.* at 411, 120 S.Ct. 1495.

**[12–14]** Claims not "adjudicated on the merits" in state court are entitled to no deference. *Fairchild I*, 784 F.3d at 711. But, "even in the setting where we lack a state court merits determination, '[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by "clear and convincing evidence."' " *Grant v. Royal*, 886 F.3d 874, 889 (10th Cir. 2018) (quoting 28 U.S.C. § 2254(e)(1) ) (alteration in original), *petition for cert. filed sub nom. Grant v. Carpenter*, No. 18-6713 (Nov. 13, 2018); *see also Hooks v. Ward* (*Hooks I* ), 184 F.3d 1206, 1223 (10th Cir. 1999) (presuming correctness of state court findings on claim not adjudicated on the merits). Although the burdens on the petitioner under AEDPA are significant, we "undertake this review cognizant that our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Fairchild v. Workman* (*Fairchild II* ), 579 F.3d 1134, 1140 (10th Cir. 2009) (internal quotation marks omitted).

With these standards in mind, we turn to Mr. Simpson's claims.

## III. DISCUSSION

As discussed, Mr. Simpson raises seven grounds for relief. We consider each of his arguments in turn.

### A. *Right to Present a Complete Defense*

Mr. Simpson first asserts he is entitled to federal habeas relief with respect to his convictions because the trial court erroneously excluded expert testimony regarding his PTSD diagnosis and dissociative episodes from the guilt stage of trial. Mr. Simpson claims Dr. Massad's testimony was necessary to support the defense that his PTSD, standing alone or in conjunction with his intoxication defense, rendered him incapable of forming the specific intent to kill. According to Mr. Simpson, excluding this evidence violated his constitutional right to present a complete defense.

We begin our review of this claim by providing additional factual and procedural background. We then address the State's arguments that the claim is unexhausted and unpreserved.[8] Deciding that the PTSD portion of Mr. Simpson's claim is properly preserved and has been exhausted, we then examine the OCCA's merits decision. We conclude that decision is not unreasonable under § 2254(d)(1), and we therefore deny Mr. Simpson relief on this claim.

#### 1. Additional Factual and Procedural Background

In reviewing this claim, the OCCA examined the transcript of the trial court hearing on the exclusion of the evidence and Dr. Massad's testimony during the sentencing stage of Mr. Simpson's trial. The OCCA concluded the trial court did not abuse its discretion by excluding this testimony from the guilt stage of trial because Dr. Massad could not say how Mr. Simpson's PTSD affected his ability to form the intent to kill. *Simpson I*, 230 P.3d at 895. As a result, the OCCA held that Mr. Simpson's PTSD diagnosis was "neither relevant to the intent element of the crime charged nor was it relevant to his defense of voluntary intoxication." *Id.*

On federal habeas review, Mr. Simpson challenges the OCCA's determination as both contrary to and an unreasonable application of clearly established federal law. The State counters that Mr. Simpson is barred from presenting this claim because he has failed to exhaust available state court remedies, he has forfeited the argument he makes on appeal by not presenting it to the district court, and, alternatively, because the OCCA's decision was neither contrary to federal law nor unreasonable.

#### 2. Exhaustion and Preservation

We begin our analysis with the state's argument that Mr. Simpson failed to exhaust his claim that the trial court violated his right to present a complete defense. *See United States v. Miller*, 868 F.3d 1182, 1185 (10th Cir. 2017).

##### a. *Legal standard*

**[15–19]** AEDPA permits federal courts to entertain only those applications for a writ of habeas corpus alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not grant such an application unless, with certain exceptions not relevant here, the applicant has exhausted state remedies before filing his petition. *Id.* § 2254(b)–(c); *see Pinholster*, 563 U.S.

8. The State also claims that Mr. Simpson failed to adequately cite the record in his appellate brief as required by Federal Rule of Appellate Procedure 28(a)(8)(A). Although we agree that Mr. Simpson's record citations are inadequate, we exercise our discretion to resolve this issue on the merits. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (recognizing that the court has the discretion to overlook inadequate briefing and to consider an issue on the merits).

at 181, 131 S.Ct. 1388. In general, to exhaust state remedies, a petitioner "must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *Thacker v. Workman*, 678 F.3d 820, 839 (10th Cir. 2012) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) ). This is accomplished by providing "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Id.* (quoting *O'Sullivan*, 526 U.S. at 845, 119 S.Ct. 1728). A claim is exhausted only after "it has been 'fairly presented' to the state court." *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) ). "Fair presentation" requires that the substance of the federal claim was raised in state court. *Id.* "The petitioner need not cite 'book and verse on the federal constitution,' but the petitioner cannot assert entirely different arguments from those raised before the state court." *Id.* (quoting *Picard*, 404 U.S. at 278, 92 S.Ct. 509). Under this standard, Mr. Simpson's claim is unexhausted if the substance of the claim he is arguing here is different from the argument he made to the OCCA.

**[20–22]** Turning to preservation, "[a] federal appellate court will not consider an issue not passed upon below." *F.D.I.C. v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ). "Consequently, when a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review." *Id.* To properly raise an argument below, a litigant must present the argument "with sufficient clarity and specificity." *Folks v. State Farm Mut. Auto. Ins. Co.*, 784 F.3d 730, 741 (10th Cir. 2015). To this point, "vague, arguable references to a point in the district court proceedings do not preserve the issue on appeal . . . because such perfunctory presentation deprives the trial court of its opportunity to consider and rule on an issue in any detail." *Id.* (citation and internal quotation marks omitted).

b. *Analysis*

Before this court, Mr. Simpson contends he suffers from dissociative episodes, and that his PTSD was the result of being shot by his friend and a lifetime of trauma. The State asserts Mr. Simpson's claim is unexhausted and unpreserved because he is presenting an entirely different theory to this court than the theory he presented to the OCCA and the district court. The State further asserts Mr. Simpson has improperly supplemented his argument on appeal by relying on facts raised in conjunction with his ineffective assistance of counsel claim. Mr. Simpson disagrees, stating, "his argument throughout has been that his PTSD, not malice aforethought, is what caused him to react the way he did." Aplt. Reply Br. at 3–5. He further contends his claim is supportable even without the additional facts about his violent upbringing, and that the evidence of dissociative episodes is not new because the description of the phenomenon, if not the name itself, was presented to the OCCA.

For purposes of discussion, we divide Mr. Simpson's argument into two categories: (1) PTSD evidence and (2) evidence of dissociative episodes. We conclude that Mr. Simpson properly preserved and exhausted his PTSD argument, but that he failed to properly preserve his argument concerning dissociative episodes.

i. PTSD evidence

**[23]** On direct appeal, Mr. Simpson argued his PTSD was the result of a single

event—his having previously been ambushed and shot by his friend. Mr. Simpson further claimed his PTSD was "relevant to the issue of whether he shot with malice aforethought, or did so out of a sense of exaggerated fear and terror caused by his PTSD," which was exacerbated by his consumption of drugs and alcohol on the night of the murders. Aplt. Br. at 22–23, *Simpson I*, 230 P.3d 888 (No. D-2007-1055). Thus, Mr. Simpson posited that evidence of his PTSD would have negated his ability to form the specific intent necessary to commit first-degree murder. Finally, Mr. Simpson argued his PTSD was relevant to support his voluntary intoxication defense.

Although Mr. Simpson's position in this court is more refined than the argument he made to the OCCA, the core of his PTSD claim is the same. His assertion that the OCCA's decision was "unreasonable based on [the OCCA and trial court's] misunderstanding of PTSD" is not a new claim, but rather an attempt to bolster his consistently-advanced position that his PTSD diagnosis was relevant as a defense during the guilt stage of trial. *Compare* Aplee. Br. at 14–29, *with Simpson I*, 230 P.3d at 894–95.[9] It is true that Mr. Simpson has presented this court with additional evidence to support a diagnosis of trauma-related PTSD, but he also correctly notes that Dr. Massad was aware of enough evidence before trial to diagnose Mr. Simpson with PTSD and in fact did so. Thus, Mr. Simpson's claim that the symptoms of his PTSD—specifically the tendency to overreact—prevented him from forming the requisite intent to kill has been exhausted.

**[24]** The State also asserts that Mr. Simpson has failed to preserve this claim on appeal by failing to raise it in the district court. The district court described Mr. Simpson's PTSD argument as follows:

> In Ground 2, [Mr. Simpson] asserts that he is entitled to habeas relief because the trial court prevented him from presenting evidence in the guilt stage that he suffered from Post Traumatic Stress Disorder (PTSD). [Mr. Simpson] argues that this evidence was relevant to the issue of intent and his voluntary intoxication defense, and that because he was unable to present this evidence, he was denied his constitutional right to present a complete defense.

*Simpson IV*, 2016 WL 3029966, at *6. Thus, Mr. Simpson advanced his PTSD argument before the district court. Accordingly, we reject the State's failure-to-preserve argument and determine Mr. Simpson's PTSD argument is properly before us.

ii. Dissociative episodes

**[25]** In this court, Mr. Simpson also attempts to introduce a new defense related to, but qualitatively different than, the PTSD defense he raised before the district

**9.** The OCCA described Mr. Simpson's claim as follows:

> Prior to trial, the defense filed a notice of intent to offer evidence of mental and/or psychological defect, deficiency, diminishment, and/or other such and related condition of defendant. Dr. Phillip Massad, a clinical psychologist, conducted a psychological evaluation of [Mr. Simpson] and issued a report in which he found it more likely than not that [Mr. Simpson] suffered from Post Traumatic Stress Disorder (PTSD). The state filed a motion to preclude the defense from offering testimony about [Mr. Simpson's] PTSD in the first stage of trial. A hearing was held on this motion and the trial court granted the State's motion. [Mr. Simpson] complains in his first proposition that this ruling was in error and violated his constitutional right to present a complete defense.

*Simpson v. State* (*Simpson I*), 230 P.3d 888, 894–95 (Okla. Crim. App. 2010).

court. In his argument to this court, Mr. Simpson contends he "was in the midst of a PTSD and/or dissociative episode during the crime[, which] reveals his brain was functioning such that either he had a reduced capacity to form the specific intent of first-degree malice aforethought murder, or he was unable to form the intent at all." Aplt. Br. at 24. To be sure, Mr. Simpson argued to the district court that his PTSD, combined with his drug and alcohol abuse, prevented him from forming the requisite mens rea. *See* Aplt. Br. at 14, *Simpson IV*, 2016 WL 3029966 (No. CIV-11-96-M) (arguing that PTSD can cause someone to "react out of an exaggerated sense of fear and terror uncontrolled by one's will" and "that the level of intoxication necessary to negate the specific intent of first-degree, malice aforethought murder is affected by PTSD"). But nowhere did he suggest, before his argument here, that he suffered from a dissociative episode at the time of the murders that rendered him "unable to form the intent at all." Accordingly, we agree with the State that Mr. Simpson failed to preserve any claim that he was in a dissociative state at the time of the murders.[10] We therefore confine our analysis of this claim to Mr. Simpson's PTSD argument.

### 3. Merits

**[26]** We turn now to the merits of Mr. Simpson's assertion that the trial court violated his constitutional right to present a complete defense when it excluded evidence that his PTSD made him hypervigilant and, together with his substance abuse on the night of the murders, rendered him incapable of forming the requisite mens rea. *See Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Washington v. Texas*, 388 U.S. 14, 18–19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Mr. Simpson raises two distinct claims of error in this regard. First, he contends the trial court erred by refusing to allow him to present a defense theory that PTSD negated his ability to form the specific intent required for first-degree murder. Second, he argues evidence establishing that he suffered from PTSD was required to assist the jury in understanding the voluntary intoxication instruction.

#### a. *OCCA decision*

The OCCA rejected both of these arguments on direct appeal, finding Dr. Massad's testimony irrelevant in both situations because he "could not testify as to how [Mr. Simpson's] PTSD could affect his intent at the time of the crime." *Simpson I*, 230 P.3d at 895. The OCCA decided this claim on the merits, thereby triggering AEDPA deference. According to Mr. Simpson, the OCCA's decision contradicted and unreasonably applied Supreme Court law.[11]

#### b. *Reasonableness of the OCCA's legal determination*

**[27]** The Supreme Court has recognized that although criminal defendants have the right to present a complete defense, they must still comply with a state's well-established rules of evidence. *See Holmes v. South Carolina*, 547 U.S. 319, 326, 126 S.Ct. 1727, 164 L.Ed.2d 503

**10.** Because we conclude Mr. Simpson failed to preserve this argument by not raising it in the district court, we do not address whether the claim was exhausted. *See Owens v. Trammell,* 792 F.3d 1234, 1246 n.8 (10th Cir. 2015) ("We do not reach the State's argument that Owens failed to exhaust his state court remedies because we base our decision on Owen's failure to raise the theory in the district court.").

**11.** Mr. Simpson does not assert the OCCA's decision was an unreasonable determination of the facts.

(2006). Oklahoma law therefore informs our analysis.

i. PTSD as a stand-alone defense

**[28]** As relevant to Mr. Simpson's first argument—that PTSD negated specific intent—the trial court correctly noted that Oklahoma permits diminished capacity evidence only in the case of an intoxication or insanity defense. *Frederick v. State*, 37 P.3d 908, 931 (Okla. Crim. App. 2001). Mr. Simpson claims Oklahoma's rule is contrary to clearly established federal law because a diagnosis of PTSD is relevant in assessing whether the individual formed the specific intent necessary for first-degree murder. But Mr. Simpson fails to identify a single federal case, let alone a Supreme Court case, supporting his position.[12] Where there is no Supreme Court case on point, there is no clearly established federal law for the purposes of AEDPA. *See Hooks v. Workman* (*Hooks II* ), 689 F.3d 1148, 1176 (10th Cir. 2012). And when a defendant "is unable to find any 'clearly established' Supreme Court precedent in support of [his] claim[,] ... habeas relief is impossible to obtain." *Miller-El v. Cockrell*, 537 U.S. 322, 350, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). As such, Mr. Simpson's claim "fails at the threshold for lack of clearly established federal law." *Hooks II*, 689 F.3d at 1176.

ii. PTSD as support for the intoxication defense

Alternatively, Mr. Simpson argues the trial court erred by excluding Dr. Massad's testimony because it was necessary to assist the jury in evaluating Mr. Simpson's intoxication defense. The OCCA held that, because Dr. Massad's testimony was irrelevant, the trial court did not abuse its discretion in excluding it. *Simpson I*, 230 P.3d at 895. This decision is reasonable under AEDPA unless no fairminded jurist could agree the evidence was irrelevant. *See Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

**[29, 30]** Under Oklahoma law, evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Okla. Stat. tit. 12, § 2401. And, "expert opinion testimony should be admitted only if it will 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Hooks v. State* (*Hooks III* ), 862 P.2d 1273, 1278 (Okla. Crim. App. 1993) (quoting Okla. Stat. tit.12, § 2702). "When a defendant raises the defense of voluntary intoxication, an expert may properly offer his or her opinion on whether the defendant's actions were intentional." *Coddington v. State*, 142 P.3d 437, 450 (Okla. Crim. App. 2006). Thus, under *Coddington*, Dr. Massad "could have properly testified that, in his opinion and based upon his specialized knowledge, he believed [Mr. Simpson] would have been unable to form the requisite deliberate intent of malice aforethought." *See id.* But, "[w]here the normal experiences and qualifications of laymen jurors permit them to draw proper conclusions from the facts and circumstances, expert conclusions or opinions are inadmissible." *Hooks III*, 862 P.2d at 1279 (quoting *Gabus v. Harvey*, 678 P.2d 253, 256 (Okla. 1984) ). The relevancy of Mr. Simpson's PTSD diagnosis, therefore, turns on whether Dr. Massad's testimony would have assisted the jury in determin-

**12.** The only Supreme Court case addressing this issue actually undermines his claim. *See Clark v. Arizona*, 548 U.S. 735, 770–71, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006) (upholding Arizona's exclusion of mental illness evidence offered to refute the mens rea element, unless such evidence is sufficient to establish an insanity defense).

ing whether Mr. Simpson's "intoxication affected his mental state and prevented him from forming malice aforethought." *See White v. State*, 973 P.2d 306, 311 (Okla. Crim. App. 1998). We have further explained that although, "psychological or psychiatric evidence that negates the essential element of specific intent can be admissible[,] [t]he admission of such evidence will depend upon whether [it] ... would negate intent rather than merely present a dangerously confusing theory of defense more akin to justification and excuse." *United States v. Brown*, 326 F.3d 1143, 1147 (10th Cir. 2003).

A review of Dr. Massad's testimony fails to demonstrate any meaningful connection between PTSD and intent generally, or intoxication specifically. Even a generous reading of his testimony demonstrates only a bare assertion that Mr. Simpson had PTSD and that PTSD could cause one to be hypervigilant and to overreact to stimuli. Dr. Massad's testimony lacked any detail on the impact Mr. Simpson's PTSD had on his ability to form the intent to kill, and Dr. Massad's testimony on the interactive effects of PTSD and intoxicants is similarly lacking. Dr. Massad opined that PTSD could be affected by drugs and alcohol because they "could lower one's defenses and increase the likelihood that [the person] would react or overreact." Trial Tr. vol. 7 at 167. On cross-examination, however, Dr. Massad admitted he was "not sure about how the brain and alcohol interact" beyond generally lowering a person's inhibitions—which occurs regardless of "whether or not they have PTSD." *Id.* at 183. This is not the type of specialized knowledge beyond the "normal experiences and qualifications of laymen jurors." *See Hooks III*, 862 P.2d at 1279. And without more, this testimony falls within the "justification and excuse" evidence cautioned against in *Brown*, 326 F.3d at 1147.

Because a fairminded jurist could agree that Dr. Massad's testimony was irrelevant, the OCCA's decision was reasonable.

### B. Brady *Claim*

Mr. Simpson next alleges the prosecutors violated their constitutional responsibility under *Brady v. Maryland* to disclose all evidence favorable to the defense. Specifically, he contends the prosecution suppressed impeachment evidence against a State sentencing-stage witness, Roy Collins.

In addressing this claim, we begin with a discussion of what *Brady* requires. We then provide additional background relevant to the OCCA's decision, concluding that the OCCA did not resolve this claim on the merits. Instead, the OCCA held that Mr. Simpson waived his *Brady* claim by not bringing it on direct appeal or in his first state post-conviction application. We next consider whether Mr. Simpson can overcome that state procedural bar and conclude he cannot. As a result, we affirm the district court's denial of relief on this claim. Finally, we consider Mr. Simpson's request for discovery and an evidentiary hearing before the district court and we deny relief on that request, as well.

#### 1. Elements of a *Brady* Claim

**[31, 32]** We have recognized three essential elements of a *Brady* claim: (1) the prosecutor suppressed the evidence; (2) the suppressed evidence was favorable to the accused, either because it is exculpatory or because it is impeaching; and (3) prejudice ensued because the suppressed evidence was material. *See Scott v. Mullin*, 303 F.3d 1222, 1230 (10th Cir. 2002); *see also Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) ("*Banks* (*Dretke*)") (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) ). Evidence is

suppressed for *Brady* purposes if the prosecution fails to disclose favorable exculpatory or impeachment evidence known either by it or the police, "irrespective of the good faith or bad faith of the prosecution." [13] *Wearry v. Cain*, —— U.S. ——, 136 S.Ct. 1002, 1006–07 & 1007 n.8, 194 L.Ed.2d 78 (2016). "Favorable evidence 'is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) ).

Here, Mr. Simpson claims the State suppressed three pieces of evidence (collectively, the "Collins Evidence"):

(1) a video-taped interview with Roy Collins from January 5, 2006, which reveals Mr. Collins's Hoover Crips gang affiliation and calls into question the veracity of his testimony concerning Mr. Simpson's jailhouse statements by revealing that Mr. Collins made nearly identical jailhouse statements about Jason Whitecrow, a defendant in an unrelated criminal trial;

(2) Mr. Collins's complete arrest, conviction, and incarceration records that reveal an additional four convictions to which Mr. Collins did not testify at trial; and

(3) statements reflecting Mr. Collins's expectation of prosecutorial assistance in exchange for his testimony.

According to Mr. Simpson, the Collins Evidence was materially favorable *Brady* evidence that could have cast doubt on the credibility of Mr. Collins's testimony, which, in turn, was critical to support the Continuing Threat Aggravator. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Douglas*, 560 F.3d at 1172–73. If Mr. Simpson can make this showing, "the prosecution's failure to disclose [the Collins Evidence] was harmful as a matter of law [and] 'there is no need for further harmless-error review.' " *See Banks v. Reynolds*, 54 F.3d 1508, 1522 (10th Cir. 1995) ("*Banks* (*Reynolds*)") (citation omitted) (quoting *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555); *see also Douglas*, 560 F.3d at 1173.

**2. OCCA Decision**

Mr. Simpson did not present his *Brady* claim to the OCCA until his second application for post-conviction relief. The OCCA held the claim was procedurally barred because the misconduct happened at trial, the legal basis for the claim was available on direct appeal and on the first post-conviction application, and "the factual basis for the claim[ ] was available and could have been ascertained through the exercise of reasonable diligence." *Simpson III*, slip op. at 4 (citing Okla. Stat. tit. 22, § 1089(D) ). Specifically, the OCCA ruled Mr. Simpson's *Brady* claim had been waived. *Id.*

**3. Procedural Default**

a. *Independent and adequate procedural bar*

**[33–35]** Under the doctrine of procedural default, "[c]laims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a habeas court. . . ." *Fairchild II*, 579 F.3d at 1141 (quotation marks omitted); *see also Martinez v. Ryan*, 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272

13. Mr. Simpson's trial counsel asserted, and the State does not contest, that the State's "open file" did not include the Collins evidence. Counsel for the State also does not contest the Collins evidence was in the possession of the Oklahoma county district attorney's office at large.

(2012) ("[A] federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule."). "To be adequate, the [state] procedural ground must be strictly or regularly followed and applied evenhandedly to all similar claims." *Thacker*, 678 F.3d at 835 (internal quotation marks omitted). We have previously determined that Oklahoma's procedural default rule in title 22, section 1089(D) of the Oklahoma Statutes meets this requirement. *See, e.g., id.* at 835–36.

**[36]** In turn, a state procedural rule is independent "if it relies on state law, rather than federal law, as the basis for decision." *Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012) (quotation marks omitted). Here, the OCCA relied only on its state procedural rule, § 1089(D), to conclude that Mr. Simpson's *Brady* claim was waived. Thus, "we must recognize the OCCA's waiver ruling and treat the claim as procedurally barred for purposes of federal habeas review." *Thacker*, 678 F.3d at 836. Consequently, Mr. Simpson's *Brady* claim is precluded from federal habeas review unless he can overcome the default.

b. *Legal background on cause and prejudice*

**[37–40]** "A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10, 132 S.Ct. 1309; *see also Fairchild II*, 579 F.3d at 1141.[14] To establish "cause," a petitioner must show that "some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Scott*, 303 F.3d at 1228 (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) ). Such objective factors include "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Id.* (quoting *Murray*, 477 U.S. at 488, 106 S.Ct. 2639). A petitioner must also show " 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); *see also Thacker*, 678 F.3d at 835. Because "cause and prejudice parallel two of the three components of the alleged *Brady* violation itself," *Strickler*, 527 U.S. at 282, 119 S.Ct. 1936, if Mr. Simpson can successfully demonstrate cause and prejudice, he will have also succeeded in establishing his *Brady* claim, *see Banks* (*Dretke*), 540 U.S. at 691, 124 S.Ct. 1256; *see also Scott*, 303 F.3d at 1230 ("[W]e conclude that the ... statements constitute *Brady* evidence that the prosecution had a duty to disclose to [petitioner]. Therefore [petitioner] has also established prejudice to overcome his procedural default."). We therefore address the *Brady* and procedural bar factors together.

Mr. Simpson must establish both cause and prejudice to overcome the state procedural bar, and we must reject his *Brady* claim if he fails to show either requirement. *See McCleskey v. Zant*, 499 U.S. 467, 502, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) ("As [petitioner] lacks cause for failing to raise the *Massiah* claim in the first federal petition, we need not consider whether he would be prejudiced by his

**14.** A petitioner may also obtain review of a procedurally defaulted claim by showing that a fundamental miscarriage of justice would occur if the merits of a claim are not addressed in the federal habeas proceeding. *See Fairchild v. Workman* (*Fairchild II* ), 579 F.3d 1134, 1141 (10th Cir. 2009). Mr. Simpson has not raised a fundamental miscarriage of justice challenge on appeal.

inability to raise the alleged *Massiah* violation at this late date." (citing *Murray*, 477 U.S. at 494, 106 S.Ct. 2639) ); *see also Coleman v. Thompson*, 501 U.S. 722, 757, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (holding petitioner's claim barred by state procedural default where petitioner could not establish cause, without considering prejudice); *Romano v. Gibson*, 239 F.3d 1156, 1171–72 (10th Cir. 2001) (assuming the State suppressed *Brady* evidence but denying relief because the evidence was not material).

We exercise our discretion to proceed directly to the prejudice/materiality question. Ultimately, we deny Mr. Simpson relief on his *Brady* claim because, even assuming he could show cause/suppression, he cannot establish prejudice/materiality.

c. *Prejudice/Materiality merits analysis*

**[41–44]** "[P]rejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes." *Banks* (*Dretke*), 540 U.S. at 691, 124 S.Ct. 1256. Suppressed evidence "is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *Kyles*, 514 U.S. at 433, 115 S.Ct. 1555). "A 'reasonable probability' is a 'probability sufficient to undermine confidence in the outcome.' " *Scott*, 303 F.3d at 1230 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ). "In evaluating the materiality of withheld evidence, we do not consider each piece of withheld evidence in isolation. Rather we review the cumulative impact of the withheld evidence, its utility to the defense as well as its potentially damaging impact on the prosecution's case." *Banks* (*Reynolds*), 54 F.3d at 1518; *see also Snow v. Sirmons*, 474 F.3d 693, 711 (10th Cir. 2007). Put another way, "we evaluate the materiality of withheld evidence in light of the entire record in order to determine if 'the omitted evidence creates a reasonable doubt that did not otherwise exist.' " *Banks* (*Reynolds*), 54 F.3d at 1518 (quoting *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ).

**[45]** Here, even if all the evidence Mr. Simpson claims is material had been disclosed, there is no reasonable probability the jury would have decided on a sentence less than death. *See Douglas*, 560 F.3d at 1173. The suppressed evidence includes: Mr. Collins's prior gang affiliation with the Hoover Crips—the same gang the victims belonged to and the rival of Mr. Simpson's gang, the Bloods; Mr. Collins's additional criminal convictions; the similarities between the two jailhouse confession stories; and Mr. Collins's alleged expectation of prosecutorial assistance in exchange for his testimony. To be sure, this evidence could have been used to impeach Mr. Collins, who testified in support of the Continuing Threat Aggravator. In evaluating prejudice/materiality, however, the impact of the evidence must be viewed in light of the impeachment evidence introduced at trial and the strength of the State's aggravating evidence. *See Banks* (*Reynolds*), 54 F.3d at 1518.

The only wholly new information withheld was Mr. Collins's prior gang affiliation and the alleged similarities between Mr. Collins's story of his conversation with Mr. Simpson and his prior testimony in the Whitecrow trial. All of the other Collins Evidence related to topics on which evidence was introduced in some form at trial. For example, the State conceded at trial that Mr. Collins wanted to exchange his testimony for favorable treatment, but claimed it never agreed to such a deal. The State also admitted, and the jury was in-

formed, that Mr. Collins was a liar, a drug dealer, and a criminal, even if the extent of those lies and crimes was not fully disclosed. In particular, the defense established during trial that Mr. Collins lied on the stand about playing football at the University of Oklahoma. It is true the prosecutor attempted to undermine the effectiveness of this impeachment evidence by suggesting that, in Mr. Collins's "drug-induced mind, he thinks he did [play football at the University of Oklahoma]." Trial Tr. vol. 8 at 19. Nonetheless, the defense efforts at trial made the jury aware that Mr. Collins's recollection of events was questionable at best. The introduction of evidence of additional criminal convictions, or of more factual inaccuracies therefore, would have had diminishing returns.

That said, when considering the suppressed evidence in light of the impeachment evidence introduced at trial, we agree with Mr. Simpson that the suppressed evidence was not all cumulative. *See Case v. Hatch*, 731 F.3d 1015, 1042–43 (10th Cir. 2013). As indicated, Mr. Collins's gang affiliation and prior testimony about Mr. Whitecrow's alleged jailhouse admissions were not offered in any form at Mr. Simpson's trial. But that fact alone does not make the suppressed evidence material. To make that assessment, we must evaluate Mr. Collins's testimony in light of the State's case as a whole. *See Banks* (*Reynolds*), 54 F.3d at 1518.

As indicated, the State alleged four aggravating factors: 1) the Prior Violent Felony Aggravator, 2) the Risk of Multiple Deaths Aggravator, 3) the HAC Aggravator, and 4) the Continuing Threat Aggravator. Although defense counsel conceded the State had proven beyond a reasonable doubt the first two aggravating factors, counsel argued the State had failed to prove Mr. Palmer's death was especially heinous, atrocious, or cruel or that Mr. Simpson would continue to be a threat in jail. Trial Tr. vol. 8 at 46–47 ("[The prosecutor] told you that he has proven beyond a reasonable doubt all four of the aggravators. I will take issue with him on three and four. . . . [T]hey didn't prove three and four.").

The State relied on Mr. Collins's testimony to prove Mr. Simpson would be a continuing threat. *Id.* at 15 ("Now, this is where Roy Collins come[s] in. A continuing threat."); *id.* at 22 ("[W]e offered Roy Collins for continuing threat."). And Mr. Collins's extensive and inflammatory testimony may have been a factor in the jury's verdict of death. But the question is not whether Mr. Collins was beneficial to the prosecution; the question is whether the prosecutor's case was strong enough that, had the evidence impeaching Mr. Collins been disclosed, there is no reasonable probability the jury would have decided on a sentence less than death. *See Douglas*, 560 F.3d at 1173. We believe it was.

Mr. Simpson characterizes Mr. Collins as critical to the State's case in aggravation, claiming, "[Mr.] Collins's testimony that Mr. Simpson tried to hire him to kill [the surviving victim] and assault and threaten witnesses and was utterly remorseless, was the centerpiece of the prosecution's case for death." Aplt. Br. at 53, 77–78. He argues the prosecutor "directed [Mr.] Collins to his theme that [Mr.] Simpson, a high rolling outsider from New Orleans, was a remorseless gangster." *Id.* at 53. While Mr. Simpson acknowledges there was other evidence to support the Continuing Threat Aggravator, he argues Mr. Collins's testimony was so important that the jury might not have imposed the death penalty without it. To put this argument in context, we must consider the other evidence offered in support of a penalty of death.

To begin, Mr. Simpson concedes there was sufficient evidence to support the jury's finding of the first two aggravators: (1) he was convicted previously of a felony involving the use or threat of violence and (2) he knowingly created a great risk of death to more than one person. There is also substantial evidence in the record that supported the Continuing Threat Aggravator, even without considering Mr. Collins's testimony.

First, the facts of the crime itself support this aggravator. *See Jones v. State*, 128 P.3d 521, 549–50 (Okla. Crim. App. 2006) ("Evidence of the callous nature of the crime and the defendant's blatant disregard for the importance of human life supports" the Continuing Threat Aggravator). Mr. Simpson gunned down three men with an assault rifle because one of the victims had punched him nearly an hour earlier. He ordered one of his codefendants, Mr. Dalton, to follow the men for several miles and threatened Mr. Robinson, his other codefendant, when Mr. Robinson initially refused to retrieve the rifle from the trunk. The shooting took place in a residential area, yet Mr. Simpson indiscriminately shot fifteen to twenty rounds into the victims' moving car, forcing it to veer off the road and hit an electrical pole. And as he fled the scene, Mr. Simpson shouted, "I'm a monster. I'm a motherfucking monster. Bitches don't want to play with me." [15] Trial Tr. vol. 4 at 44–46.

The State also offered other evidence of Mr. Simpson's callous disregard for human life as support for finding the Continuing Threat Aggravator. For example, immediately following the murders, Mr. Simpson proceeded with his plan to visit some women he had met at Fritzi's. The jury could have reasonably inferred a lack of remorse from this conduct and weighed that attitude in favor of finding Mr. Simpson a continuing threat.

Mr. Simpson's attempts to conceal evidence further support a finding that he would be a continuing threat. The record reflects that Mr. Simpson threatened Mr. Dalton's family in an attempt to keep Mr. Dalton from speaking to the police, and that Mr. Simpson's codefendants took his threats seriously.

Mr. Simpson's past criminal convictions can also serve as evidence in support of the Continuing Threat Aggravator. *See Lockett v. State*, 53 P.3d 418, 428 (Okla. Crim. App. 2002). The State relied on Mr. Simpson's previous conviction for armed robbery and offered Mr. Pham's testimony about the facts underlying that offense. Mr. Pham related how Mr. Simpson forced his way into Mr. Pham's home, threatened him with a gun, beat him across the face and back, stole his wallet, forced him onto his knees, and then shot him in the head. Mr. Pham provided powerful evidence supporting a finding that Mr. Simpson would be a continuing threat.

Weighing all of the aggravating evidence the State introduced against the previously discussed evidence Mr. Simpson presented in mitigation,[16] we find no reasonable probability that the outcome of the sentencing proceeding would have been different had the Collins Evidence been produced. We do not discount the obvious significance of Mr. Collins's testimony or the State's reliance on it. But given the defense's success-

**15.** This recitation of Mr. Simpson's statement immediately after the shooting is not identical to the sanitized version in the OCCA's findings. But for purposes of our analysis we rely on the trial transcript because it reflects the evidence as presented to the jury.

**16.** See Section I.B.1.a.ii, *supra,* for a detailed discussion of the mitigating evidence Mr. Simpson presented.

ful, if admittedly limited, impeachment of Mr. Collins and the compelling nature of the State's other aggravating evidence, Mr. Simpson "has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if [Mr. Collins's] testimony had been [further] impeached or excluded entirely." *See Strickler*, 527 U.S. at 296, 119 S.Ct. 1936. Therefore, the evidence was not material under *Brady*, and Mr. Simpson cannot demonstrate prejudice.[17]

In summary, because Mr. Simpson cannot establish prejudice, we need not consider whether he could show cause. *See McCleskey*, 499 U.S. at 502, 111 S.Ct. 1454. In the absence of a showing of both cause and prejudice, Mr. Simpson cannot overcome the state procedural bar and we cannot consider this claim on habeas review. Accordingly, we deny Mr. Simpson relief on his *Brady* claim.

### 4. Evidentiary Hearing and Discovery Motions

**[46, 47]** In conjunction with his *Brady* claim, Mr. Simpson appeals the district court's denial of his motion for an evidentiary hearing and discovery seeking additional impeachment evidence as to Roy Collins. The district court denied the motion after determining that Mr. Simpson "would not be entitled to relief even if Mr. Collins'[s] testimony was completely discounted or excluded." *Simpson IV*, 2016 WL 3029966, at *41. We review a district court's denial of a motion for discovery or an evidentiary hearing for abuse of discretion. *See Fairchild II*, 579 F.3d at 1147 (evidentiary hearing standard); *Wallace v. Ward*, 191 F.3d 1235, 1245 (10th Cir. 1999) (motion for discovery standard).

**[48]** Generally speaking, federal habeas review "is 'limited to the record that was before the state court that adjudicated the claim on the merits.' " *Smith v. Aldridge*, 904 F.3d 874, 886 (10th Cir. 2018) (quoting *Pinholster*, 563 U.S. at 181, 131 S.Ct. 1388). As a result, "we can only order evidentiary hearings if the petitioner meets the requirements in *both* §§ 2254(d) and (e)(2)." *Id.*

Here, where the OCCA did not explicitly reach the merits of Mr. Simpson's *Brady* claim, it is questionable whether § 2254(d)

**17.** Mr. Simpson also claims the prosecutor violated his duty under *Napue v. Illinois*, 360 U.S. 264, 269–70, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), "not [to] solicit[ ] false evidence" and "to correct what he knows to be false and elicit the truth," by guiding Mr. Collins into misleading testimony about his education, criminal history, and motivation for testifying, and by knowingly failing to correct false testimony about Mr. Collins's football career at the University of Oklahoma. Like with his *Brady* claim, Mr. Simpson's *Napue* claim is procedurally defaulted. Thus, before we can consider the merits of Mr. Simpson's *Napue* claim, he must satisfy the cause and prejudice standard. But Mr. Simpson is unable to demonstrate prejudice because, for the reasons the *Brady* evidence was not material, he cannot demonstrate that the prosecutor's failure to correct false statements in Mr. Collins's testimony "not merely . . . created a *possibility* of prejudice, but that [it] worked to his *actual* and substantial disadvantage, infecting [his] entire trial with error of constitutional dimensions." *See Daniels v. United States*, 254 F.3d 1180, 1192 (2001) (quoting *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). In so concluding, we acknowledge the anomaly in that the prejudice standard for prevailing on the merits of a *Napue* claim is lower than the prejudice standard for overcoming the procedural bar. *See United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015) ("Under *Napue* materiality is easier to establish [than under *Brady*]; the failure to disclose is material unless it was harmless beyond a reasonable doubt."). But, we also observe that where Mr. Simpson never identifies or advances an argument, to this court, under the lower prejudice standard for *Napue* claims, we will not consider any argument in favor of substituting the *Napue* prejudice standard for the prejudice standard to overcome the procedural bar.

applies to his request for an evidentiary hearing. *See* 28 U.S.C. § 2254(d) ("An application for a writ of habeas corpus ... 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*...." (emphasis added) ). But because Mr. Simpson cannot satisfy either the § 2254(e)(2) requirements or the pre-AEDPA requirements where § 2254(e)(2) does not apply, we need not determine the applicability of § 2254(d) to a request for an evidentiary hearing where the state court did not explicitly adjudicate a claim on the merits.

**[49, 50]** Section 2254(e)(2) of Title 28 states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Under this provision, "AEDPA ... bars an evidentiary hearing for a nondiligent petitioner unless the petitioner can satisfy *both* §§ 2254(e)(2)(A) *and* (B)." *Pinholster*, 563 U.S. at 209–10, 131 S.Ct. 1388 (emphasis added).[18] However, "[i]f the prisoner did not fail to develop the factual basis for his claim in State court, § 2254(e)(2) is not applicable and a federal habeas court should proceed to analyze whether an evidentiary hearing is appropriate or required under pre-AEDPA standards." *Barkell v. Crouse*, 468 F.3d 684, 693 (10th Cir. 2006) (quotation marks omitted). Under this pre-AEDPA standard, a petitioner is entitled to an evidentiary hearing "if (1) the facts were not adequately developed in state court, so long as that failure was not attributable to the petitioner, and (2) his allegations, if true and not contravened by the existing factual record, would entitle him to habeas relief." *Id.* at 696 (quotation marks omitted); *see Medina v. Barnes*, 71 F.3d 363, 366 (10th Cir. 1995) (pre-AEDPA case stating that petitioner entitled to evidentiary hearing if he made "allegations which, if proved, would entitle him to relief"). Similarly, Mr. Simpson is entitled to discovery if he establishes "good cause," *Wallace*, 191 F.3d at 1245. "Good cause is established 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief.' " *Id.* (quoting *Bracy v. Gramley,* 520 U.S. 899, 908–09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) ).

For the reasons explained above, Mr. Simpson cannot show that the jury would have given him a sentence less than death even with the additional impeachment evidence against Mr. Collins. Accordingly, Mr. Simpson has not satisfied § 2254(e)(2)(B) or the pre-AEDPA standard where § 2254(e)(2) does not apply

**18.** To the extent our pre-*Pinholster* decisions state a petitioner meets the standard for an evidentiary hearing under § 2254(e)(2) by satisfying "2254(e)(2)(A) *or* (B)," *see Bryan v. Mullin,* 335 F.3d 1207, 1214 (10th Cir. 2003) (en banc) (emphasis added), *see also Cannon v. Mullin,* 383 F.3d 1152, 1176 (10th Cir. 2004), *Pinholster* resolves any ambiguity in the statute by clearly requiring the petitioner to satisfy *both* 2254(e)(2)(A) *and* (B).

because the petitioner acted diligently in the state court.[19] The district court therefore properly denied his motion for discovery and an evidentiary hearing.

### C. *Consideration of Mitigating Evidence*

Mr. Simpson next claims the trial court's instruction and the prosecutor's improper argument unconstitutionally limited the jury's consideration of his mitigating evidence. On direct appeal, the OCCA denied relief, rejecting both prongs of Mr. Simpson's argument. *Simpson I*, 230 P.3d at 903–04.[20]

We begin our review of this claim with a general overview of the legal background. Next, we examine the OCCA's decision and conclude it adjudicated this issue on the merits. Accordingly, we proceed to the question of whether the OCCA unreasonably applied clearly establish law or unreasonably determined the facts. Under AEDPA's deferential standard of review, we deny relief on this claim.

#### 1. Legal Background

**[51, 52]** "The Supreme Court has repeatedly held that the Constitution requires that a jury 'cannot be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.' " *Hanson v. Sherrod*, 797 F.3d 810, 850 (10th Cir. 2015) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) ); *see Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). This is true regardless of whether the preclusion results from the jury instruction itself or from prosecutorial argument. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 261, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007); *see also Mills v. Maryland*, 486 U.S. 367, 375, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). But prosecutorial misrepresentations "are not to be judged as having the same force as an instruction from the court" and must be considered "in the context in which they are made." *Boyde v. California*, 494 U.S. 370, 384–85, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). When evaluating whether a jury was unconstitutionally precluded from considering mitigating evidence, "[t]he proper inquiry is 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' " *Hanson*, 797 F.3d at 850 (quoting *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190).

**19.** Because Mr. Simpson cannot satisfy either standard, we need not decide whether the OCCA reached an unreasonable determination when it concluded that "the factual basis for the [*Brady*] claim[ ] was available and could have been ascertained through the exercise of reasonable diligence." *Simpson III*, slip op. at 4 (citing Okla. Stat. tit. 22, § 1089(D) ).

**20.** The State asserts Mr. Simpson "never raised a prosecutorial misconduct claim to the OCCA, or to the district court, regarding the prosecutor's arguments relating to his mitigation evidence" and that he was not granted a COA on this issue. Aplee. Br. at 79–80. We disagree. *See Simpson I*, 230 P.3d at 903–04 ("[T]his Court recognized that while the instruction on mitigating evidence did not unconstitutionally limit the evidence the jury could consider as mitigating, it was subject to misuse by prosecutors in closing argument. *This is what [Mr. Simpson] argues happened in the present case.*" (emphasis added) (footnote omitted) ); Case Management Order dated December 1, 2016, at 1–2 (granting COA on "Ground II, Oklahoma's jury instruction defining mitigating circumstances is unduly limiting; moreover, the prosecutors exploited the instruction to blunt or eliminate jury consideration of important mitigating evidence, all in violation of the Sixth, Eighth, and Fourteenth Amendments.").

**2. OCCA Decision**

On direct appeal, Mr. Simpson argued that the instruction on mitigating evidence, combined with the prosecutor's improper argument, unconstitutionally prevented the jury from considering relevant evidence in mitigation. The OCCA rejected this claim on the merits, stating: "A review of the prosecutor's closing argument concerning the mitigating evidence instruction, the mitigating evidence itself and all instructions concerning mitigation evidence given in this case supports our conclusion that the jurors' consideration of the evidence offered in mitigation was not unfairly limited in this case." *Simpson I*, 230 P.3d at 904. Because the OCCA adjudicated Mr. Simpson's claim on the merits, our review is limited by AEDPA, and we must affirm unless the OCCA's decision was contrary to or an unreasonable application of clearly established Supreme Court authority or based on an unreasonable determination of the facts in light of the evidence presented at trial. *See* 28 U.S.C. § 2254(d).

**3. Reasonableness of the OCCA Decision**

a. *Mitigation instruction*

Mr. Simpson first claims the language of Oklahoma's uniform jury instructions improperly precluded the jury from considering evidence that did not "extenuate or reduce the degree of [his] moral culpability or blame." Aplt. Br. at 80–81. We rejected this exact challenge in *Hanson*, and we must do so again today.

In *Hanson*, this court considered the constitutionality of the same instruction used in Mr. Simpson's case: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case." 797 F.3d at 850–51; Trial R. vol. 3 at 604. Relying on the Supreme Court's edict that jury instructions must be looked at in context rather than in isolation, *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190, we concluded that the second sentence in the instruction "broadened any potential limitations imposed by the first sentence," *Hanson*, 797 F.3d at 851. And where, as is true here, the instruction is coupled with another instruction enumerating the defendant's asserted mitigating factors and informing the jury it "may decide that other mitigating circumstances exist, and if so, [it] should consider those circumstances as well," we concluded that there is no reasonable likelihood the jury would have felt precluded from considering any mitigating evidence. *Id.* Mr. Simpson has pointed us to nothing that would permit us to depart from this binding precedent.

b. *Prosecutor's closing argument*

**[53]** More compelling is Mr. Simpson's assertion that the prosecutor made improper comments designed to mislead the jurors into believing they could not legally consider Mr. Simpson's mitigating evidence unless it reduced his moral culpability or blame. Throughout his closing argument, the prosecutor made no less than nine separate statements which either generally defined mitigating evidence as reducing moral culpability or blame or specifically compared Mr. Simpson's mitigating factors to that definition ("Moral Culpability Comments").[21] One example of

**21.** Mr. Simpson relies on the Moral Culpability Comments to support two of his arguments: (1) the jury's consideration of his mitigating evidence was unconstitutionally limited, and (2) prosecutorial misconduct rendered his sentencing trial fundamentally unfair. There is some overlap in these arguments, but the two are distinct claims aris-

this came near the end of closing argument as the prosecutor was summarizing Mr. Simpson's mitigating evidence:

> There is not one bit of mitigating evidence that reduces [Mr. Simpson's] degree of moral culpability. *That's what the law is. Does [the] mitigating circumstance reduce his degree of moral culpability or blame?*
>
> Look at [the instruction]. Not one bit. Not his age, not his family, certainly not them. They're good people. They don't want to be here. He brought them into it, too.
>
> And his mental condition, there's nothing wrong with him. There's not one bit of evidence that reduces his degree of moral culpability or blame. And [Dr. Massad] didn't tell you that, even if for some reason the P.h.D. [sic] convinces you, okay, he's got Post-Traumatic Stress, how does that reduce his degree of blame?

Trial Tr. vol. 8 at 31 (emphasis added). The record is replete with similar Moral Culpability Comments.[22] But we are constrained by AEDPA's deferential standard from providing relief to Mr. Simpson on this basis.

Several cases guide our analysis of this issue. In *Boyde*, the Supreme Court held a prosecutor's statements, that "the mitigating evidence did not 'suggest that petitioner's crime is less serious or that the gravity of the crime is any less' and that 'nothing I have heard lessens the seriousness of this crime,'" were not improper attempts to narrow the jury's consideration of mitigating evidence. 494 U.S. at 385, 110 S.Ct. 1190. The Court concluded the prosecutor was merely arguing that "the evidence did not sufficiently mitigate Boyde's conduct[;] [the prosecutor] never suggested that the background and character evidence could not be considered." *Id.* (internal quotation marks omitted). The Court noted, however, that other comments by the prosecutor "explicitly assumed that [Mr. Boyde's] character evidence was a proper factor in the weighing process" and the defense attorney "also stressed a broad reading of [the instruction] in his argument to the jury." *Id.* at 385–86, 110 S.Ct. 1190. Similarly, we held in *Hanson* that the prosecutor's statement that the jury should "consider whether any of the mitigating circumstances 'really extenuate or reduce Hanson's degree of culpability or blame,'" did not limit the jury because the prosecutor followed with other comments that "encouraged [the jurors] to consider any and all mitigating evidence they thought relevant." *Hanson*, 797 F.3d at 851.

**[54]** Although these decisions are informative, Mr. Simpson's case has some key distinctions. The prosecutor began his discussion of Mr. Simpson's mitigating evidence by advancing an improperly narrow definition of mitigating evidence[23] as "what the law is." Trial Tr. vol. 8 at 31. He

ing under different constitutional standards. In this section, we address only Mr. Simpson's claim that the prosecutor's Moral Culpability Comments improperly limited the jury's consideration of his evidence in mitigation. We address Mr. Simpson's separate argument that the Moral Culpability Comments denied him a fundamentally fair sentencing trial in section III.D.4.a.

**22.** Numerous additional examples are provided in footnotes 23-27.

**23.** "Now, mitigating evidence.... Mitigating evidence, mitigating circumstances are those which in fairness and mercy and sympathy may extenuate or reduce the degree of moral culpability or blame. Does that make sense? Mitigating evidence presented is that which reduces the degree of moral culpability or blame for the murder." Trial Tr. vol. 8 at 23.

then systematically and repeatedly attacked Mr. Simpson's age,[24] mental state,[25] and family support,[26] both individually and collectively,[27] as failing to meet that definition. While a prosecutor may "comment[ ] on the weight that should be accorded to the mitigating factors," he cannot preclude the jury from "giving effect to the mitigating evidence" or "suggest that the jury was not permitted to consider the factors." *Fox v. Ward*, 200 F.3d 1286, 1299–1300 (10th Cir. 2000). The prosecutor's argument here attempts to do just that. Unlike the prosecutors in *Hanson* and *Boyde*, the prosecutor here made no comments encouraging the jury to consider all the factors in mitigation and, instead, ended his closing argument by again asserting that Mr. Simpson's mitigating evidence did not reduce his culpability or blame. And neither the trial court nor defense counsel corrected the impression created by the comments. The closest defense counsel came to refuting the prosecutor's attempts to limit what the jury could consider as mitigating evidence was counsel's statement: "Hypervigilance, fear, and the responses to those are part of the PTSD disorder, Post-Traumatic Stress Disorder. And it is something that you can consider." Trial Tr. vol. 8 at 45.

Mr. Simpson's case is closer to our recent decision in *Grant*. As in Mr. Simpson's case, an Oklahoma jury convicted Mr. Grant of murder and then sentenced him to death. *See Grant*, 886 F.3d at 887. During Mr. Grant's sentencing trial, the jury received the same instruction defining mitigating circumstances as "extenuat[ing] or reduc[ing] the degree of moral culpability or blame" as at issue here. *See id.* at 930 (internal quotation marks omitted). The defense presented evidence of Mr. Grant's "mental illness" and "disadvantaged and dysfunctional childhood" as mitigating evidence, *id.* at 918, and argued that it provided "an explanation" for the defendant's actions even though it did not "excuse what happened," *id.* at 936–37.

In rebuttal, the prosecutor emphasized the limiting language of the mitigating in-

**24.** "How in the world does his age reduce his degree of moral culpability or blame for this murder? It doesn't." Trial Tr. vol. 8 at 24.

**25.** Mr. Simpson challenges three of these statements:

[1] "Even if somehow you find that, okay, more likely than not he's got Post-Traumatic Stress, that's not an excuse. Judge Gray didn't tell you that's an excuse. Judge Gray didn't say that prevents the imposition of the death penalty. Not at all. It's just something he's trying to hide behind...." Trial Tr. vol. 8 at 29.

[2] "And now it's, 'Okay. Well, it's a mitigating factor that I've got PTSD.' You get back to the room and you say, 'How in the world does that reduce his degree of moral culpability or blame for this case?' It doesn't. It doesn't." Trial Tr. vol. 8 at 32.

[3] "Let's talk about the mitigators. Mitigating circumstances are those which in fairness, sympathy, and mercy may extenuate or reduce the degree of moral culpability or blame. Ask yourselves, does this Defendant have PTSD? If he does, does it reduce the degree of moral culpability or blame? I would submit to you, no way. Not even close. First of all, I would submit to you he doesn't have PTSD. But if he does, there's no way it reduces the degree of his moral culpability and blame." Trial Tr. vol. 8 at 61.

**26.** "How in the world does hiding behind his family support reduce his degree of moral culpability or blame?" Trial Tr. vol. 8 at 25.

**27.** Mr. Simpson identifies two such statements:

[1] "Now, they presented mitigating evidence that they've alleged in Instruction Number 14. And you've got to ask yourselves how in the world does this evidence reduce his degree of moral culpability or blame." Trial Tr. vol. 8 at 24.

[2] "Look at his mitigating evidence and ask yourselves, how in the world does that reduce his blame for this incident? It doesn't. It's not even close." Trial Tr. vol. 8 at 33.

struction by telling the jury, "the law tells you what [the definition of mitigating circumstances] means.... It says that mitigating circumstances are those which reduce the moral culpability or blame of the defendant. That those things, in order to be mitigating, must reduce his moral culpability or blame." *Id.* at 937 (emphasis omitted). After the trial court overruled an objection by the defense, the prosecutor in *Grant* pressed further, saying "the law says, not [what the prosecutor says], not what the defense attorneys say, but what the [c]ourt tells you and what the law says is that before something can be mitigating[,] it must reduce the moral culpability or blame of the defendant." *Id.* (emphasis omitted). The prosecutor then argued that Mr. Grant's mental illness did not reduce his moral culpability or blame and implied it therefore could not be mitigating because the jury "ha[d] to look at whether or not [Mr. Grant's mental illness] reduces his moral culpability or blame. That is what the law says that you must do." *See id.* (emphasis omitted).

Mr. Grant appealed to the OCCA, arguing "that the prosecutor focused on only one part of the definition of mitigating evidence, and thus unfairly limited the jurors' consideration of the evidence he had offered as mitigating." *Id.* at 931 (internal quotation marks omitted). The OCCA rejected this "dual challenge," holding that "the jurors in this case were properly instructed that anything could be considered mitigating." *Id.* (internal quotation marks omitted). In his § 2254 petition, Mr. Grant again argued that the jury was precluded from considering proper mitigation evidence by the language of the instruction and the prosecutor's "exploitation" of it. *Id.* at 935 (internal quotation marks omitted). Much like this case, the prosecutor in *Grant* presented the jury with a narrow definition of mitigating evidence, characterized that definition as "what the law says," and then argued the specific evidence presented by the defense failed to meet that definition. *See id.* at 937 (internal quotation marks omitted). We ultimately concluded that, even considering the combined impact of the prosecutor's comments and the instruction, Mr. Grant could not overcome the OCCA's decision under the deferential standard of review required by AEDPA. *Id.* at 939. We reach a similar conclusion here.

Despite the pervasive nature of the prosecutor's Moral Culpability Comments in Mr. Simpson's case, the OCCA concluded the jury's consideration of the evidence was "not unfairly limited" by "the prosecutor's closing argument concerning the mitigating evidence instruction, the mitigating evidence itself and all instructions concerning mitigating evidence." *Simpson I*, 230 P.3d at 904. Under AEDPA's deferential standard of review, we uphold the OCCA's decision. To be sure, Mr. Simpson's case evidences significant and troubling prosecutorial comments that, standing alone, might violate federal constitutional law. *See Eddings*, 455 U.S. at 110, 102 S.Ct. 869 ("[T]he Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ) ).

**[55, 56]** But the comments do not stand alone. The jury received constitutionally sound jury instructions—including one specifically identifying the categories of evidence offered in mitigation—and Mr. Simpson offered extensive evidence on each of those topics. *See* Section I.B.1.a.ii, *supra*. Under these circumstances, we can-

not say that no fairminded jurist would agree with the OCCA's conclusion that the jury was not precluded from considering the evidence offered by Mr. Simpson in mitigation. *See Richter*, 562 U.S. at 102, 131 S.Ct. 770. It follows then, that under AEDPA, the OCCA's decision was not unreasonable.[28]

### D. *Prosecutorial Misconduct*

Mr. Simpson claims that, during the closing arguments in his sentencing trial, the prosecutor made improper comments that rendered his trial so fundamentally unfair it deprived him of his due process rights. The OCCA denied this claim on direct appeal, holding that any improper comments did not render Mr. Simpson's sentencing trial fundamentally unfair when considered within the context of the entire trial. *Simpson I*, 230 P.3d at 899.

We begin our review of this claim by first setting forth the OCCA's decision. We next consider the proper standard of review, rejecting Mr. Simpson's claim that the OCCA's decision is so unclear as to be unentitled to AEDPA deference. Having concluded the claim is subject to AEDPA deference, we then provide a discussion of the general legal background governing claims of prosecutorial misconduct affecting the fundamental fairness of a proceeding. Ultimately, we conclude the OCCA's decision is not unreasonable under AEDPA's deferential standard, and we deny relief on this claim.

#### 1. OCCA Decision

Mr. Simpson raised his prosecutorial misconduct claim on direct appeal. Reviewing for plain error, the OCCA denied relief, stating:

> The alleged instances of [prosecutorial] misconduct include allegations that the prosecutor argued facts not in evidence, engaged in unnecessary ridicule of [Mr. Simpson], contrasted [Mr. Simpson's] situation with that of the victims', appealed to justice and sympathy for the victims and their families and improperly shifted the burden of proof. Many of these comments, including the single comment met with objection, fell within the broad parameters of effective advocacy and do not constitute error. We review those comments bordering upon impropriety within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. Given the magnitude of the State's evidence against [Mr. Simpson,] this Court finds that any inappropriate comments not ob-

**28.** The prosecution's misuse of the instruction here occurred despite defense counsel's motion for an order in limine prohibiting precisely this type of argument. Furthermore, at the time of the prosecutor's argument, both this court and the OCCA had previously held that such comments are improper and risk erroneously informing the jury that it cannot consider legally relevant mitigating evidence. *See Le v. Mullin*, 311 F.3d 1002, 1017–18 (10th Cir. 2002); *Harris v. State*, 164 P.3d 1103, 1113–14 (Okla. Crim. App. 2007). We find ourselves yet again chastising prosecutors for engaging in the kind of inappropriate behavior that undermines our constitutional protections and "create[s] grave risk of upsetting an otherwise unobjectionable verdict on appeal or on collateral review. It is time to stop." *See Bland v. Sirmons*, 459 F.3d 999, 1028 (10th Cir. 2006). We remind prosecutors they are representatives of the government and "servant[s] of the law." *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Their obligation is not to "win a case, but [to see] that justice shall be done." *Id.* "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one," *id.*, and there is no place in the law for those who would do otherwise.

jected to did not deprive [Mr. Simpson] of a fair trial or affect the jury's finding of guilt or assessment of punishment. There was no plain error here.

*Id.* (citations omitted).

**2. Standard of Review**

**[57]** Mr. Simpson claims this court should review his prosecutorial misconduct claims de novo for two reasons. First, he argues the OCCA did not adjudicate his federal claim on the merits. Second, Mr. Simpson contends that, even if the OCCA intended to resolve some of his prosecutorial misconduct claims on the merits, its decision is not entitled to AEDPA deference because it is unclear which claims the OCCA adjudicated on the merits and which it did not. We address each argument in turn.

a. *Adjudication on the merits*

**[58–60]** "[W]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) (quoting *Richter*, 562 U.S. at 92, 131 S.Ct. 770). Even when a state court "fails either to mention the federal basis for the claim or cite any state or federal law in support of its conclusion," we presume the court "reache[d] a decision on the merits." *Fairchild I*, 784 F.3d at 712 (internal quotation marks omitted); *see Johnson*, 568 U.S. at 301, 133 S.Ct. 1088 (reiterating that a rebuttable presumption applies even "[w]hen a state court rejects a federal claim without expressly addressing that claim"). This presumption "may be overcome when there is reason to think some other explanation for the state court's decision is more likely," *Richter*, 562 U.S. at 99–100, 131 S.Ct. 770, or when the claim was rejected due to "sheer inadvertence," *Johnson*, 568 U.S. at 303, 133 S.Ct. 1088. The petitioner bears the burden of showing a claim was not adjudicated on the merits in state court. *Fairchild I*, 784 F.3d at 711. Thus, the OCCA's decision is entitled to deference unless Mr. Simpson can show some reason to believe it is more likely the OCCA adjudicated his claim solely under state law principles. *See Richter*, 562 U.S. at 99–100, 131 S.Ct. 770.

Mr. Simpson attempts to make this showing by pointing to the OCCA's statement that it "will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair." *Simpson I*, 230 P.3d at 899. He contends this standard creates a different analytical standard than the federal rule. According to Mr. Simpson, the use of the word "flagrant" implies an additional requirement that is not present in federal review. This argument is without merit. Not only is there no additional definition or analysis conducted by Oklahoma courts to satisfy this alleged extra element, but we have already ruled that Oklahoma's standard is the same as the federal standard. *E.g.*, *Bland*, 459 F.3d at 1024; *Patton v. Mullin*, 425 F.3d 788, 811 (10th Cir. 2005).

For these reasons, we review Mr. Simpson's claim under AEDPA, and he is entitled to relief only if the OCCA's decision was an unreasonable application of clearly established federal law.[29]

**29.** Mr. Simpson raises two additional, alternative bases for de novo review of this claim. First, Mr. Simpson argues de novo review is required because the OCCA "said nothing about the misconduct's impingement on [his] constitutional rights to present mitigation."

b. *Scope of decision on the merits*

The OCCA noted that it had reviewed the alleged misconduct and found that "[m]any of these comments ... fell within the broad parameters of effective advocacy and do not constitute error." *Id.* But the court then stated it had reviewed "those comments bordering upon impropriety" for plain error and concluded that Mr. Simpson was not deprived of a fair trial. *Id.* Of significance for our purposes, the OCCA never specified which statements it considered appropriate advocacy and which it deemed "bordering upon impropriety." *Id.* As a result, Mr. Simpson contends the OCCA's decision is not entitled to AEDPA deference. We are not convinced.

In *Douglas*, 560 F.3d at 1178–79, we considered a similar issue. There, the state court's plain error opinion stated only that it had reviewed the defendant's multiple prosecutorial misconduct claims and found no plain error. As in this case, it was impossible in *Douglas* "to determine whether the court's review was or was not merits based" on a statement-by-statement review. *See id.* at 1178. We held that in such situations, "our cases require us to assume that the state's review is on the merits and thus afford it § 2254(d) deference." *Id.* Accordingly, we review Mr. Simpson's "assertion of improper prosecutorial comments independently under federal law, and ... afford § 2254(d) deference to the OCCA's ultimate conclusion that a new [sentencing] trial was not warranted on the basis of prosecutorial misconduct." *See id.* at 1178–79.

### 3. Legal Background

**[61–63]** A prosecutor's misconduct will warrant a new trial only where the improper statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) ). An assessment of the fundamental fairness of Mr. Simpson's sentencing trial "requires [an] examination of the entire proceedings, including the strength of the evidence against the petitioner" at both the guilt and sentencing stages of trial. *See id.* We also consider "[a]ny cautionary steps—such as instructions to the jury—offered ... to counteract improper remarks" and "[c]ounsel's failure to object to the comments." *Id.*

*See* Aplt. Br. at 92. We disagree. As discussed *supra*, the OCCA considered Mr. Simpson's claim that the improper statements unconstitutionally limited his presentation of mitigating evidence in conjunction with his challenge to the language of the instruction. *Simpson I*, 230 P.3d at 904 ("A review *of the prosecutor's closing argument concerning the mitigating evidence instruction*, the mitigating evidence itself and all instructions concerning mitigating evidence given in this case supports our conclusion that the jurors' consideration of the evidence offered in mitigation was not unfairly limited in this case." (emphasis added) ). The improper prosecutorial argument claim we address in this section—although including the Moral Culpability Comments—is not tied to Mr. Simpson's claim that the jury was precluded from considering his mitigation evidence, and the OCCA accordingly analyzed the claims separately. We have adopted the same approach here.

Second, Mr. Simpson argues the OCCA's analysis is " 'contrary to' clearly established federal law because it did not examine the entire proceedings, including the strength of the evidence against Mr. Simpson as to the critical sentencing phase." Aplt. Br. at 93 n.51. But a review of the OCCA's opinion refutes this assertion. *Simpson I*, 230 P.3d at 899 ("We review those comments bordering upon impropriety *within the context of the entire trial*, considering not only the propriety of the prosecutor's actions, but *also the strength of the evidence against the defendant and the corresponding arguments of defense counsel*." (emphasis added) ).

"Ultimately, this court considers the jury's ability to judge the evidence fairly in light of the prosecutor's conduct." *Id.*

**[64, 65]** Given the nature of prosecutorial misconduct claims, we evaluate the prejudicial impact of any improper comments individually and collectively. *See id.* at 1022 ("Our cases on prosecutorial misconduct make it clear that we must consider all the complained of conduct *in toto* because individual, harmless prosecutorial errors can add up to make a trial fundamentally unfair in the aggregate."). "In death-penalty cases, we review whether the improper comments as a whole so infected the trial with unfairness as to . . . render[ ] the sentencing fundamentally unfair in light of the heightened degree of reliability demanded in a capital case." *Bland*, 459 F.3d at 1029 (internal quotation marks omitted).

### 4. Merits

Mr. Simpson claims the prosecutor made improper comments during closing argument that fall into four broad categories: (1) Moral Culpability Comments; (2) denigration of mitigation evidence; (3) improper comparison between the victims and the defendant; and (4) improper calls for the death penalty as a civic responsibility. Mr. Simpson did not raise contemporaneous objections to these comments. As a result, the OCCA reviewed for plain error. *Simpson I*, 230 P.3d at 899. We begin our review by individually evaluating each category of the prosecutor's argument challenged by Mr. Simpson to determine whether any resultant misconduct rendered his trial fundamentally unfair. Then, we evaluate the collective prejudice of all misconduct. We do so under the deferential AEDPA standard because the OCCA rendered a decision on the merits of this claim.

#### a. *Moral Culpability Comments*

**[66]** Having already identified the Moral Culpability Comments challenged by Mr. Simpson, we turn to the propriety of such comments and whether any of them, individually or cumulatively, denied Mr. Simpson a fundamentally fair sentencing trial. Here, we are guided by our decision in *Le*. In *Le*, the prosecution made the following statements during closing arguments regarding the defendant's mitigating evidence:

> We have a whole list of things that have been submitted as mitigating circumstances. *The Court instructs you that mitigating circumstances are those which in fairness and mercy—get this—may be considered as extenuating or reducing the moral culpability or blame. It doesn't say anything about whether you've been a good guy in the past or anything like that.* Do these circumstances extenuate or reduce the degree of moral culpability o[r] responsibility for what he did? It's up to you to decide what are mitigating circumstances.
>
> The defense talks about Mr. Le being a hard worker, a machinist, invent[or], a good teacher, teaching English to Vietnamese people, good to family. Does that in any way officiate (sic) or mitigate or relieve or make any less horrible what he did to [the victims]? I submit to you they do not. He's good to his family. He's got five things on here about his family. Well, nearly everybody is good to their family. Does it make it all right to go out and murder? Does it make you less guilty when you go out and commit this kind of a crime?

311 F.3d at 1016–17 (internal quotation marks omitted).

Like in Mr. Simpson's case, the prosecutor construed the instruction as limited to evidence that reduces moral culpability or

blame and then specifically argued Mr. Le's evidence did not meet that criteria. In *Le,* we determined the prosecutor's remarks were irrelevant, improper, and "may have implied that the jury had the ability to ignore the legal requirement that it must consider mitigating evidence." *Id.* at 1018. But we also noted the jury received the correct instructions and defense counsel mitigated the impact of the prosecution's misstatement by reminding the jury that it must, by law, consider all mitigating evidence. *Id.* at 1018–19. We concluded that "in light of the overwhelming evidence of Mr. Le's guilt and evidence of the presence of aggravating factors, because both the jury instructions and the defense counsel's argument correctly stated the law, and because [the prosecutor] never explicitly and clearly misstated the law," the OCCA's determination that Mr. Le's trial was not rendered fundamentally unfair was reasonable. *Id.* at 1019.

Here, we are compelled to reach the same result. The Moral Culpability Comments were improper and pervasive. Nevertheless, the evidence of Mr. Simpson's guilt was overwhelming, the State presented powerful aggravating evidence, and we have already concluded the jury was not precluded from considering Mr. Simpson's mitigating evidence. As we now explain, when we view the misconduct in the context of the entire proceeding, we cannot conclude the OCCA acted unreasonably in holding that the prejudicial impact of these comments, individually or cumulatively, did not render the sentencing trial fundamentally unfair.

b. *Denigration of mitigation evidence*

**[67, 68]** Mr. Simpson asserts several instances where he claims the prosecutor improperly denigrated his mitigating evidence. Prosecutors are given a "wide latitude of argument," *Thornburg v. Mullin*, 422 F.3d 1113, 1131 (10th Cir. 2005), and may properly comment "on the weight that should be accorded to the mitigating factors," as well as "information about the defendant, his character, and the circumstances of his offense made known to the jury throughout the bifurcated trial," *Fox*, 200 F.3d at 1300 (internal quotation marks omitted). *See Bland*, 459 F.3d at 1026 ("As long as the jury is properly instructed on the use of mitigating evidence, the prosecution is free to comment on the weight the jury should accord to it."). But it is improper for a prosecutor to make an argument based purely on personal opinion. *See Le*, 311 F.3d at 1017–18. Keeping these principles in mind, we evaluate whether any of the statements challenged by Mr. Simpson, either individually or collectively, render his sentencing trial fundamentally unfair.

Mr. Simpson challenges five statements [30] in which he alleges the prosecutor shamed him for relying on his family support [31] and his mental condition [32] as miti-

**30.** In addition to the comments identified below, Mr. Simpson claims several of the prosecutor's comments about the defense giving the jury a "guilt trip" denied him a fair trial. He did not challenge these statements in the OCCA or the district court, and we will not consider them in the first instance. *See Parker v. Scott*, 394 F.3d 1302, 1307 (10th Cir. 2005).

**31.** "They fed him, they clothed him, they provided love. They hugged him, they sent him to school. Those are nice people. Shame on him for hiding behind his family. They don't want to be here.... Shame on him for hiding behind his family support. Those are good people.

... How in the world does hiding behind his family support reduce his degree of moral culpability or blame?" Trial Tr. vol. 8 at 25.

**32.** "Now [Mr. Simpson's voluntary intoxication defense] didn't work. So now we're coming in yesterday and, okay, you don't buy that, now we go to door number two, we've got Post-Traumatic Stress Disorder. You

gating factors. For example, the prosecutor called Mr. Simpson's PTSD diagnosis an "excuse" [33] and an "insult" [34] to "legitimate people with PTSD." [35] It is appropriate for the prosecutor to argue based on the record facts that Mr. Simpson did not actually suffer from PTSD and was instead using it as an excuse to avoid responsibility. But characterizing Mr. Simpson's diagnosis as an "insult to all legitimate people with PTSD" and "legitimate veterans" strays into inappropriate personal opinion. Similarly, the prosecutor's comments suggesting the defense should be ashamed for relying on Mr. Simpson's family support and mental health improperly denigrated Mr. Simpson's mitigating evidence. *See Cuesta-Rodriguez v. Royal*, No. CIV-11-1142-M, 2016 WL 5485117, at *10, 13 (W.D. Okla. Sept. 29, 2016) (finding that the prosecutor "may have inched close to improper argument" by shaming the defendant for using his family as a mitigating factor).

Although several of these statements were improper, none of them, separately or cumulatively, rises to the level necessary to have deprived Mr. Simpson of a fundamentally fair sentencing proceeding. Similar improper prosecutorial statements have rarely been held, standing alone, to render a trial fundamentally unfair. This is especially so in a case, such as this one, where the State has presented significant evidence in aggravation. *See generally Le*, 311 F.3d at 1021.

c. *Improper comparison with the victims*

**[69, 70]** Mr. Simpson next objects to the prosecutor's statement: "Of course, [Mr. Simpson's family would] go to the penitentiary to see him. Of course they would. You know, they're good people. These victims can't. They can go to the cemetery." Trial Tr. vol. 8 at 25. We agree that "it is prosecutorial misconduct for the prosecution to compare the plight of the victim with the life of the defendant in prison." *Bland*, 459 F.3d at 1028. The statement here was an improper comment designed to stir the jurors' emotions and elicit sympathy for the victims. *See id.* at 1027 (holding improper the prosecutor's statement "[m]aybe the Defendant will be in prison ... [b]ut one thing is for sure, [the victim] won't be here and his family won't be able to be with him"). Nonetheless, considering the extensive aggravating evidence presented to the jury, we cannot conclude that this single reference to the plight of the victims, as compared to Mr. Simpson, rendered the sentencing trial fundamentally unfair.

d. *Justice demands a death sentence*

**[71, 72]** We have also held that "it is improper for a prosecutor to suggest that a jury has a civic duty to convict." *Bland*, 459 F.3d at 1027 (internal quotation marks omitted). Although an appeal to justice and civic duty is not always improper, *see Han-*

know, shame on them. Again, that's ducking responsibility.... You know, it's an insult to all legitimate people with PTSD." Trial Tr. vol. 8 at 28.

**33.** "Even if somehow you find that, okay, more likely than not he's got Post-Traumatic Stress, that's not an excuse. Judge Gray didn't tell you that's an excuse.... It's just something he's trying to hide behind...." Trial Tr. vol. 8 at 29.

**34.** "Some guy [Dr. Massad] comes in here and tells you, well, more likely than not he's got Post-Traumatic Stress Disorder. You know what? That is an insult to people that really do." Trial Tr. vol. 8 at 26.

**35.** "When I say shame on them, lots of people have Post-Traumatic Stress Disorder, that is an insult to legitimate veterans." Trial Tr. vol. 8 at 27.

*son*, 797 F.3d at 839 (finding it proper to tell the jury it will be doing justice by deciding *which* punishment is appropriate rather than asserting *death* is appropriate), urging the jury to "impose a death sentence on the grounds of civic duty" is inappropriate, *Le*, 311 F.3d at 1022 (finding it improper to tell the jury they "could only do justice in this case by bringing in a verdict of death" (internal quotation marks omitted) ). Here, the prosecutor's comments mirror the language in *Le* and cross the bounds of permissible argument:

> Justice in this case demands you to do the most difficult thing you have to do in *fulfilling your civic duty as a juror. Justice for Glen Palmer, for his family, justice for Anthony Jones and his family, demands that you render a verdict of the death penalty in this case. Justice demands it.* And it will be difficult but, ladies and gentlemen, I'm going to ask you to let your verdict speak to this Defendant. Let your verdict speak to Glen Palmer's family. Let your verdict speak to Anthony Jones'[s] family.
>
> Let your verdict speak to the carnage that this Defendant has left behind and his commitment to be a criminal and a cold-blooded killer. And let your verdict speak for the community that in this kind of a case for this Defendant *there is one just verdict and only one and that is to recommend a sentence of death.*

Trial Tr. vol. 8 at 63–64 (emphasis added).

Despite the impropriety of the prosecutor's argument, we are not convinced this comment, on its own, deprived Mr. Simpson of a fundamentally fair sentencing proceeding in view of the "overwhelming evidence of Mr. [Simpson's] guilt, evidence of aggravating factors supporting the death sentence, [and] the general content of the instructions to the jury." *See Le*, 311 F.3d at 1022.

e. *Totality of prosecutorial misconduct*

**[73, 74]** Although we have identified a substantial number of improper prosecutorial statements, none of them, standing alone, was sufficiently prejudicial to deny Mr. Simpson his due process rights. "[B]ecause individual, harmless prosecutorial errors can add up to make a trial fundamentally unfair in the aggregate," *id.*, we now consider the cumulative effect of the improper statements.

Given the extensive and recurring misconduct committed by the prosecutor, it is appropriate to question whether the jury was able to judge the evidence fairly. But the OCCA answered that question affirmatively and, under AEDPA, we are bound by the OCCA's "ruling unless it constitutes an unreasonable application of the cumulative-error doctrine." *See Thornburg*, 422 F.3d at 1137. The petitioner's burden under this standard is steep, and we cannot say that no reasonable jurist would agree with the OCCA that the prosecutor's misconduct did not prevent the jury from fairly considering the evidence during the sentencing phase of trial. The evidence of Mr. Simpson's guilt was overwhelming, the State presented significant evidence in support of the aggravating factors, and the jury was properly instructed as to its ability to consider mitigating evidence and to impose a sentence less than death. Therefore, the OCCA's determination that the prosecutor's misconduct did not deny Mr. Simpson a fundamentally fair sentencing trial is reasonable and must be upheld under AEDPA.

### E. *Especially Heinous, Atrocious, or Cruel Aggravator*

Mr. Simpson next claims there is insufficient evidence to support the jury's finding that the murder of Glen Palmer was heinous, atrocious, or cruel and that the HAC Aggravator is unconstitutionally over-

broad. In addressing this claim, we begin by discussing the general legal background governing challenges to capital aggravators. Next, we provide additional factual and procedural background, including the resolution of Mr. Simpson's claim in the state court proceedings and in the district court. Although Mr. Simpson raised both a sufficiency-of-the-evidence claim under the Fourteenth Amendment and a vagueness claim under the Eighth Amendment in the state court,[36] we determine that he abandoned his Eighth Amendment argument in the district court. We therefore consider only his Fourteenth Amendment sufficiency-of-the-evidence claim in this opinion. In doing so, we first provide a discussion of the relevant law and then conclude the OCCA's decision holding that the evidence is sufficient to support the HAC aggravator as to Mr. Palmer is not unreasonable. As a result, we deny relief on this claim.

### 1. Legal Background

**[75–77]** As we recently explained in *Wood v. Carpenter*, a defendant can challenge the jury's finding of a capital aggravator in two ways:

> First, a defendant can bring a sufficiency of the evidence claim under *Jackson v. Virginia*, 443 U.S. 307, 316 [99 S.Ct. 2781, 61 L.Ed.2d 560] (1979). It violates the Fourteenth Amendment's guarantee of due process if a jury sentences a defendant to death based on an aggravator, even though there was insufficient evidence for any rational juror to have concluded the aggravator was met. Because state law defines aggravators, this question turns on state law.
>
> Second, petitioners can challenge an aggravating circumstance as unconstitutionally vague. It violates the Eighth and Fourteenth Amendments for death sentences to be arbitrarily imposed. As a consequence, if an aggravating circumstance is so vague it could apply to any and every murder, then sentencing a defendant to death because that aggravator was met violates the Constitution.

907 F.3d 1279, 1305 (10th Cir. 2018) (citations omitted).

The distinction between these two methods of challenging a capital aggravator is important here because although Mr. Simpson initially pursued both avenues, he later abandoned his Eighth Amendment claim. We now discuss the evolution of Mr. Simpson's claims regarding the HAC Aggravator.

### 2. Factual and Procedural Background

#### a. *Trial*

During the sentencing stage of Mr. Simpson's trial, the jury was instructed that, to impose the HAC Aggravator, it must find the State had proven beyond a reasonable doubt that the murder of Mr. Palmer "was preceded by either torture of the victim or serious physical abuse of the victim." Trial R. vol. 3 at 600. The trial court further instructed that torture is defined as "the infliction of either great physical anguish or extreme mental cruelty." *Id.* The instruction also stated the jury could not find "serious physical abuse" or "great physical anguish" unless "the victim experienced conscious physical suffering prior to his death." *Id.*

In his closing statement, the prosecutor told the jury the State "must prove ... that the murder in this case of Glen Palmer was either preceded by torture or seri-

**36.** As we discuss below, a vagueness claim also invokes protections afforded by the Fourteenth Amendment. For ease of reference, however, we refer to Mr. Simpson's challenge to the sufficiency of the evidence as his Fourteenth Amendment claim and his vagueness challenge as his Eighth Amendment claim.

ous physical abuse." Trial Tr. vol. 8 at 10. The prosecutor then conceded, "[t]here's no question it's not torture," but he asserted that it did constitute "serious physical abuse." *Id.* The jury found the HAC Aggravator both as to the murder of Mr. Palmer and, although it was never argued, as to the murder of Mr. Jones.

b. *OCCA and district court decisions*

On direct appeal, Mr. Simpson claimed there was insufficient evidence to support the HAC Aggravator under the Fourteenth Amendment and that to apply it to the facts of this case would broaden the aggravator beyond the constitutional limits proscribed by the Supreme Court and the Eighth Amendment. The OCCA did not address Mr. Simpson's Eighth Amendment claim, but held there was sufficient evidence to support the HAC Aggravator for Mr. Palmer:

> With regard to the murder of Glen Palmer, the evidence showed that Palmer was shot four times. He suffered a grazing gunshot wound to the right shoulder, two superficial gunshot wounds to the left side of his back, and an ultimately fatal gunshot wound to his chest. Although he was initially conscious after being shot, his breathing became labored and he made gurgling sounds as his chest filled with blood before he died. There was testimony that immediately after he had been shot, Palmer was able to speak, was aware that he had been shot and was fearful that the shooters would return. Reviewing the evidence in the light most favorable to the State, we find that the evidence supports a finding that Palmer's death was preceded by physical suffering and mental cruelty.

*Simpson I*, 230 P.3d at 902–03. The OCCA reached a contrary conclusion as to Mr. Jones because "he likely died within seconds of being shot." *Id.* at 903. It therefore struck the aggravator as to the murder of Mr. Jones, but determined that no relief was necessary because the State had not presented any evidence solely in support of the HAC Aggravator as to Mr. Jones, and thus "the jury's weighing process of mitigating evidence against aggravating circumstances was not skewed." *Id.* Mr. Simpson did not take any action to obtain a ruling from the OCCA on his Eighth Amendment claim. *See, e.g.*, Rule of the Court of Criminal Appeals 3.14(B)(1) (permitting petition for rehearing if "[s]ome question decisive of the case and duly submitted by the attorney of record has been overlooked by the court").

In the district court, Mr. Simpson renewed his claim that there was insufficient evidence to support the HAC Aggravator as to Mr. Palmer, but he did not argue the HAC Aggravator was unconstitutionally vague, either on its face or as applied to him. The district court held the OCCA's decision was not unreasonable "in light of the double deference afforded it" when reviewing sufficiency of the evidence claims under AEDPA. *Simpson IV*, 2016 WL 3029966, at *25. Mr. Simpson challenges that decision in his appeal to this court.

**3. Preservation**

**[78]** The State argues we should review only Mr. Simpson's Fourteenth Amendment sufficiency-of-the-evidence challenge because Mr. Simpson did not preserve the Eighth Amendment vagueness claim by failing to raise it in the district court and by inadequately briefing it in his opening brief to this court. Mr. Simpson asserts that he has "always argued the Fourteenth Amendment insufficiency-of-the-evidence claim cannot be assessed in a vacuum, and that [the] OCCA must assess the evidence under a constitu-

tionally narrow standard." Aplt. Reply Br. at 33. In support, he points to a single footnote in his opening brief to the district court which merely requested supplemental briefing on the HAC Aggravator because the page constraints on his brief did "not permit a complete analysis of ... the unreasonable failure of the OCCA to abide by the limiting requirements of the Supreme Court in *Maynard v. Cartwright*, 486 U.S. 356 [108 S.Ct. 1853, 100 L.Ed.2d 372] (1988)[,] and the Tenth Circuit in *Thomas v. Gibson*, 218 F.3d 1213, 1227 (10th Cir. 2000)." App'x at 122. But Mr. Simpson provided no analysis of those decisions.

By not raising an Eighth Amendment challenge to the HAC Aggravator in the district court and inadequately briefing it here, Mr. Simpson has failed to preserve that claim.[37] *See Stouffer v. Trammell*, 738 F.3d 1205, 1222 n.13 (10th Cir. 2013) ("We do not generally consider issues that were not raised before the district court as part of the habeas petition."); *Heard v. Addison*, 728 F.3d 1170, 1175 (10th Cir. 2013) ("We do not reach that issue in this case, however, because ... we conclude that [Mr.] Heard never raised such a claim, in his petition or otherwise, before the federal district court."). As a result, we consider only whether the OCCA's sufficiency-of-the-evidence decision was unreasonable. Because the OCCA decided that issue on the merits, we afford it deference under AEDPA. *See* 28 U.S.C. § 2254(d).

**4. Sufficiency of the Evidence**

a. *Additional legal background*

**[79–82]** We review the sufficiency of the evidence "under the 'rational fact-finder' standard announced in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)," which requires an appellate court to "determine, after reviewing the evidence presented at trial in the light most favorable to the government, whether any rational trier of fact could have found the aggravating circumstance existed beyond a reasonable doubt." *Boltz v. Mullin*, 415 F.3d 1215, 1232 (10th Cir. 2005). "To assess the sufficiency of the evidence, we first determine the elements of the offense and then examine whether the evidence suffices to establish each element." *Anderson-Bey v. Zavaras*, 641 F.3d 445, 448 (10th Cir. 2011). When reviewing the sufficiency of the evidence in capital cases, "aggravating factors operate as 'the functional equivalent of an element of a greater offense.' " *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ). The substantive elements of an aggravating factor necessary to impose the death penalty are a matter of state substantive law. *Hamilton v. Mullin*, 436 F.3d 1181, 1194 (10th Cir. 2006).

Under Oklahoma law, to establish the HAC Aggravator, the State must prove beyond a reasonable doubt "that the murder of the victim was preceded by torture

**37.** Mr. Simpson argues that his Eighth Amendment claim is preserved under this court's decision in *Pavatt v. Royal,* 859 F.3d 920 (10th Cir.), *opinion amended and superseded on denial of reh'g,* 894 F.3d 1115 (10th Cir. 2017), *reh'g en banc granted sub nom Pavatt v. Carpenter,* 904 F.3d 1195 (10th Cir. 2018). We disagree. The *Pavatt* decision on which Mr. Simpson relies has been amended and superseded. The presently-controlling version of *Pavatt* clearly indicates that Mr. Pavatt raised both a Fourteenth Amendment sufficiency-of the-evidence claim and an Eighth Amendment vagueness challenge to the HAC Aggravator as defined by state law. 894 F.3d at 1125. Mr. Simpson challenged only the sufficiency of the evidence in his habeas petition and he has therefore not preserved any Eighth Amendment claim.

or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty." *Warner v. State*, 144 P.3d 838, 880 (Okla. Crim. App. 2006), *overruled on other grounds by Taylor v. State*, 419 P.3d 265 (Okla. Crim. App. 2018). "Serious physical abuse requires evidence of conscious physical suffering." *Id.* While the extent of the mental anguish or physical abuse a victim suffers "is not susceptible to mathematical precision," *Walton v. Arizona*, 497 U.S. 639, 655, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring*, 536 U.S. at 588–89, 122 S.Ct. 2428, it must be more than "the brief duration necessarily accompanying virtually all murders," *Medlock v. Ward*, 200 F.3d 1314, 1324 (2000) (Lucero, J., concurring).

b. *Merits*

**[83, 84]** As discussed, because the OCCA decided Mr. Simpson's sufficiency-of-the-evidence claim on direct appeal, AEDPA constrains our review. Review of sufficiency of the evidence under AEDPA "adds an additional degree of deference, and the question becomes whether the OCCA's conclusion that the evidence was sufficient constituted an unreasonable application of the *Jackson* standard." *Hooks II*, 689 F.3d at 1166 (internal quotation marks omitted). Mr. Simpson asserts the OCCA's decision was unreasonable because it "did not assess the level of [Mr. Palmer's] suffering, but rather assumed . . . that because [Mr.] Palmer died more slowly than [Mr.] Jones he was in 'great physical anguish.' " Aplt. Br. at 97. The State counters that the question is not the length or extent of Mr. Palmer's suffering; the question is whether there was sufficient evidence to support the jury's conclusion that Mr. Palmer experienced conscious physical suffering as Oklahoma defines it. Reviewing the evidence in the light most favorable to the government, the State contends the OCCA was reasonable in concluding such evidence exists. We agree.

Here, the State relied on the testimony of Dr. Jeffrey Grofton, the coroner who performed Mr. Palmer's autopsy, and London Johnson, the surviving victim, to establish that Mr. Palmer experienced conscious physical suffering. Mr. Palmer was shot four times, but was conscious long enough to perceive that he had been shot and to fear further injury. Mr. Johnson, who was in the car with Mr. Palmer and Mr. Jones when it was suddenly fired upon, testified that when he opened the car door, Mr. Palmer told him to "[s]hut that door. They're going to come back." Trial Tr. vol. 3 at 42. Mr. Palmer then revealed he had been shot and was unable to move. Mr. Johnson also testified that Mr. Palmer's breathing "sounded like he was—like he was trying to breathe, but he had blood in his throat." Trial Tr. vol. 3 at 45. Dr. Grofton testified that Mr. Palmer possibly experienced difficulty breathing because "the left side of [his] chest was filling up with blood which would essentially collapse the left lung making it exceedingly difficult to breathe." Trial Tr. vol. 5 at 162–63. Mr. Palmer died before emergency assistance arrived.

Although Mr. Palmer did not expressly state he was in pain, and neither Dr. Grofton nor Mr. Johnson testified as to how long Mr. Palmer was conscious or whether he appeared to be in pain, the jury could have reasonably inferred that Mr. Palmer experienced conscious physical suffering based on the evidence about his wounds. Mr. Palmer was conscious and able to speak for some period of time before he died. He was aware of his injuries and struggled to breathe as his lungs filled with blood. Viewing the evidence in the light most favorable to the State and applying AEDPA's deferential standard of

review, we cannot conclude the OCCA acted unreasonably in deciding there was sufficient evidence to support the jury's finding that Mr. Palmer experienced conscious physical suffering as defined by Oklahoma law. We therefore deny Mr. Simpson relief on this claim.

### F. *Ineffective Assistance of Counsel*

Mr. Simpson alleges his trial counsel was ineffective during both the guilt and sentencing stages of the trial. With respect to the guilt stage, Mr. Simpson contends trial counsel was ineffective for failing to request a second-degree murder instruction. As to the sentencing stage of trial, Mr. Simpson argues trial counsel preformed ineffectively by failing to: (1) investigate, prepare, and present lay witnesses, (2) object to improper prosecutorial arguments, (3) object to the mitigating evidence jury instruction, and (4) object to the HAC jury instruction.

In reviewing this claim, we begin with a general discussion of the relevant legal background. We then consider each allegation of ineffective performance individually. In doing so, we provide any further discussion of law pertinent to the particular allegation of ineffectiveness. We then review the OCCA's decision to determine whether it rejected that claim on the merits. Finally, we address whether the OCCA's merits decision was reasonable. In each instance, we conclude the OCCA's merits decision was not contrary to or an unreasonable application of Supreme Court law and was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). We therefore deny relief on Mr. Simpson's IAC claim.

#### 1. Legal Background

**[85–88]** Claims of ineffective assistance of counsel are evaluated under the two-prong approach established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish an ineffective assistance of counsel claim, Mr. Simpson "must show both that his counsel's performance 'fell below an objective standard of reasonableness' *and* that 'the deficient performance prejudiced the defense.' " *See Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011) (quoting *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052). When evaluating whether counsel's performance was deficient, "[t]he question is whether [the] representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105, 131 S.Ct. 770 (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052). Judicial review under this standard is "highly deferential," *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, and "we strongly presume that an attorney acted in an objectively reasonable manner and that an attorney's challenged conduct *might* have been part of a sound trial strategy," *Hanson*, 797 F.3d at 826 (internal quotation marks omitted). Furthermore, "[w]e must 'judge the reasonableness of counsel's challenged conduct' on the specific facts of the case 'viewed as of the time of counsel's conduct.' " *Id.* at 826 (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052).

**[89]** Even if counsel performed in a constitutionally deficient manner, Mr. Simpson is not entitled to relief unless he can prove actual prejudice. *See Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. To demonstrate prejudice, Mr. Simpson must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* at 694, 104 S.Ct. 2052. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Id.*

**[90, 91]** Review under both AEDPA and *Strickland* is "highly deferential, and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105, 131 S.Ct. 770 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009) ). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

**2. Failure to Investigate, Prepare, and Present Lay Witnesses**

a. *Additional legal background*

**[92–94]** Under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. 2052. "When a petitioner alleges ineffective assistance of counsel stemming from a failure to investigate mitigating evidence at a capital-sentencing proceeding, we evaluate the totality of the evidence—both that adduced at trial, and the evidence adduced in habeas proceedings." *Williams v. Trammell*, 782 F.3d 1184, 1215 (10th Cir. 2015) (internal quotation marks omitted). In doing so, we "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Hooks II*, 689 F.3d at 1202 (internal quotation marks omitted), considering "the strength of the State's case and the number of aggravating factors the jury found to exist, as well as the mitigating evidence the defense did offer and any additional mitigating evidence it could have offered," *Knighton v. Mullin*, 293 F.3d 1165, 1178 (10th Cir. 2002). And, when conducting our reweighing analysis, we "must consider not just the mitigation evidence that [Mr. Simpson] claims was wrongfully omitted, but also what the prosecution's response to that evidence would have been." *Wilson v. Trammell*, 706 F.3d 1286, 1306 (10th Cir. 2013). Prejudice is established if a defendant can show "a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Bland*, 459 F.3d at 1030 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052).

b. *OCCA decision*

Mr. Simpson argued that trial counsel rendered constitutionally ineffective assistance relative to the investigation and presentation of mitigating evidence at the sentencing stage. On direct appeal, the OCCA stated:

> Next, [Mr. Simpson] complains that defense counsel was ineffective for failing to adequately investigate and present additional evidence of innocence. He first specifically complains that counsel was ineffective for failing to investigate and present additional mitigating evidence. While [Mr. Simpson] has shown this Court that additional mitigation witnesses could have been called and others that were called could have given additional testimony, he has not shown a reasonable probability that but for counsel's alleged unprofessional error in not presenting this evidence, the result of the proceeding would have been different.

*Simpson I,* 230 P.3d at 904–05. Thus, the OCCA assumed deficient performance but concluded Mr. Simpson failed to satisfy the prejudice prong of *Strickland*. We take a similar path in resolving this claim, assuming deficient performance and giving AEDPA deference to the OCCA's determination on the prejudice prong.

c. *Merits*

**[95]** Mr. Simpson faults his trial counsel for not presenting a more comprehensive picture of his troubled upbringing. On direct appeal, evidence surfaced that Mr. Simpson's mother became addicted to crack cocaine when he was a young child and that drug use and violence were common in the home. In the midst of this instability, Mr. Simpson became sexually active at fourteen and had fathered children with two separate women by the time he was sixteen years old. He also began skipping school, using and selling drugs, committing burglaries, and carrying guns as early as age fourteen. The evidence on direct appeal further indicated that Mr. Simpson reported being sexually assaulted as a teenager. Mr. Simpson faults his trial counsel for failing to develop the story of his traumatic childhood.

To properly analyze Mr. Simpson's claim, we first look at the evidence presented in mitigation during sentencing. Recall that the defense relied heavily on Dr. Massad's testimony and the testimony of Mr. Simpson's family about the paranoia Mr. Simpson exhibited after he was shot. From this evidence, the jury was informed of the violence surrounding Mr. Simpson during his teenage years; for what evidence could be more indicative of a violence-filled upbringing than Mr. Simpson being comatose for two months as a result of sustaining five gunshot wounds in a drive-by shooting. And the shooting of Mr. Simpson occurred in retaliation for him deciding not to kill a witness slated to testify against one of his friends—a friend who had been involved in a violent crime. Thus, one of the thrusts of the evidence Mr. Simpson proffers in support of this ineffective assistance of counsel claim was, to some degree, already before the jury such that its theoretical mitigating value is minimized. *Cf. Grant*, 886 F.3d at 924 (upholding OCCA's conclusion of no prejudice for sentencing phase ineffective assistance, by reasoning, *inter alia*, that "omitted evidence of organic brain damage ... would have merely supplemented" other mitigation evidence already before the jury); *Williams*, 782 F.3d at 1216 (finding lack of prejudice where additional evidence was cumulative of evidence already before the jury).

The mitigating value of the unpresented evidence is further decreased when considered in light of the prosecution's potential response. If the State had an opportunity to respond to Mr. Simpson's additional mitigating evidence, it is not apparent the jury would have viewed the evidence about Mr. Simpson's upbringing, on the whole, as mitigating. Rather, a reasonable jurist could conclude the evidence would have actually increased the odds of a verdict of death as, by Mr. Simpson's own admission, he, before turning sixteen, had already (1) dropped out of school; (2) impregnated two different women; (3) sold drugs; (4) committed burglaries; and (5) routinely carried a firearm. New and additional evidence from the State on these matters would have reduced any sympathy the jury had for Mr. Simpson because the evidence would not only have painted Mr. Simpson as living a lawless life contrary to the norms and expectations of society, but also would have furthered the State's argument relative to the continuing threat aggravator.

Apart from the potential response by the state to the additional mitigating evidence, we cannot conclude the OCCA reached an unreasonable conclusion on the prejudice prong of *Strickland* when all the mitigating evidence is considered in light of the aggravating evidence. The state presented strong evidence in support of the death sentence, and the additional mitigation does little, if anything, to undermine

the aggravating factors found by the jury. A key aspect of Mr. Simpson's offense and a key aspect of his history and characteristics highlight the reasonableness of the OCCA's conclusion. First, in committing his offense, Mr. Simpson sprayed fifteen to twenty bullets at the moving car driven by Mr. Palmer while the vehicle was passing through a residential area. Thus, not only did Mr. Simpson's conduct result in the deaths and serious wounding of the three individuals in the vehicle, it also endangered the lives of other uninvolved persons. Second, and of significant persuasive value, the State presented compelling testimony from Mr. Pham, whom Mr. Simpson had shot in the back of the head, execution-style, after forcing his way into Mr. Pham's house and stealing Mr. Pham's wallet.

In light of the strong evidence offered by the State, as well as the State's likely response to the additional mitigation evidence Mr. Simpson's trial counsel did not present, we conclude Mr. Simpson has not demonstrated the OCCA unreasonably applied *Strickland* and its progeny when it concluded Mr. Simpson was not prejudiced by any alleged deficient performance by counsel. We therefore deny relief on this claim.[38]

### 3. Failure to Preserve the Record

Mr. Simpson next raises ineffective assistance of counsel claims based on several instances where trial counsel allegedly failed to preserve issues for appeal. We address Mr. Simpson's claim that counsel was ineffective for failing to request a second-degree murder instruction, before we turn to the alleged failures we have already rejected as stand-alone claims for habeas relief.

#### a. *Failure to request a jury instruction on second-degree murder*

Mr. Simpson first asserts that trial counsel was constitutionally ineffective for failing to request an instruction on second-degree depraved mind murder. For the reasons we now explain, we deny relief on this claim.

##### i. Additional legal background

**[96–100]** For counsel's failure to request a lesser-included offense instruction to constitute deficient performance, Mr. Simpson must have been entitled to such an instruction based on the evidence presented at trial. *See Bland*, 459 F.3d at 1031 ("Counsel therefore could not have been ineffective in failing to request an instruction to which [the defendant] was not entitled based on the evidence . . . ."). "[T]he availability of a lesser included offense instruction in a state criminal trial is a matter of state law." *Darks v. Mullin*, 327 F.3d 1001, 1008 (10th Cir. 2003). Under Oklahoma law, "[a] trial court must instruct the jury on lesser-included offenses when the lesser-included offense or the defendant's theory of the case is supported by any evidence in the record." *Hooker v. State*, 887 P.2d 1351, 1361 (Okla. Crim.

**38.** Mr. Simpson also appeals the district court's denial of his motion for an evidentiary hearing on this claim, which we review for an abuse of discretion. *Fairchild II*, 579 F.3d at 1147. Mr. Simpson cannot satisfy § 2254(e)(2) or the *pre*-AEDPA requirements where § 2254(e)(2) does not apply. *See supra* Section III.B.4. As discussed above, even accepting Mr. Simpson's factual allegations, he cannot show that counsel's mitigation strategy fell below an acceptable level of performance as required to establish constitutional error for purposes of § 2254(e)(2)(B) or an entitlement to relief for purposes of the pre-AEDPA standard where § 2254(e)(2) does not apply because the petitioner tried to diligently develop the factual basis in state court. Therefore, the district court properly denied his request for an evidentiary hearing.

App. 1994). In a homicide case, "the trial court must instruct the jury on every degree of homicide where the evidence would permit the jury rationally to find the accused guilty of the lesser offense and acquit him of the greater." *Malone v. State*, 876 P.2d 707, 711 (Okla. Crim. App. 1994). A jury instruction on second-degree depraved mind murder is warranted only when the evidence "reasonably support[s] the conclusion that the defendant committed an act so imminently dangerous to another person or persons as to evince a state of mind in disregard for human life, *but without the intent of taking the life of any particular individual*." *Jackson v. State*, 146 P.3d 1149, 1160 (Okla. Crim. App. 2006) (emphasis added).

ii. OCCA decision

In Mr. Simpson's case, the OCCA analyzed two claims related to the Second Degree Depraved Mind Murder instruction. The OCCA first determined Mr. Simpson was not entitled to the instruction on the merits:

> [Mr. Simpson] argues that an instruction on th[e] lesser offense [of Second Degree Depraved Mind Murder] was warranted because at most, the evidence showed that he simply fired into the car in which [Mr.] Palmer, [Mr.] Jones and [Mr.] Johnson were riding. He asserts ... there was no evidence that he intended to kill his victims.... We find otherwise. In light of the testimony that [Mr. Simpson] threatened to "chop" up [Mr.] Palmer and his companions, instructed [Mr.] Dalton to follow [Mr.] Palmer's car and then shot as many as twenty rounds at the moving vehicle with an assault rifle, we find that the evidence did not reasonably support the conclusion that [Mr. Simpson] did not intend to kill the men in the Chevy. An instruction on Second Degree Depraved Mind Murder was not warranted by the evidence....

*Simpson I*, 230 P.3d at 897.

The OCCA then considered whether Mr. Simpson's counsel was ineffective for failing to request the second-degree murder instruction. The court stated, in relevant part:

> [Mr. Simpson] first argues that trial counsel was ineffective for failing to object to ... the submission of improper jury instructions and verdict forms. These alleged failings concern issues raised and addressed above.... We found in Proposition III that an instruction on Second Degree Depraved Mind Murder was not warranted by the evidence.... Most of these alleged failings do not reflect a deficient performance by defense counsel and [Mr. Simpson] has not shown a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

*Id.* at 904. Despite this language, Mr. Simpson contends "the OCCA did not specifically preclude deficient performance" for a failure to request the second-degree murder instruction. Aplt. Br. at 45.

Mr. Simpson relies on the OCCA's statement that, "[m]ost of these alleged failings do not reflect a deficient performance by defense counsel." *Simpson I*, 230 P.3d at 904. Because the OCCA's use of "most" indicates that some of counsel's performance was deficient, Mr. Simpson claims the failure to request an instruction on second-degree murder falls within that group. We are not convinced.

The OCCA's analysis addressed eight alleged failings of counsel, some of which (the admission of hearsay evidence and the failure to object to the HAC Aggravator for Mr. Jones) the court specifically found were error. *Id.* Based on the language quoted above, however, there can be no

serious argument that the OCCA found, or even failed to decide whether, counsel was deficient for failing to request an instruction on second-degree murder. *See United States v. Barrett*, 797 F.3d 1207, 1220 (10th Cir. 2015); *Bland v. State*, 4 P.3d 702, 731 (Okla. Crim. App. 2000). The OCCA expressly held "the evidence did not reasonably support the conclusion that [Mr. Simpson] did not intend to kill" the victims. *Simpson I*, 230 P.3d at 897. Thus, the OCCA reasoned a second-degree murder instruction "was not warranted by the evidence" and, as we now explain, it follows that counsel did not render ineffective assistance under *Strickland*. We therefore interpret the OCCA's decision as an adjudication on the merits and afford it AEDPA deference.

iii. Merits

**[101, 102]** Mr. Simpson argues the jury should have been instructed on second-degree depraved mind murder because there was "ample evidence putting the issue of specific intent in question." [39] Aplt. Br. at 45. Again, we disagree.

As the OCCA noted, Mr. Simpson "threatened to 'chop up' [Mr.] Palmer and his companions," *Simpson I*, 230 P.3d at 897, and testimony offered at trial equated "chopping up" with shooting them with an AK-47 rifle. The evidence also showed that Mr. Simpson ordered Mr. Dalton to follow Mr. Palmer's car, and that when Mr. Palmer's vehicle was in range, Mr. Simpson fired as many as twenty rounds into it with an assault rifle. And he did so knowing that three people were in the targeted car. We agree with the OCCA that the evidence presented at trial did not support a second-degree murder instruction because no reasonable jury could have concluded that Mr. Simpson lacked the specific intent to kill.

Trial counsel was not required to request an instruction that was not reasonably supported by the evidence. *See Grissom v. Carpenter*, 902 F.3d 1265, 1291–92 (10th Cir. 2018). Nor is it likely that the trial court would have given such an instruction, even if trial counsel had requested it. *Cf. Delo v. Lashley*, 507 U.S. 272, 275, 113 S.Ct. 1222, 122 L.Ed.2d 620 (1993) ("[W]e have said that to comply with due process state trial courts need to give jury instructions in capital cases only if the evidence so warrants."). Accordingly, we cannot conclude that no fairminded jurist would agree with the OCCA that counsel did not perform deficiently by failing to request a jury instruction on second-de-

**39.** To the extent Mr. Simpson asserts a failure to include this instruction violated his constitutional right under *Beck v. Alabama*, 447 U.S. 625, 635–36, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), to have the jury instructed on a lesser-included offense supported by the evidence, his claim fails. First, Mr. Simpson was not granted a COA on this issue and, as such, we do not have jurisdiction to resolve the claim without first issuing a COA ourselves. *See Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 736 (10th Cir. 2016). Second, Mr. Simpson failed to request this instruction at trial and this court has held that a defendant may not prevail on a *Beck*-claim based on an instruction a defendant failed to request. *Grant v. Trammell*, 727 F.3d 1006, 1011–13 (10th Cir. 2013). Finally, even assuming Mr. Simpson presented a proper *Beck* claim, it would fail on the merits because his jury was instructed on both first-degree murder and the lesser-included offense of first-degree manslaughter by misdemeanor. The Supreme Court has held the requirements of *Beck* are satisfied so long as the jury is presented with *any* evidentiary-supported alternative to the "all-or-nothing choice between capital murder and innocence," *Schad v. Arizona*, 501 U.S. 624, 646–47, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (quoting *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)). Despite calling the misdemeanor manslaughter charge "unrealistic," Mr. Simpson concedes that it "technically applied to the evidence at hand." Aplt. Br. at 46.

gree depraved mind murder under the present facts. Thus, the OCCA's adjudication of Mr. Simpson's ineffective assistance of counsel claim was reasonable.

b. *Failure to object to improper prosecutorial arguments*

Next, Mr. Simpson contends his counsel performed deficiently by failing to object to improper prosecutorial arguments.

i. OCCA decision

The OCCA considered this claim together with the ineffective assistance of counsel claim discussed above and stated, in relevant part:

> In Proposition VI, we found that none of the alleged improper comments made by the prosecutor could be found to have affected the jury's finding of guilt or assessment of punishment.... Most of these alleged failings do not reflect a deficient performance by defense counsel and [Mr. Simpson] has not shown a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

*Simpson I*, 230 P.3d at 904. Like the underlying prosecutorial misconduct claim, the OCCA rejected this claim because Mr. Simpson could not meet the prejudice prong of *Strickland*. This is a decision on the merits, and we review the OCCA's prejudice determination under AEDPA's and *Strickland*'s doubly deferential standard of review. But, because the OCCA did not address the conduct prong, we exercise our discretion to consider de novo whether counsel performed deficiently. *See Hooks II*, 689 F.3d at 1188.

ii. Merits

**[103, 104]** We held in Section III.D, *supra*, that nearly all of the prosecutorial arguments Mr. Simpson challenges—the Moral Culpability Comments and comments denigrating the evidence in mitigation, comparing the victims' deaths to Mr. Simpson's incarceration, and calling for the death penalty as a civic duty—were improper. Trial counsel made a motion in limine to prohibit prosecutorial argument of this nature, but made no further objection to these improper comments during the sentencing trial. Failing to do so "fell below an objective standard of reasonableness," *see Strickland*, 466 U.S. at 688, 104 S.Ct. 2052, and rendered counsel's performance deficient. As we previously concluded, however, the OCCA reasonably determined the misconduct did not deprive Mr. Simpson of a fundamentally fair sentencing trial. Because Mr. Simpson cannot show that he was actually prejudiced by counsel's deficient performance, the OCCA was reasonable in concluding he was not denied effective assistance of counsel. *See Hanson*, 797 F.3d at 837 ("We begin by noting that before [Mr.] Hanson can succeed on his counsel's failure-to-object claims, he must show that the underlying prosecutorial-misconduct claims themselves have merit.").

c. *Failure to object to the "mitigation evidence" jury instruction*

As his next basis for ineffective assistance of counsel related to the failure to preserve the record, Mr. Simpson argues his counsel performed deficiently by failing to object to the jury instruction on mitigation evidence. We again disagree.

i. OCCA decision

Mr. Simpson raised this claim on direct appeal. The OCCA addressed Mr. Simpson's challenge to the mitigation instruction in its discussion of the constitutionality of the instruction and briefly in its ineffective assistance of counsel analysis.

With respect to the constitutionality of the instruction, the OCCA stated:

> In his twelfth proposition, [Mr. Simpson] argues that the definition of mitigating circumstances given to the jury in this case was unconstitutional as it impermissibly limited the jury's consideration of mitigating evidence. This Court has consistently upheld constitutional challenges to the instruction at issue.

*Simpson I*, 230 P.3d at 903. Thus, the OCCA rejected Mr. Simpson's challenge to the mitigation instruction, and we have affirmed that conclusion.

The OCCA also rejected Mr. Simpson's ineffective assistance of counsel claim based on trial counsel's failure to object to that instruction:

> In his thirteenth proposition, [Mr. Simpson] argues that he was denied his Sixth Amendment right to the effective assistance of counsel for several alleged failings of trial counsel.... In support of his proposition, [Mr. Simpson] first argues that trial counsel was ineffective for failing to object to ... the submission of improper jury instructions and verdict forms. These alleged failings concern issues raised and addressed above.... In Proposition XII, we found that the jurors' consideration of the evidence offered in mitigation in this case was not unfairly limited. Most of these alleged failings do not reflect a deficient performance by defense counsel and [Mr. Simpson] has not shown a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

*Id.* at 904.

From this discussion, it is fair to conclude the OCCA found no deficient performance with respect to trial counsel's failure to object to the mitigation instruction. First, the OCCA held the instruction was constitutionally sound, noting it had been repeatedly upheld in the face of challenges. *Id.* at 903. Second, because the mitigation instruction was a correct statement of law, trial counsel did not perform deficiently in failing to object to it. *See Castro v. Ward*, 138 F.3d 810, 830–31 (10th Cir. 1998) (holding counsel is not ineffective for failing to object to mitigation jury instruction that accurately states the law); *see also Northern v. Boatwright*, 594 F.3d 555, 560–61 (7th Cir. 2010) (noting that the jury instruction challenged by the defendant was a correct statement of law and stating, "[o]bviously, an attorney is not constitutionally deficient for failing to lodge a meritless objection"); *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir. 2001) ("[C]ounsel's failure to object to a jury instruction (or to request an additional instruction) constitutes unreasonably deficient performance only when the trial court's instruction contained 'clear and previously identified errors.'" (quoting *Bloomer v. United States*, 162 F.3d 187, 193 (2d Cir. 1998))). Because the OCCA adjudicated Mr. Simpson's claim on the merits, we afford it appropriate deference under AEDPA.

ii. Merits

**[105]** In Section III.C, *supra*, we evaluated the merits of Mr. Simpson's challenge to the jury instruction on mitigating evidence and concluded the OCCA acted reasonably in denying relief because the instruction correctly stated the law. Although we concluded that counsel's failure to object to the prosecutor's misuse of the instruction constituted deficient performance, counsel is not expected to object to legally accurate jury instructions. *See Castro*, 138 F.3d at 830–31. Consequently, Mr. Simpson cannot show that his counsel's performance in failing to object to the instruction "fell below an objective stan-

dard of reasonableness," *see Strickland*, 466 U.S. at 688, 104 S.Ct. 2052, and the OCCA reasonably determined counsel was not constitutionally ineffective.

d. *Failure to object to the HAC jury instruction*

Finally, Mr. Simpson argues his counsel was ineffective for failing to object to the HAC jury instruction because the instruction "failed to clarify the HAC [A]ggravator was not to be alleged for Anthony Jones." Aplt. Br. at 48. Recall that, although the State did not assert the HAC Aggravator with respect to the murder of Mr. Jones, the jury found it had been proved beyond a reasonable doubt as to the murder of Mr. Palmer and as to the murder of Mr. Jones. Mr. Simpson claims trial counsel could have avoided this confusion by objecting to the instruction for the murder of Mr. Jones, which erroneously listed the HAC Aggravator as an option that could be found unanimously by the jury.[40]

i. OCCA decision

On direct appeal, the OCCA rejected Mr. Simpson's ineffective assistance of counsel claim based on the HAC instruction. In considering Mr. Simpson's standalone, non-ineffective-assistance-of-counsel challenge to the HAC Aggravator as to Mr. Jones's death, the OCCA concluded the challenge was "well taken" and struck the aggravator. *Simpson I*, 230 P.3d at 903. The OCCA, however, denied relief on the non-ineffective-assistance-of-counsel claim because the State did not present any evidence on the aggravator as to Mr. Jones such that the "the jury's weighing process of mitigating evidence against aggravating circumstances was not skewed." *Id.* In essence, the OCCA concluded that while an error occurred, the error did not prejudice Mr. Simpson.

When the OCCA reached Mr. Simpson's ineffective assistance of counsel claim relative to the jury instruction on the HAC Aggravator, it stated:

> [W]e found that the heinous, atrocious or cruel aggravating circumstance was proven beyond a reasonable doubt as to the murder of Glen Palmer. Although this aggravating circumstance was stricken as to the murder of Anthony Jones, [Mr. Simpson's] jury did not consider improper aggravating evidence in deciding punishment.... Most of these alleged failings do not reflect a deficient performance by defense counsel and [Mr. Simpson] has not shown a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

*Id.* at 904. Before this court, Mr. Simpson acknowledges that the OCCA's holding on

**40.** The instruction for Count 2, the count related to the murder of Mr. Jones, states:

> We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths unanimously find the following statutory aggravating circumstance[ ] or circumstances as shown by the circumstance or circumstances checked:
>
> ____ The defendant, prior to this sentencing proceeding, was convicted of a felony involving the use or threat of violence to the person;
>
> ____ During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;
>
> ____ The murder was especially heinous, atrocious, or cruel;
>
> ____ At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Trial R. vol. 3 at 585; *see also id.* at 530 (identify Count 2 being as to the murder of Mr. Jones). The jury checked all four aggravators.

his ineffective assistance of counsel argument relevant to the HAC Aggravator as to Mr. Jones's "did not preclude deficient performance." Aplt. Br. at 49. Rather, the OCCA determined Mr. Simpson was not prejudiced by the seemingly deficient performance with respect to the HAC instruction and denied relief on this claim based on the second prong of *Strickland*. *Id.*

ii. Merits

Because the OCCA rejected Mr. Simpson's ineffective assistance of counsel claim on the merits, we afford its decision deference under § 2254(d). We conclude the OCCA did not act unreasonably in rejecting Mr. Simpson's claim. We have already determined that the instruction was a correct statement of Oklahoma law, and the OCCA struck the aggravator as to Mr. Jones. Because there was no evidence introduced solely to support the HAC Aggravator, we cannot conclude that the OCCA's decision that Mr. Simpson was not prejudiced was unreasonable. Accordingly, we deny Mr. Simpson relief on this claim.

### G. *Cumulative Error*

Mr. Simpson's final claim is that even if the individual errors in his trial do not warrant relief, their cumulative impact denied him a fundamentally fair trial and sentencing proceeding. We address this claim in three sections. First, we discuss the relevant legal background. Next, we review the OCCA's decision, taking note of the errors it included in its analysis. Finally, having found no errors the OCCA did not include in its analysis, we review the reasonableness of its decision under AEDPA's deferential standard of review. Ultimately, we conclude the OCCA's decision was reasonable, and we deny Mr. Simpson relief on this claim.

#### 1. Legal Background

**[106–109]** "Cumulative error analysis is an extension of harmless error and conducts the same inquiry as for individual error, focusing on the underlying fairness of the trial." *Darks*, 327 F.3d at 1018 (internal quotation marks and citations omitted). This 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." *United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002) (internal quotation marks omitted). Only actual constitutional errors are considered when reviewing a case for cumulative error. *See Jackson v. Warrior*, 805 F.3d 940, 955 (10th Cir. 2015) ("[C]umulative-error in the federal habeas context applies only where there are two or more actual constitutional errors." (quotation marks omitted) ); *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) (en banc) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). To determine the harmlessness of the cumulative error, "courts look to see whether the defendant's substantial rights were affected." *Rivera*, 900 F.2d at 1470; *see also Darks*, 327 F.3d at 1018. A defendant's substantial rights are affected when "the cumulative effect of the errors ... had a 'substantial and injurious effect or influence in determining the jury's [sentence].' " *See Hanson*, 797 F.3d at 852 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) ).

#### 2. OCCA Decision

On direct appeal, the OCCA denied Mr. Simpson relief on his cumulative error claim, concluding that, "[a]ny errors were harmless beyond a reasonable doubt, indi-

vidually and cumulatively." *Simpson I*, 230 P.3d at 906. This is a decision on the merits, and we are bound by the OCCA's cumulative error determination unless it is contrary to or an unreasonable application of the cumulative error doctrine. *See Hanson*, 797 F.3d at 852 ("Because the OCCA considered the merits of the cumulative error claim, we review its decision through the deferential lens of AEDPA."); *Thornburg*, 422 F.3d at 1137 ("We must defer to [the OCCA's cumulative error] ruling unless it constitutes an unreasonable application of the cumulative-error doctrine.").

### 3. Merits

**[110]** Upon reviewing Mr. Simpson's claims, we, like the OCCA, have identified four sentencing-stage errors that do not individually entitle Mr. Simpson to habeas relief: (1) prosecutorial misconduct; (2) counsel's deficient performance in failing to investigate and present further mitigating evidence regarding Mr. Simpson's upbringing;[41] (3) counsel's deficient performance in failing to object to the prosecutorial misconduct; and (4) counsel's deficient performance in failing to object the HAC Aggravator jury instruction.[42]

We now determine their cumulative impact. *See Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003) (holding prosecutorial misconduct and deficient performance by counsel "should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice").

**41.** Where we presume deficient performance for purposes of the first prong of an ineffective assistance of counsel claim but reject the claim on the prejudice prong, we include the assumed error in our cumulative error analysis. *See Grant v. Royal*, 886 F.3d 874, 954–55 (10th Cir. 2018), *petition for cert. filed sub nom. Grant v. Carpenter*, No. 18-6713 (Nov. 13, 2018).

**42.** Mr. Simpson argues we should also include the harmless errors identified by the OCCA in our cumulative error analysis, specifically the invalidation of the HAC Aggravator as to the murder of Mr. Jones and the admission of hearsay evidence by Mr. Collins. But the Order granting COA authorizes Mr. Simpson to raise "cumulative error, *limited to errors in the grounds on which a Certificate of Appealability has been granted*." Case Management Order at 2, dated December 1, 2016 (emphasis added). Neither the district court nor this court issued a Certificate of Appealability on Mr. Simpson's claims related to invalidation of the HAC aggravator as to Mr. Jones or the hearsay testimony of Mr. Collins. And Mr. Simpson has not moved to modify the COA to include these claims. Notwithstanding that omission, we have recognized that cumulative error review requires the aggregation of all constitutional errors found to be harmless and any "substantive errors ... individually determined not to warrant habeas relief because of a lack of sufficient prejudice under substantive constitutional standards." *Cargle v. Mullin*, 317 F.3d 1196, 1220 (10th Cir. 2003). As a result, the limitation in the Order granting COA may be inappropriately narrow. We need not resolve this question, however, because neither of the errors identified by the OCCA are constitutional errors.

First, with respect to the jury's finding of the HAC Aggravator as to the murder of Mr. Jones, the OCCA concluded there was no constitutional error because the jury "did not consider improper aggravating evidence in deciding punishment." *Simpson I*, 230 P.3d at 903. Under these circumstances, the invalidation of the HAC Aggravator does not inform our cumulative error analysis. *See Hanson v. Sherrod*, 797 F.3d 810, 848–49, 853 (10th Cir. 2015) (excluding the invalidation of an aggravating sentencing factor from its cumulative error analysis where all the evidence admitted under the invalidated aggravator was properly admissible under other valid aggravators).

Second, the OCCA agreed with Mr. Simpson that five letters written by Mr. Collins and introduced at trial "were hearsay for which no exception applied." *Simpson I*, 230 P.3d at 898. But importantly for our purposes, the OCCA rejected Mr. Simpson's argument that admission of the letters violated his Sixth Amendment right to confrontation because "[Mr.] Collins testified at trial and was subject to cross examination." *Id.* at 899; *see id.* at 906.

All the identified errors occurred at the sentencing stage of the trial; therefore, we review whether the errors "rendered the sentencing fundamentally unfair in light of the heightened degree of reliability demanded in a capital case." *Thornburg*, 422 F.3d at 1137 (internal quotation marks omitted).

The OCCA held the cumulative effect of these errors was "harmless beyond a reasonable doubt." *See Simpson I*, 230 P.3d at 906. Under AEDPA's deferential standard of review, we cannot conclude that no reasonable jurist would agree with that assessment. Despite the identified errors, the jury was presented with copious amounts of aggravating evidence, overwhelming evidence of guilt, and proper instructions from the trial court. Recall that Mr. Simpson pursued the victims in response to an altercation that occurred over an hour earlier and did so armed with an assault rifle. When Mr. Simpson's vehicle drew abreast of the victim's car, he fired up to twenty rounds into that car, killing two of the passengers and severely wounding the other. Before leaving the scene, Mr. Simpson announced, "I'm a monster. I'm a motherfucking monster. Bitches don't want to play with me." Trial Tr. vol. 4 at 44–46. He then proceeded with his plans to rendezvous with some women he had met earlier at a club. The evidence also revealed that Mr. Simpson had previously been convicted of an armed home invasion, during which he shot the victim in the head.

Under these circumstances, the OCCA's cumulative error analysis is not unreasonable, and Mr. Simpson is not entitled to habeas relief as to his death sentences.[43]

## IV. CONCLUSION

We AFFIRM the district court's denial of federal habeas relief under 28 U.S.C. § 2254 as to Mr. Simpson's convictions in the guilt stage of his trial and as to his death sentences. We DENY Mr. Simpson's motion for modification of his COA.


**43.** Mr. Simpson also raises a cumulative error claim as to his convictions. Having found no error related to the guilt stage of Mr. Simpson's trial, there is nothing to cumulate, and we deny this claim. *See Hanson,* 797 F.3d at 853 ("[W]e cannot engage in a cumulative error analysis absent at least two errors.").

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United States District Court, W.D. Oklahoma.

Kendrick Antonio SIMPSON, Petitioner,
v.
Kevin DUCKWORTH, Interim Warden,
Oklahoma State Penitentiary, Respondent. [1]

Case No. CIV-11-96-M
|
Signed 05/25/2016

**Attorneys and Law Firms**

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## MEMORANDUM OPINION

VICKI MILES-LaGRANDE, 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. 23. Petitioner challenges the convictions entered against him in Oklahoma County District Court Case No. CF-06-496. Tried by a jury in 2007, Petitioner was found guilty of first degree murder (Counts 1 and 2), discharging a firearm with intent to kill (Count 3), and possession of a firearm after former felony conviction (Count 4). Petitioner received a life sentence for Count 3 and a 10-year concurrent sentence for Count 4. For Counts 1 and 2, Petitioner was sentenced to death. In support of both death sentences, the jury found four aggravating circumstances: (1) Petitioner was previously convicted of a felony involving the use or threat of violence to the person; (2) Petitioner knowingly created a great risk of death to more than one person; (3) the murder was especially heinous, atrocious, or cruel; and (4) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society (O.R. III, 529-31, 583-87; O.R. IV, 612, 665-69; J. Tr. VI, 110-11; J. Tr. VIII, 65-67, 83). With respect to Count 2, the murder of Anthony Jones, the especially heinous, atrocious, or cruel aggravator was later stricken. [2]

Petitioner has presented eighteen grounds for relief. Respondent has responded to the petition and Petitioner has replied. [3] Docs. 23, 49, and 63. In addition to his petition, Petitioner has filed motions for discovery and an evidentiary hearing. Docs. 42 and 51. After a thorough review of the entire state court record (which Respondent has provided), the pleadings filed in this case, and the applicable law, the Court finds that, for the reasons set forth below, Petitioner is not entitled to his requested relief.

### I. Procedural History.

Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). The OCCA affirmed in a published opinion. Simpson, 230 P.3d at 907. Petitioner sought review of the OCCA's decision by the United States Supreme Court. His petition for writ of certiorari was denied on January 18, 2011. Simpson v. Oklahoma, 562 U.S. 1185 (2011). Petitioner also filed two post-conviction applications, which the OCCA denied in unpublished opinions. Simpson v. State, No. PCD-2012-242 (Okla. Crim. App. Mar. 8, 2013); Simpson v. State, No. PCD-2007-1262 (Okla. Crim. App. Oct. 13, 2010).

### II. Facts.

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

> On the evening of January 15, 2006, Jonathan Dalton, Latango Robertson and [Petitioner] decided to go to Fritzi's hip hop club in Oklahoma City. Prior to going to the club, the three drove in Dalton's white Monte Carlo to [Petitioner's] house so that [Petitioner] could change clothes. While at his house, [Petitioner] got an

assault rifle which he brought with him.[FN3] Before going to Fritzi's, the men first went to a house party where they consumed alcohol and marijuana. When they left the party, [Petitioner] put the assault rifle into the trunk of the Monte Carlo, which could be accessed through the back seat.

FN3. There was testimony that this weapon was an AK–47 or SKS assault rifle.

The three arrived at Fritzi's between midnight and 1:00 a.m. on January 16. Once inside, they went to the bar to get a drink. [Petitioner] and Dalton also took a drug called "Ecstasy." After getting their drinks, Dalton and Robertson sat down at a table while [Petitioner] walked around. When [Petitioner] walked by London Johnson, Anthony Jones and Glen Palmer, one of the three apparently said something to him about the Chicago Cubs baseball cap that he was wearing. [Petitioner] went back to the table and told Dalton and Robertson that some guy had given him a hard time about his cap. At some point, [Petitioner] approached Johnson, Jones and Palmer again. During this encounter, [Petitioner] told them that he was going to "chop" them up.[FN4] After making this threat, [Petitioner] walked away. He returned a short time later and walked up to Palmer. [Petitioner] extended his hand and said, "We cool." Palmer hit [Petitioner] in the mouth knocking him to the floor. [Petitioner] told Dalton and Robertson that he wanted to leave and the three of them left the club.

FN4. Johnson testified at trial that this meant to him that [Petitioner] was going to shoot at them with a "chopper" which was an AK–47.

Out in the parking lot, [Petitioner], Dalton and Robertson went to Dalton's Monte Carlo. Before leaving, they talked with some girls who had come out of the club and were parked next to them. The girls told the men to follow them to a 7–11 located at NW 23rd Street and Portland. When they arrived at the store, [Petitioner], Dalton and Robertson backed into a parking space toward the back door and the girls pulled in next to the pumps. While the men were sitting in the Monte Carlo, they saw Johnson, Jones and Palmer drive into the parking lot in Palmer's Chevy Caprice. They recognized Palmer as the person who had hit [Petitioner] at Fritzi's. Dalton told [Petitioner] to "chill out" but [Petitioner] was mad and wanted to retaliate against Palmer. When Palmer drove out of the parking lot onto 23rd Street and merged onto I–44, [Petitioner] told Dalton to follow them.

While they were following the Chevy, [Petitioner], who was sitting in the front passenger seat, told Robertson, who was sitting in the back seat, to give him the gun. He told Robertson that if he had to get the gun himself, there was going to be trouble. Robertson reached through the back seat into the trunk and retrieved the gun for [Petitioner]. Dalton followed the Chevy as it exited the interstate onto Pennsylvania Avenue. He pulled the Monte Carlo into the left lane beside the Chevy as they drove on Pennsylvania Avenue and [Petitioner] pointed the gun out his open window and started firing at the Chevy.

***3** When the Chevy was hit with bullets, Palmer was driving, Jones was sitting in the front passenger seat and Johnson was in the back seat. Johnson heard about twenty rapid gun shots and got down on the floor of the car. He did not see the shooter but noticed a white vehicle drive up beside them. The Chevy jumped the curb and hit an electric pole and fence before coming to a stop. Palmer and Jones had been shot. Jones had been shot in the side of his head and torso and was unconscious. Palmer had been shot in the chest. He was initially conscious and able to talk but soon lost consciousness when he could no longer breathe. Johnson tried to give both Jones and Palmer CPR but was unsuccessful. He flagged down a car that was driving by and asked the driver to get help. Both Palmer and Jones died at the scene from their gunshot wounds.

After he fired at the Chevy, [Petitioner] said, "I'm a monster. I just shot the car up." He added, "They shouldn't play with me like that." Dalton kept driving until they reached a residence in Midwest City where he was staying. They dropped the gun off and switched cars, and then Dalton, Robertson and [Petitioner] went to meet some girls they had talked to at Fritzi's.

Simpson, 230 P.3d at 893-94.

### III. Standard of Review.

#### A. Exhaustion as a Preliminary Consideration.

The exhaustion doctrine is a matter of comity. It provides that before a federal court can grant habeas relief to a state prisoner, it must first determine that he has exhausted all

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

**B. Procedural Bar.**

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

**C. Merits.**

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

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

***4** "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 1: Failure to Instruct on Second Degree Murder as a Lesser Included Offense.**

In his first ground for relief, Petitioner asserts that the jury should have been instructed on second degree murder as a lesser included offense. He contends that the absence of this instruction constitutes a violation of Beck v. Alabama, 447 U.S. 625 (1980). Although Petitioner argued on direct appeal that this instruction should have been given to the jury, Respondent asserts that Petitioner failed to fairly present the Beck claim he now raises. Accordingly, Respondent contends that Petitioner's Ground 1 is unexhausted and subject to procedural default. However, Respondent also presents an alternative argument that even under de novo review, Petitioner's Beck claim does not warrant habeas relief.

In denying Petitioner relief on this claim, the OCCA rejected Petitioner's argument that "there was no evidence that he intended to kill his victims." Simpson, 230 P.3d at 897.

> In light of the testimony that [Petitioner] threatened to "chop" up Palmer and his companions, instructed Dalton to follow Palmer's car and then shot as many as twenty rounds at the moving vehicle with an assault rifle, we find that the evidence did not reasonably support the conclusion that [Petitioner] did not intend to kill the men in the Chevy. An instruction on Second Degree Depraved Mind Murder was not warranted by the evidence and the trial court did not abuse its discretion in declining to give this instruction *sua sponte.*

Id. Although Petitioner asserts that this holding is contrary to and an unreasonable application of Beck, he nevertheless acknowledges two circumstances which without question remove him from the constitutional protections of Beck: (1) he did not request an instruction on second degree murder and (2) the jury was instructed on a lesser included manslaughter offense. Therefore, it matters not whether Petitioner's Ground 1 is viewed with AEDPA deference because even under de novo review, Petitioner's claim fails.

In Beck, the Supreme Court addressed the constitutional ramifications of lesser-included instructions for a capital crime. Prior to Beck, the Supreme Court had "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process." Beck, 447 U.S. at 637. In Beck, however, the Supreme Court carved out an exception for those high stake cases where the death penalty is a possible punishment.

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense–but leaves some doubt with respect to an element that would justify conviction of a capital offense–the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments ....

***5** Id. Beck, therefore, requires a trial court in a capital case to give the jury a third option to convict the defendant for a lesser-included non-capital offense, when such lesser offense is supported by the evidence. Id. at 627.

The Tenth Circuit has repeatedly held that a petitioner may not prevail on a Beck claim premised on a lesser-included instruction he failed to request at trial. Grant v. Trammell, 727 F.3d 1006, 1011-13 (10th Cir. 2013). In Grant, the Tenth Circuit, citing its holding in Hooks v. Ward, 184 F.3d 1206 (10th Cir. 1999), noted that "[t]he Hooks rule is federal in nature, an explanation of what's required as a matter of federal due process doctrine to invoke Beck." Grant, 727 F.3d at 1011. "[A] state generally won't be said to offend a defendant's due process right to particular instructions when it has no occasion to refuse a request for them." Id. at 1012. Since Hooks, the Tenth Circuit has "expressly and repeatedly" denied Beck relief in the absence of a request for the instruction at trial. Id. (citing Thornburg v. Mullin, 422 F.3d 1113, 1126-27 (10th Cir. 2005), and Darks v. Mullin, 327 F.3d 1001, 1007 (10th Cir. 2003), among others). The record in this case clearly shows that Petitioner failed to make a request for a second degree murder instruction (J. Tr. VI, 46, 50), and therefore, denial of Petitioner's Ground 1 is warranted on this basis. [4]

In addition, Petitioner's Beck claim fails because the jury was given the option of convicting him of a lesser included offense. The record reflects that with respect to both Counts 1 and 2, the jury was instructed on first degree manslaughter by misdemeanor, with the underlying misdemeanor being reckless conduct with a firearm (O.R. III, 569-73). Although Petitioner argues that this lesser included offense was a "ridiculous option" and that second degree depraved mind murder was the better option based on the presented evidence, Petition, p. 9, Beck does not require instructions on every lesser-included non-capital offense supported by the evidence. In Schad v. Arizona, 501 U.S. 624 (1991), the Supreme Court acknowledged the "strict holding of Beck" and found that when a jury is given a " 'third option,' " Beck is not

implicated because a jury is "not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence." Schad, 501 U.S. at 645-48.

Although Petitioner attempts to distinguish his case from Schad, Schad makes clear that "the [Beck] rule is not implicated when the court instructs the jury on one lesser included offense supported by the evidence, even if instructions on other lesser included offenses might have been warranted." Bland v. Sirmons, 459 F.3d 999, 1016 (10th Cir. 2006) (citing Schad). See also Eizember v. Trammell, 803 F.3d 1129, 1146 (10th Cir. 2015) ("The [Supreme] Court explained [in Schad] that Beck doesn't guarantee multiple lesser-included offense instructions or the defendant's favorite such instruction."). Schad reinforces the narrow holding of Beck and its finding of a constitutional infirmity when a capital jury is not given a third option. Schad, 501 U.S. at 646-47. The third option is a lesser offense supported by the evidence – one which enhances the "rationality and reliability" of the jury deliberation process by giving the jury, who is otherwise convinced of a defendant's guilt but questions whether the evidence supports a capital crime, an acceptable middle ground choice. Spaziano v. Florida, 468 U.S. 447, 455 (1984), overruled on other grounds by Hurst v. Florida, 577 U.S____, 136 S. Ct. 616, 623 (2016). It is intended to avoid "the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free." Id. In this case, the jury was given a third option. If Petitioner's intoxication prevented him from forming the specific intent required to find him guilty of first degree malice murder, then the jury had the option of finding him guilty of first degree manslaughter because he engaged in reckless conduct when he fired multiple shots into a moving vehicle containing three occupants. For this reason as well, the Court concludes that Petitioner is not entitled to relief on his Ground 1.

***6** Ground 1 is denied.

**B. Ground 2: PTSD Evidence.**

In Ground 2, Petitioner asserts that he is entitled to habeas relief because the trial court prevented him from presenting evidence in the guilt stage that he suffered from Post Traumatic Stress Disorder (PTSD). Petitioner argues that this evidence was relevant to the issue of intent and his voluntary intoxication defense, and that because he was unable to present this evidence, he was denied his constitutional right to present a complete defense. Petitioner presented this claim to the OCCA on direct appeal. Respondent asserts that Petitioner's Ground 2 should be denied because Petitioner has failed to show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law. The Court agrees with Respondent.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Id. However, these rights are not absolute. "While the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence ...." Holmes v. South Carolina, 547 U.S. 319, 326 (2006). See United States v. Scheffer, 523 U.S. 303, 308 (1998) ("[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."); Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

Prior to trial, Petitioner filed a notice of intent "to offer evidence ... of his mental, emotional, psychologic and/psychiatric condition before, during and after the time of the alleged offense ..." (O.R. III, 421-22). The State filed a motion to preclude such evidence in the first stage, and after a hearing on the matter, the State's motion was granted (O.R. III, 501-06, 516-17; M.Tr. 9/19/07, 3-25). At trial, Dr. Phillip Massad, a clinical psychologist, testified in the punishment stage that he had evaluated Petitioner and determined that Petitioner "more likely than not" had PTSD (J. Tr. VII, 160-63). Dr. Massad explained that someone with PTSD "might be hypersensitive and overreact," "become hypervigilant," and "might have an exaggerated startle response" (J. Tr. VII, 166-67). Dr. Massad also testified that drugs or alcohol might "increase the likelihood that [someone with PTSD] would react or overreact" (J. Tr. VII, 167). Dr. Massad opined that Petitioner's criminal actions "might be consistent with somebody who has PTSD and is reacting to the present

situation in a way as influenced by past history and what's already happened to them" (J. Tr. VII, 168). On cross-examination, Dr. Massad made it clear that he did not evaluate Petitioner's criminal responsibility and that his opinion did not include a determination that Petitioner did not know right from wrong when he shot and killed the victims (J. Tr. VII, 178).

***7** In denying Petitioner relief on this claim on direct appeal, the OCCA applied applicable Supreme Court authority, concluding that Petitioner was not denied his constitutional right to present a defense because the PTSD evidence was not relevant to the issues to be determined in the guilt stage. Simpson, 230 P.3d at 894-95.

> [Petitioner] argues that the evidence that he suffered from PTSD was relevant to the issue of his intent at the time of the offense. The transcript of the hearing on the State's motion to preclude defense testimony about PTSD in the first stage of trial reveals that after speaking with Dr. Massad and reviewing his report, the prosecutor believed that Dr. Massad would not be able to testify that [Petitioner's] PTSD precluded [Petitioner] from forming the intent to kill. Contrary to this, the defense counsel believed that Dr. Massad would testify that "it is possible that the PTSD affected him to the extent that he was not able to form the specific intent." Although Dr. Massad did not testify at the motion hearing, he did testify during the second stage of [Petitioner's] trial. At trial, Dr. Massad testified that although PTSD, especially when combined with alcohol and drug usage, could make a person hypersensitive and increase the likelihood that they would overreact to a situation, he acknowledged that he had not administered tests on [Petitioner] to determine whether [Petitioner] knew what he was doing at the time of the shooting. Thus, Dr. Massad could not testify as to how [Petitioner's] PTSD could affect his intent at the time of the crime.
>
> The record before this Court supports the prosecutor's position that Dr. Massad could not testify that [Petitioner's] PTSD precluded him from forming the intent to kill. Accordingly, the evidence that Petitioner suffered from PTSD was neither relevant to the intent element of the crime charged nor was it relevant to his defense of voluntary intoxication, which requires a showing that [Petitioner's] intoxication rendered it impossible to form the intent element of the crime charged. The trial court's ruling precluding the defense from presenting this evidence during the first stage of trial was not an abuse of discretion and did not deprive [Petitioner] of his constitutional right to present a defense. There was no error here.

Id. at 895 (citation omitted).

Petitioner's challenge to the OCCA's decision is a simple one. Whereas the OCCA found the PTSD evidence to be irrelevant to first stage issues, Petitioner contends just the opposite. Petitioner's primary argument is that the evidence was relevant as an explanation to the jury for why he acted like he did, i.e., why he was hyperviligant and overreacted. Petition, pp. 12-14. Petitioner contends that "[h]ad Dr. Massad been allowed to testify, jurors would have been given an explanation of how an individual suffering from ... PTSD can react out of an exaggerated sense of fear and terror ...." Petition, p. 14. Petitioner additionally contends that the drugs and alcohol he consumed that night exacerbated the situation, and that had the jurors heard this evidence, "they would have understood that the level of intoxication necessary to negate the specific intent of first-degree, malice aforethought murder is affected by PTSD." Id.

Petitioner's arguments fail to show that the OCCA acted unreasonably in denying him relief on this claim. Explanations for why Petitioner may have overreacted do not address the issue of whether he was incapable of forming specific intent. As such, it was not unreasonable for the OCCA to find no error in the first stage exclusion of the evidence. See United States v. Brown, 326 F.3d 1143, 1146-48 (10th Cir. 2003) (discussing the admissibility of mental health expert testimony to negate specific intent and finding that the district court did not err in excluding irrelevant PTSD evidence).[5] Moreover, regarding his involuntary intoxication defense, Petitioner has not made any showing that his level of intoxication was affected by his PTSD. Dr. Massad gave no such testimony, but stated only that the ingestion of drugs and alcohol could increase the likelihood that Petitioner would overreact. Again, because there is nothing here to suggest that Petitioner's PTSD and substance abuse prevented him from forming specific intent, only that these circumstances may have caused him to overreact, the Court cannot find the OCCA's determination unreasonable. Petitioner's Ground 2 is therefore denied.

**C. Ground 3: Voluntary Intoxication Instruction.**

***8** In Ground 3, Petitioner asserts that he was denied a fair trial due to a faulty instruction regarding the jury's consideration of his voluntary intoxication defense. Petitioner additionally claims that this error was made worse by the prosecutor's closing argument. Petitioner raised this claim on direct appeal, and the OCCA denied relief. Respondent argues that relief must be denied because Petitioner has failed to show that the OCCA's decision is an unreasonable one.

"A habeas petitioner who seeks to overturn his conviction based on a claim of error in the jury instructions faces a significant burden." Ellis v. Hargett, 302 F.3d 1182, 1186 (10th Cir. 2002). "Unless the constitution mandates a jury instruction be given, a habeas petitioner must show that, in the context of the entire trial, the error in the instruction was so fundamentally unfair as to deny the petitioner due process." Tiger v. Workman, 445 F.3d 1265, 1267 (10th Cir. 2006).

> It is well established that a criminal defendant has a due process right to a fair trial. E.g., Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Further, the Supreme Court has acknowledged that an instructional error can, under certain circumstances, result in a violation of a defendant's right to a fair trial. See Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977); Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). Importantly, however, the Court has stated that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Henderson, 431 U.S. at 154, 97 S.Ct. 1730. "The question in such a collateral proceeding," the Court has stated, "is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," and "not merely whether the instruction is undesirable, erroneous, or even universally condemned ...." Id. (internal quotation marks and citations omitted).

Cummings v. Sirmons, 506 F.3d 1211, 1240 (10th Cir. 2007).

With respect to Petitioner's voluntary intoxication defense, the jury was instructed as follows:

**INSTRUCTION NO. 30**

**DEFENSE OF VOLUNTARY INTOXICATION – INTRODUCTION**

> Evidence has been introduced of intoxication of the defendant as a defense to the charge that the defendant has committed the crime in Count 1 of Murder In The First Degree and in Count 2 of Murder In The First Degree.

**INSTRUCTION NO. 31**

**DEFENSE OF VOLUNTARY INTOXICATION – REQUIREMENTS**

> The crimes in Counts 1 and 2 of Murder In The First Degree have 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 the specific criminal intent because of his intoxication.

**INSTRUCTION NO. 32**

**DEFENSE OF VOLUNTARY INTOXICATION BY DRUGS OR ALCOHOL**

> The defense of intoxication can be established by proof of intoxication caused by drugs or alcohol.

**INSTRUCTION NO. 33**

**DEFENSE OF VOLUNTARY INTOXICATION – BURDEN OF PROOF – COUNT 1**

It is the burden of the State to prove beyond a reasonable doubt that the defendant formed the specific criminal intent of the crime in Count 1 of Murder In The First Degree. If you find that the State has failed to sustain that burden, by reason of the intoxication of Kendrick A. Simpson, then Kendrick A. Simpson must be found not guilty of Murder In The First Degree. You may find Kendrick A. Simpson guilty of Manslaughter In The First Degree, if the State has proved beyond a reasonable doubt each element of the crime of Manslaughter In The First Degree.

**INSTRUCTION NO. 34**

**DEFENSE OF VOLUNTARY INTOXICATION – BURDEN OF PROOF – COUNT 2**

***9** It is the burden of the State to prove beyond a reasonable doubt that the defendant formed the specific criminal intent of the crime in Count 2 of Murder In The First Degree. If you find that the State has failed to sustain that burden, by reason of the intoxication of Kendrick A. Simpson, then Kendrick A. Simpson must be found not guilty of Murder In The First Degree. You may find Kendrick A. Simpson guilty of Manslaughter In The First Degree, if the State has proved beyond a reasonable doubt each element of the crime of Manslaughter In The First Degree.

**INSTRUCTION NO. 35**

**DEFENSE OF VOLUNTARY INTOXICATION – DEFINITIONS**

**Incapable Of Forming Specific Criminal Intent**– The state in which one's mental powers have been overcome through intoxication, rendering it impossible to form *a criminal intent.*

**Intoxication**– A state in which a person is so far under the influence of an intoxicating liquor or drug to such an extent that his judgment is impaired.

(O.R. III, 563-68) (emphasis added). Petitioner's sole complaint with these instructions is the first definition contained in the last instruction, Instruction No. 35. As *italicized* above, Petitioner's argument is that this single reference to *a criminal intent*, as opposed to specific criminal intent, "required the jury to determine [he] was unable to form *any* criminal intent before granting him use of the Voluntary Intoxication defense." Petition, p. 15.

In denying Petitioner relief on this claim, the OCCA looked at the instructions as a whole and determined that the "jury was adequately advised that malice aforethought was the proper intent to apply to the voluntary intoxication defense." Simpson, 230 P.3d at 900. A simple review of the instructions set forth above confirms the OCCA's conclusion. The jury was clearly informed that Petitioner's murder counts required a finding that Petitioner had the specific intent of malice aforethought and that if Petitioner's drug and alcohol consumption rendered him incapable of forming this specific intent, he must be found not guilty of the first degree murder counts. See Cupp, 414 U.S. at 146-47 (It is "well established ... that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."). The OCCA's additional determination that the prosecutor's comments "were largely correct and proper statements of the law" with respect to the issue of intent (and Petitioner's voluntary intoxication defense) is a reasonable one as well. Simpson, 230 P.3d at 900.[6] See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (The question

is whether the prosecutor's actions or remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process."). For the foregoing reasons, the Court finds that Petitioner's Ground 3 falls far short of the sort of "extreme malfunction" which this Court is empowered to correct. Richter, 562 U.S. at 102. Relief is therefore denied.

**D. Ground 4: Petitioner's Custody Status.**

In Ground 4, Petitioner asserts that his constitutional rights were violated by references during trial to his custodial status. Petitioner presented this claim to the OCCA for the first time in his second post-conviction application, which was filed after the filing of his petition in this case. The OCCA declined to reach the merits of the claim, and Respondent urges this Court to apply a procedural bar.

***10** When a state court applies a state procedural rule to preclude merits consideration of a claim, a federal habeas court will follow suit if the rule is one which "is independent of the federal question and adequate to support the judgment." Coleman, 501 U.S. at 729. "To be independent, the procedural ground must be based solely on state law." Thacker v. Workman, 678 F.3d 820, 835 (10th Cir. 2012) (citing English v. Cody, 146 F.3d 1257, 1259 (10th Cir. 1998)). "To be adequate, the procedural ground 'must be strictly or regularly followed and applied evenhandedly to all similar claims.' " Thacker, 678 F.3d at 835 (quoting Sherrill v. Hargett, 184 F.3d 1172, 1174 (10th Cir. 1999)).

In disposing of Petitioner's Ground 4, the OCCA held as follows:

> [Petitioner] claims that the trial court erred in announcing to the jury that the deputy was present in the courtroom because [Petitioner] was in custody and needed to be escorted to all of his court proceedings. This alleged error occurred at trial and as it is based neither on newly-discovered facts nor on new controlling legal authority, it is therefore barred from review in this post-conviction application. 22 O.S.Supp.2006, § 1089(D).

Simpson, No. PCD-2012-242, slip op. at 7. Although the Tenth Circuit has repeatedly recognized the OCCA's application of a procedural bar to claims which could have been raised in an initial post-conviction application but were not,[7] its validity has been questioned in recent years, as Petitioner has asserted in this case, based on the OCCA's decision in Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002), and subsequent cases in which the OCCA has reached the merits of certain claims raised in subsequent post-conviction applications. The Tenth Circuit has determined, however, that despite the OCCA's decision in Valdez and its application of Valdez in post-conviction review, the procedural rule applied by the OCCA to bar claims which could have been raised in a petitioner's first post-conviction proceeding remains both adequate and independent. Fairchild v. Trammell, 784 F.3d 702, 719 (10th Cir. 2015) (acknowledging the independence of the rule), cert. denied, 136 S. Ct. 835 (2016); Williams v. Trammell, 782 F.3d 1184, 1213-14 (10th Cir. 2015) (acknowledging the adequacy and independence of the rule), cert. denied, 136 S. Ct. 806 (2016); Black v. Tramwell [sic], 485 Fed.Appx. 335, 335-37 (10th Cir. 2012) (rejecting an independence challenge and reaffirming the adequacy of the rule after certification of a question to the OCCA); Banks v. Workman, 692 F.3d 1133, 1144-47 (10th Cir. 2012) (rejecting a challenge to the adequacy and independence of the rule); Black v. Workman, 682 F.3d 880, 914, 916-19 (10th Cir. 2012) (rejecting an adequacy challenge to the rule and certifying a question to the OCCA regarding independence of the rule); Thacker, 678 F.3d at 834-36 (finding the rule both independent and adequate); Spears v. Mullin, 343 F.3d 1215, 1254-55 (10th Cir. 2003) (addressing the adequacy of the rule). In light of this circuit precedent, the Court rejects Petitioner's challenge to the OCCA's application of Section 1089(D)(8) to bar merits review of his Ground 4.[8]

***11** Because the OCCA's application of Section 1089(D)(8) is both adequate and independent, the Court cannot consider the merits of Petitioner's Ground 4 unless Petitioner can satisfy an exception. Petitioner may overcome the application of a procedural bar to this claim if he can show either cause and prejudice or a fundamental miscarriage of justice.[9] Coleman, 501

U.S. at 750. The cause and prejudice exception requires Petitioner to demonstrate that some external objective factor, unattributable to him, prevented his compliance with the procedural rule in question. Spears, 343 F.3d at 1255. He must also show that the failure resulted in actual prejudice. Thornburg, 422 F.3d at 1141.

In an effort to satisfy the cause and prejudice exception, Petitioner asserts that his default should be excused based on the ineffectiveness of his trial, appellate, and post-conviction counsel. Reply, p. 4. However, none of these assertions are sufficient to overcome the imposition of a procedural bar to his claim. Neither ineffective assistance of trial counsel nor ineffective assistance of appellate counsel explains Petitioner's failure to present his Ground 4 in his first post-conviction application. In addition, post-conviction counsel ineffectiveness cannot serve as cause. Coleman, 501 U.S. at 752 (because there is no constitutional right to representation in state post-conviction proceedings, a petitioner " 'bear[s] the risk of attorney error that results in a procedural default' ") (citation omitted); Spears, 343 F.3d at 1255 (citing 28 U.S.C. § 2254(i), Coleman, and Smallwood, 191 F.3d at 1269, for the proposition that "ineffective representation in state post-conviction proceedings is inadequate to excuse a procedural default"); Thomas v. Gibson, 218 F.3d 1213, 1222 (10th Cir. 2000) (relying on "well-established Supreme Court precedent" to reject an allegation of cause based upon post-conviction counsel's representation).[10] Because Petitioner has not demonstrated sufficient cause and prejudice to overcome the imposition of a procedural bar to his Ground 4, the Court concludes that it is procedurally barred.

**E. Ground 5: Firearm Demonstration.**

In Ground 5, Petitioner complains about a firearm demonstration sponsored by the prosecution. On direct appeal, Petitioner argued that the trial court abused its discretion in permitting the demonstration because it was both misleading and prejudicial. Finding no error in the trial court's evidentiary ruling, the OCCA denied relief. Simpson, 230 P.3d at 897-98. Although Petitioner admits to some "reformulation" of the claim, he asserts that his Ground 5 is in essence the same claim he raised on direct appeal. Reply, pp. 4-5. Respondent asserts that to the extent Petitioner has recast his claim into a prosecutorial misconduct claim, it is unexhausted and subject to an anticipatory procedural bar. Respondent additionally asserts that if the claim is construed to be the same claim raised on direct appeal, Petitioner is not entitled to relief because the OCCA's resolution of the claim is neither legally nor factually unreasonable.

Respondent cites Bland in support of his argument that the prosecutorial misconduct aspect of Petitioner's Ground 5 is unexhausted. In Bland, the Tenth Circuit discussed the exhaustion requirement as follows:

> ***12** A state prisoner generally must exhaust available state-court remedies before a federal court can consider a habeas corpus petition. See 28 U.S.C. § 2254(b)(1)(A); Hawkins v. Mullin, 291 F.3d 658, 668 (10th Cir. 2002). A claim has been exhausted when it has been "fairly presented" to the state court. Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). "Fair presentation" requires more than presenting "all the facts necessary to support the federal claim" to the state court or articulating a "somewhat similar state-law claim." Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (per curiam). "Fair presentation" means that the petitioner has raised the "substance" of the federal claim in state court. Picard, 404 U.S. at 278, 92 S.Ct. 509. The petitioner need not cite " 'book and verse on the federal constitution,' " id. (quoting Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)), but the petitioner cannot assert entirely different arguments from those raised before the state court. For example, in Hawkins, 291 F.3d at 669, the defendant argued on direct appeal that the trial court erred in not considering whether he knowingly and voluntarily waived the opportunity to present mitigating evidence. In his request for federal habeas corpus relief, however, he argued that trial counsel was ineffective in failing to investigate possible mitigating evidence. Id. We held that he had failed to exhaust that claim because "[w]hile [the defendant's] state-court claims focused on the *trial court's* actions" his federal habeas claims "specifically challenge[d] only *defense counsel's* failings." Id. (emphasis added).

Bland, 459 F.3d at 1011. As in Hawkins, the Tenth Circuit in Bland found that a claim was unexhausted and procedurally barred because "[a] challenge to the actions of the prosecution differs significantly from a challenge to the instructions given by the court." Bland, 459 F.3d at 1012.

As in Bland, the Court finds that to the extent Petitioner now alleges that the prosecutor used false or misleading evidence to obtain a conviction against him, this claim is unexhausted because it is significantly different from the claim he raised on direct appeal. A challenge to the prosecutor's conduct is clearly not the same as a challenge to the trial court's evidentiary ruling. If Petitioner were to return to state court to exhaust this claim, the OCCA would undoubtedly procedurally bar it due to Petitioner's failure to raise it on direct appeal or in either of his two prior applications for post-conviction relief. See Ground 4, supra (discussing the validity of the OCCA's waiver rule in successive applications for post-conviction relief).

As for the claim Petitioner raised on direct appeal, the Court finds that the OCCA reasonably determined the evidentiary issue. In denying Petitioner relief, the OCCA set forth the following analysis:

> During the first stage of trial, the State conducted a firearms demonstration in which the jury was transported to an Oklahoma City Police Department firing range and an investigator for the Oklahoma County District Attorney's Office, Gary Eastridge, demonstrated the use of an AK-style semi-automatic weapon. Defense counsel objected to this demonstration and his objection was overruled.[FN6] [Petitioner] complains in his fourth proposition that this ruling was in error. Again, the admissibility of evidence is within the discretion of the trial court, which will not be disturbed absent a clear showing of abuse, accompanied by prejudice to the accused. Jackson, 2006 OK CR 45, ¶ 48, 146 P.3d at 1165.
>
> FN6. The record is clear that while defense counsel objected to the demonstration, he did not object to the investigator's testimony.
>
> Because the weapon used in the shooting was never recovered, it is not known whether it was a fully automatic or a semi-automatic firearm. [Petitioner] contends that the demonstration of a semi-automatic weapon mislead the jury to believe that he had used this type of weapon in the shooting and bolstered the State's assertion that he shot with the intent to kill as he would have had to purposefully pull the trigger of a semi-automatic weapon many times to discharge as many bullets as were reported to have been fired. Thus, he argues, this demonstration was misleading and prejudicial.
>
> ***13** The investigator who performed the demonstration testified that when an AK–47 fully automatic rifle is used, a single pull of the trigger will fire the weapon until the trigger is released. He testified that when a semi-automatic weapon is used, each pull of the trigger fires a single shot. He demonstrated a quick, repeated firing of a semi-automatic assault rifle. The testimony and demonstration showed the jury that either weapon could have been used by [Petitioner]. Neither the investigator's testimony nor his demonstration misled the jury to believe that [Petitioner] used a semi-automatic rather than a fully-automatic weapon. The demonstration which showed that a semi-automatic weapon could have been used was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2001, §§ 2401, 2403. The trial court did not abuse its discretion in overruling [Petitioner's] objection to the demonstration.

Simpson, 898 P.3d at 897-98. Payne v. Tennessee, 501 U.S. 808, 825 (1991), provides that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." However, Petitioner has not shown that the OCCA's decision is contrary to or an unreasonable application of this high standard. Because the murder weapon could have been a semi-automatic weapon, it was not unreasonable for the OCCA to find that a demonstration on how a semi-automatic works was relevant evidence. Relief is therefore denied.

**F. Ground 6: Prosecutorial Misconduct.**

In Ground 6, Petitioner alleges that he was denied a fair trial due to comments made by the prosecutor during voir dire and in both first and second stage closing arguments. Petitioner raised this claim on direct appeal but was denied relief. Simpson, 230 P.3d at 899. Respondent makes two arguments in response to this ground. First, Respondent contends that two of the comments were not a part of Petitioner's direct appeal claim. Consequently, he argues that they are unexhausted and should be procedurally barred. Response, pp. 38-39. As to the remaining comments, Respondent additionally asserts that Petitioner should be denied relief because the OCCA's decision is not contrary to or an unreasonable application of Supreme Court law. Having reviewed Petitioner's direct

appeal brief, the Court concludes that the entirety of Petitioner's Ground 6 was contained in his direct appeal claim. See Brief of Appellant, Case No. D-2007-1055, pp. 55, 59-60 (discussing the two comments Respondent argues were not presented on direct appeal). However, for the following reasons, the Court additionally concludes that Petitioner has not shown that he is entitled to relief under AEDPA deference.

Generally, allegations of prosecutorial misconduct are given due process review. Stouffer v. Trammell, 738 F.3d 1205, 1221 (10th Cir. 2013); Hamilton v. Mullin, 436 F.3d 1181, 1187 (10th Cir. 2006). The question is whether the prosecutor's actions or remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. A fundamental fairness inquiry "requires examination of the entire proceedings, including the strength of the evidence against the petitioner, both as to guilt at that stage of the trial and as to moral culpability at the sentencing phase." Le v. Mullin, 311 F.3d 1002, 1013 (10th Cir. 2002). See also Coleman v. Brown, 802 F.2d 1227, 1237 (10th Cir. 1986) ("[T]o determine whether a state prosecutor's remarks were so flagrant as to deny a defendant a fair trial, we must take notice of all the surrounding circumstances, including the strength of the state's case."). "The ultimate question is whether the jury was able to fairly judge the evidence in light of the prosecutors' conduct." Bland, 459 F.3d at 1024. [11]

***14** In denying Petitioner relief, the OCCA held as follows:

> In Proposition VI, [Petitioner] complains that prosecutorial misconduct deprived him of his right to a fair trial. "This Court will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair." Williams v. State, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. [Petitioner] concedes that all but one of the comments complained of were not met with objection at trial. We review the comments not objected to for plain error only. Matthews v. State, 2002 OK CR 16, ¶ 38, 45 P.3d 907, 920.
>
> The alleged instances of misconduct include allegations that the prosecutor argued facts not in evidence, engaged in unnecessary ridicule of [Petitioner], contrasted [Petitioner's] situation with that of the victims', appealed to justice and sympathy for the victims and their families and improperly shifted the burden of proof. Many of these comments, including the single comment met with objection, fell within the broad parameters of effective advocacy and do not constitute error. Martinez v. State, 1999 OK CR 33, ¶ 44, 984 P.2d 813, 825. We review those comments bordering upon impropriety within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. DeRosa v. State, 2004 OK CR 19, ¶ 53, 89 P.3d 1124, 1145. Given the magnitude of the State's evidence against [Petitioner] this Court finds that any inappropriate comments not objected to did not deprive [Petitioner] of a fair trial or affect the jury's finding of guilt or assessment of punishment. There was no plain error here.

Simpson, 230 P.3d at 899. Characterizing the OCCA's decision as a "cursory blanket holding," Petitioner complains that "it gave [his] claims short shrift," and he faults the OCCA for failing to address the challenged comments individually. Petition, pp. 30-31. Petitioner asserts that each of his seven complaints warrant relief independently, but he also argues their cumulative effect.

Despite Petitioner's criticisms of the OCCA's analysis, it is clear that the AEDPA does not require a state court to adjudicate claims in any particular format. In fact, the AEDPA does not even require the state court to set forth the reasoning behind its holding. Richter, 562 U.S. at 98. "When the state court does not explain its decision, the applicant must still show that 'there was no reasonable basis for the state court to deny relief.' " Fairchild, 784 F.3d at 711 (quoting Richter). Petitioner's need to know more does not make the OCCA's decision an unreasonable one. The OCCA reviewed Petitioner's complaints in the context of the entire trial and the presented evidence and found that it "did not deprive [Petitioner] of a fair trial or affect the jury's finding of guilt or assessment of punishment." Simpson, 230 P.3d at 899. To obtain relief here, Petitioner must show that *all* fairminded jurists would disagree with the OCCA's assessment. Frost v. Pryor, 749 F.3d 1212, 1225-26 (10th Cir. 2014) ("Under the test, if *all* fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, *some* fairminded jurists could possibly agree with the state court decision, then it was not

unreasonable and the writ should be denied.") (emphasis added); Stouffer, 738 F.3d at 1221 (citing Richter, 562 U.S. at 101, for the proposition that relief is warranted "*only if all* 'fairminded jurists' would agree that the state court got it wrong") (emphasis added). This he has not done. Accordingly, relief on Ground 6 is denied.

**G. Ground 7: Second Stage Hearsay Evidence.**

***15** In his seventh ground for relief, Petitioner complains about the admission of hearsay evidence in the second stage, a claim he raised on direct appeal. Although the OCCA agreed with Petitioner that the evidence should not have been admitted, it found the error harmless beyond a reasonable doubt and denied relief. Simpson, 230 P.3d at 898. Petitioner challenges the OCCA's harmless error finding, but Respondent contends that relief must be denied because the standard for relief set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993), has not been met.

In the second stage, Roy Collins, a jailhouse informant, testified about his interactions with Petitioner in the Oklahoma County Jail (J. Tr. VII, 31-32). In addition to telling Mr. Collins details about his crimes (J. Tr. VII, 42-44), Petitioner asked Mr. Collins about "taking care" of three witnesses for him. Mr. Collins testified that Petitioner asked him if he was connected enough to have one male witness killed and two other pregnant female witnesses beat up. The cost for these services was also discussed (J. Tr. VII, 44-46). From these interactions with Petitioner, Mr. Collins also told the jury that Petitioner "had no remorse ... whatsoever," and that he "used to walk around and smile and laugh about it all the time" (J. Tr. VII, 44, 47). Following this testimony, the State introduced five letters written by Mr. Collins regarding his contact with Petitioner and his offer to help the State with its case against Petitioner. These letters were admitted without objection and read to the jury by Mr. Collins (J. Tr. VII, 49-56; State's Exhibits 81-85).

As noted above, the OCCA agreed with Petitioner that Mr. Collins' letters should not have been admitted. Simpson, 230 P.3d at 898 ("The letters were hearsay for which no exception applied."). The OCCA denied relief, however, due to harmless error. The OCCA reasoned as follows:

> [T]he record reveals that Collins' testimony prior to the introduction of the letters provided the jury substantially the same information as was contained within the letters. Collins testified that [Petitioner] had confessed to committing the crime, had shown no remorse for his actions and had even laughed about the crime and wanted to kill and threaten potential witnesses. Thus, while the letters were inadmissible hearsay, the information contained therein was cumulative to properly admitted evidence. In light of Collins' admissible testimony, we find that the introduction of this inadmissible hearsay was harmless error.

Id. Contrary to the OCCA's finding, Petitioner contends that the evidence contained in the letters was not "substantially the same" as the testimony given by Mr. Collins. Specifically, Petitioner argues that the letters contained additional damaging information including Mr. Collins' fear that Petitioner might harm him for stealing Petitioner's witness list (J. Tr. VII, 52-53; State's Exhibit 83). Petitioner argues that "the clear implication from these hearsay statements was that the shooting incident was not just a one-time circumstance and that [Petitioner] was the kind of person who would not hesitate to kill if he considered it necessary to further his interests." Petition, p. 34. In addition, Petitioner argues the letters contained insensitive statements about the victims' families. In discussing Petitioner's lack of remorse, Mr. Collins wrote of Petitioner's disbelief that the victims' families were crying because the victims were gang bangers, a life they chose for themselves (J. Tr. VII, 54-55; State's Exhibit 84).

***16** Brecht applies to Petitioner's Ground 7. Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (the Brecht standard applies to Section 2254 cases regardless of whether the state court recognized the error and reviewed it under Chapman). Therefore, the question is whether the alleged error " 'had [a] substantial and injurious effect or influence

in determining the jury's verdict.' " Brecht, 507 U.S. at 631 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). "[A] 'substantial and injurious effect' exists when the court finds itself in 'grave doubt' about the effect of the error on the jury's verdict." Bland, 459 F.3d at 1009 (quoting O'Neal v. McAninch, 513 U.S. 432, 435 (1995)). " 'Grave doubt' exists where the issue of harmlessness is 'so evenly balanced that [the court] feels [itself] in virtual equipoise as to the harmlessness of the error.' " Id. at 1009-10. Because a death sentence requires a unanimous verdict, the ultimate question is whether the court "harbor[s] a significant doubt" as to the effect of the evidence on at least one juror whose vote could have made the difference between life and death. Lockett v. Trammel [sic], 711 F.3d 1218, 1232 (10th Cir. 2013) (internal citations omitted).

The Court does not harbor a significant doubt that the admission of Mr. Collins' letters had a substantial and injurious effect on the jury's death verdicts. In his testimony, Mr. Collins discussed Petitioner's willingness to kill the star witness against him and harm two other witnesses. The additional information that Mr. Collins felt Petitioner might harm him as well was just more of the same. As for the statements about the victims' families crying, these comments related to Petitioner's lack of remorse, about which Mr. Collins had already testified. Accordingly, the Court agrees with the OCCA that the hearsay contained in the letters was cumulative and therefore harmless.

However, even beyond the cumulative nature of the hearsay evidence, a review of all of the evidence supporting Petitioner's death sentences provides additional support for a finding of harmless error. First, the crimes committed and the circumstances surrounding their commission. [12] Petitioner began the evening with an expectation of trouble when he took his AK-47 with him for an evening out–first to a party and then to a hip hop club where gang members were known to hang out. At the club, Petitioner, described as wearing a red hat and having tattooed tear drops on his face, got into an argument with the victims over his hat, and he threatened to shoot them with his AK-47 (J. Tr. III, 19-20, 26-31, 154, 158, 172-74; J. Tr. IV, 10, 12-13, 16-17, 31-34; J. Tr. V, 32-34, 36-37, 56-60). After a later failed attempt to make good with the victims, one that resulted in Petitioner being hit in the mouth by victim Glen Palmer, Petitioner left the club (J. Tr. III, 31-32, 84-85, 118-19; J. Tr. IV, 19-21; J. Tr. V, 41-44). Although the matter appeared to be over, Petitioner got mad when he saw Mr. Palmer and the other two victims at a nearby convenience store shortly thereafter. Directing the driver of the vehicle he occupied to follow Mr. Palmer's vehicle, Petitioner pursued them for over three miles with his AK-47 in hand. Eventually coming along side them on a main city street, Petitioner plastered the driver's side of Mr. Palmer's moving vehicle with numerous bullets, killing Mr. Palmer and Anthony Jones, injuring London Johnson, and striking the front door of the home of Annie Emerson who was awake at 3 a.m. in anticipation of her daily prayer time. As he left the scene, Petitioner exclaimed, "I'm a monster. I'm a mother****ing monster. Bitches don't want to play with me" (J. Tr. III, 41-47, 49, 249-56; J. Tr. IV, 25, 27-29, 31, 35-46; J. Tr. V, 47-52, 60-66; State's Exhibits 1-2, 5, 21, and 32-33). These very facts overwhelmingly support the jury's findings of the great risk of death to more than one aggravator and the continuing threat aggravator. They show that Petitioner is a self-proclaimed force to be reckoned with and that his response to alleged wrongs committed against him will be excessive, deadly, and without concern for those who get in the way of his retaliation efforts.

***17** Second, the additional evidence that Petitioner is a continuing threat. In addition to the evidence introduced through Mr. Collins, both of Petitioner's co-defendants testified that they had been threatened by Petitioner. Co-defendant Jonathan Dalton testified that Petitioner told him not to talk to the police. Specifically, Petitioner said, "B, if you say anything, I know where your mama stays, I know where your sister stays. I'm going to their front door with it" (J. Tr. IV, 46-47). After Petitioner met with police, Petitioner told Dalton that the police wanted to speak with him, too. At Petitioner's direction, Petitioner, Dalton, and Latango Robertson, the other co-defendant, got together and agreed to tell the police the same story, which included "[e]verything ... but the shooting" (J. Tr. IV, 47-49; J. Tr. V, 74-75). Robertson testified that Petitioner also threatened him when Petitioner asked him to retrieve his AK-47 from the trunk. When Robertson tried to talk Petitioner out of it, Petitioner told him, "Well, if I had [sic] to get it myself, there's going to be trouble" (J. Tr. V, 60-61, 75-76).

Third, evidence that Petitioner, at the age of sixteen, committed an armed robbery. The victim of the robbery, Hung Pham, testified and gave details about the crime.

Mr. Pham, an electronics repairman, testified Petitioner came into his home at night under the guise of seeking his repair services. Petitioner put a gun to his face, called him a bitch, and beat him up. He then pulled him into a closet, had him kneel down, and demanded all his money. Mr. Pham gave Petitioner all the money in his wallet, about $140, but Petitioner believed Mr. Pham had more. Petitioner shot Mr. Pham from behind. Luckily, the bullet went through Mr. Pham's ear and not his head (J. Tr. VII, 92-104). In addition to satisfying the prior violent felony aggravator, this prior conviction was also more evidence that Petitioner is a continuing threat.

Finally, the satisfaction of yet another aggravating circumstance, the especially heinous, atrocious, or cruel murder of Mr. Palmer. The evidence showed that Mr. Palmer did survive the shooting for a period of time and that during that time he expressed his fear that Petitioner would come back to finish him off. Mr. Johnson testified that Mr. Palmer had trouble breathing and that it sounded like Mr. Palmer had blood in his throat (J. Tr. III, 42-43, 45-46). The medical examiner testified that Mr. Palmer died a result of a gunshot wound to the chest, and although Mr. Palmer would have needed immediate medical care to survive, the medical examiner corroborated Mr. Johnson's testimony that Mr. Palmer could have lived for a short period of time after being shot (J. Tr. V, 161-63). See Ground 12, infra.

In response to this strong evidence supporting four aggravating circumstances, Petitioner did present mitigating circumstances, including his age, mental condition, and family support (O.R. III, 605). However, Petitioner's mitigation evidence was not enough to overcome the State's fortified second stage case.

Petitioner's first witness challenged Mr. Collins' credibility. Although he did so successfully,[13] his testimony countered only a small portion of the aggravating evidence the State presented.

Petitioner's grandmother, mother, and aunt also testified. Petitioner's grandmother, Marie Decoud, explained that because Petitioner was born to her daughter while she was still in high school, Ms. Decoud took care of him until his mother finished school. Ms. Decoud testified that Petitioner's father took no hand in raising him, and she described Petitioner as a "very good" child, noting that he was "[m]annerable" and "well raised." Ms. Decoud was the first witness to testify about Petitioner being "shot up" when he was in New Orleans. Petitioner was severely injured in this incident and was in a coma for three or more months. After his initial release, an infected gunshot wound caused Petitioner to undergo additional treatment and further hospitalization. Ms. Decoud testified that if the jury imposed a sentence less than death, she would be supportive of and would visit Petitioner, as she did when he was previously incarcerated (J. Tr. VII, 140-44, 148). Through Ms. Decoud's testimony the jury was also advised that Petitioner did not graduate from high school, but only attended school through the eighth grade (J. Tr. VII, 146).[14]

***18** Petitioner's mother, Barbara Mason, testified that she was sixteen years old when she had Petitioner. She acknowledged her mother's help with Petitioner, and she confirmed that Petitioner's father was not involved in their lives nor did he provide any support. Ms. Mason testified that Petitioner was a good child, that she "had no problem out of him," and that he was loved by his family. Ms. Mason also testified about Petitioner being shot in 2004, providing additional information that it was a drive-by shooting and that Petitioner was shot five times. Ms. Mason told the jury that Petitioner took responsibility for his crime against Mr. Pham. Like her mother, Ms. Mason concluded her testimony by saying that she would visit Petitioner in jail if he received an imprisonment sentence (J. Tr. VII, 151-55).

Although Petitioner's aunt, Chrisunda Thomas, described Petitioner as "a sweet kid" who "never gave any trouble," she acknowledged that Petitioner went to prison when he was sixteen and that she visited him in prison two to three times a month. Like her mother and her sister, Ms. Thomas discussed Petitioner being shot in November of 2004 and how critical his injuries were. After being shot, Petitioner became paranoid, afraid to even respond to someone knocking on the door, for fear that someone was returning to finish him off. Ms. Thomas testified that she loved Petitioner and that she wished he was not in this situation. She testified that she would visit Petitioner in prison (J. Tr. VII, 199-206).

Dr. Massad testified regarding Petitioner's mental health. As previously discussed in connection with Petitioner's Ground 2, supra, Dr. Massad's psychological evaluation of Petitioner revealed that Petitioner "more likely than not" had PTSD (J. Tr. VII, 160-63). Dr. Massad explained

that in order to be diagnosed with PTSD, "one has to have been exposed to a life-threatening trauma or serious illness and then satisfy different criteria that are key to that trauma." Petitioner's life-threatening trauma was being shot in a drive-by shooting (J. Tr. VII, 163). Dr. Massad testified that someone with PTSD "might be hypersensitive and overreact," "become hypervigilant," and "might have an exaggerated startle response" (J. Tr. VII, 166-67). He also testified that drugs or alcohol might "increase the likelihood that [someone with PTSD] would react or overreact" (J. Tr. VII, 167). It was Dr. Massad's opinion that Petitioner's criminal actions "might be consistent with somebody who has PTSD and is reacting to the present situation in a way as influenced by past history and what's already happened to them" (J. Tr. VII, 168). Dr. Massad told the jury that "there are a multitude of treatments for PTSD" and that Petitioner's PTSD could be managed or even cured (J. Tr. VII, 172).

Petitioner's final witness was a former girlfriend, De'Andrea Lagarde. In her limited testimony, she told the jury that she had known Petitioner for three or four years. She knew Petitioner when he got shot and together they left New Orleans to come to Oklahoma after Hurricane Katrina. Ms. Lagarde testified that she loves and cares about Petitioner and she told the jury that she would visit him in prison if the jury spared him of a death sentence (J. Tr. VII, 217-20).

In light of all of the evidence presented in the second stage, the Court concludes that the hearsay contained in the letters was cumulative to the testimony given by Mr. Collins prior to their introduction, and because the aggravating circumstances so greatly outweighed the mitigating ones, the Court additionally concludes that the letters had little or no effect on the jury's sentencing determination, much less a substantial and injurious one. Accordingly, relief on Ground 7 is denied.

**H. Ground 8: Improper Vouching.**

In Ground 8, Petitioner asserts that the testimony given by a police detective in the second stage regarding Mr. Collins, the jailhouse informant, was improper vouching. Petitioner raised this claim on direct appeal. The OCCA addressed the merits of the claim and denied relief. Simpson, 230 P.3d at 901. Not surprisingly, the parties disagree as to the reasonableness of the OCCA's holding.

***19** Immediately after Mr. Collins testified, the State presented Oklahoma City Police Detective John George. In a mere three pages of testimony, Detective George testified that Mr. Collins was consistent.

> Q. And without going into the interview, was he consistent with you?
>
> A. He was very consistent. I think he provided a whole lot more about his history that we never asked him, but the story about [Petitioner] and his involvement was pretty much the same story he told today.

(J. Tr. VII, 84). Detective George also testified that Mr. Collins was not given anything in exchange for his testimony, although Detective George believed he should have.

> Q. Did you give Roy Collins anything?
>
> A. We should have.
>
> Q. That's a, "No"?
>
> A. No, we didn't.
>
> Q, I mean – –
>
> A. He got absolutely nothing from us.
>
> Q. Should he have?
>
> A. I believe he should have. I think he was – – when we went to interview him he knew stuff that we didn't even know. I didn't know the witnesses were pregnant at prelim. I had no idea.
>
> I mean, there was no doubt in my mind that [Petitioner] told him these things because he had details – –

(J. Tr. VII, 85). Detective George's answer was cutoff by a defense objection, which was overruled (J. Tr. VII, 86-87), and then the following concluding testimony was given:

> Q. So, I'm sorry, as I was saying, Roy Collins was consistent with the information you had, is that correct?
>
> A. Yes.
>
> Q. You weren't feeding Roy Collins information?
>
> A. No, sir.

> Q. And if I understand you, you owe Roy Collins, but you haven't given him anything?
>
> A. I feel like we do.

(J. Tr. VII, 87).

In denying Petitioner relief on this claim, the OCCA held as follows:

> Evidence is impermissible vouching only if the jury could reasonably believe that a witness is indicating a personal belief in another witness's credibility, "either through explicit personal assurances of the witness's veracity or by implicitly indicating that information not presented to the jury supports the witness's testimony." Warner v. State, 2006 OK CR 40, ¶ 24, 144 P.3d 838, 860. In the present case, Detective George neither gave explicit personal assurances of these witnesses' veracity nor did he implicitly indicate that information not presented at trial supported these witnesses' testimony. [15] Detective George did not improperly vouch for the credibility of other witnesses and the admission of his testimony was not an abuse of discretion.

Simpson, 230 P.3d at 901. Petitioner argues that this holding is an unreasonable determination of the facts, and that it is both contrary to and an unreasonable application of United States v. Young, 470 U.S. 1 (1985), and Lisenba v. California, 314 U.S. 219 (1941). As to the OCCA's factual determination, Petitioner has not shown that the OCCA's characterization of Detective George's testimony is unreasonable. For the following reasons, the Court additionally concludes that the OCCA's decision is not contrary to or an unreasonable application of Supreme Court law.

In Young, the Supreme Court reviewed a prosecutor's closing statement to determine if it amounted to plain error. Young, 470 U.S. at 6. In response to comments made by defense counsel in his closing argument, the prosecutor stated several times, without one objection, that he personally believed that the defendant had committed fraud, and he went so far as to tell the jurors that if they found otherwise, they were not doing their job. Id. at 4-6. In its analysis, the Supreme Court stated as follows:

> ***20** The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 18-19. The Court ultimately concluded that no plain error occurred because the prosecutor's comments "contained no suggestion that he was relying on information outside the evidence presented at trial" and the overwhelming evidence of the defendant's guilt. Id. at 19-20.

Unlike Young, Petitioner's complaint here does not relate to comments made by the prosecutor but by a witness. See Parker v. Scott, 394 F.3d 1302, 1310 (10th Cir. 2005) (acknowledging the absence of Supreme Court authority that "vouching testimony itself violates the Due Process Clause"); Washington v. Addison, No. 08-CV-481-TCK-PJC, 2012 WL 1081082, at *3 (N.D. Okla. Mar. 28, 2012) (citing Parker: "Significantly, no Supreme Court authority holds that improper vouching violates due process."). In addition, there is no indication that the testimony given by Detective George regarding Mr. Collins' credibility was based on any information not already before the jury. Detective George testified that Mr. Collins' testimony at trial regarding what Petitioner told him was consistent with what Mr. Collins told him during a prior interview. He went on to say that he believed that Mr. Collins had received his information from Petitioner because he knew details that the police did not even know. One such detail was the fact that the two female witnesses that Petitioner wanted beaten up were

pregnant at the time, a detail mentioned by Mr. Collins in his own testimony.

Petitioner also relies on Lisenba for relief. In Lisenba, the Supreme Court set forth the fundamental fairness standard of review for general due process violations:

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.

Lisenba, 314 U.S. at 236. See Parker, 394 F.3d at 1310-11 (discussing Lisenba and the fundamental fairness inquiry). As the Tenth Circuit has acknowledged, however, "it is not improper for a prosecutor to direct the jury's attention to evidence that tends to enhance or diminish a witness's credibility." Thornburg, 422 F.3d at 1132. In the present case, the prosecutor presented Detective George to enhance Mr. Collins' credibility through evidence that his testimony was consistent with what he told the police and that he knew things he could have only learned from Petitioner. As the prosecutor told the trial court in response to defense counsel's objection at trial, this evidence was presented to counter the implication raised by the defense on cross-examination that Mr. Collins could have obtained information about Petitioner's case from public records, especially given Mr. Collins' experience as a prison law clerk (J. Tr. VII, 62-63, 67-68, 70-71, 82-83, 86). Under these circumstances, and given all of evidence presented in support of the four aggravating circumstances as noted in Ground 7, supra, the Court concludes that Petitioner was not denied a fundamentally fair trial on account of Detective George's testimony, and therefore the OCCA did not act unreasonably in denying him relief on this claim. Consequently, Ground 8 is denied.

**I. Ground 9: Exculpatory Evidence.**

***21** In Ground 9, Petitioner asserts that the prosecution withheld exculpatory evidence which could have been used to challenge the credibility of Mr. Collins. Petitioner raised this claim in his second post-conviction application, but the OCCA did not address its merits. Respondent argues for the application of a procedural bar, but Petitioner asserts that the merits of this claim should be addressed because the OCCA's procedural ruling is neither adequate nor independent. Petitioner additionally asserts that he can satisfy the cause and prejudice exception to the procedural bar because the prosecution suppressed the evidence (cause) and because the evidence is material (prejudice). For the reasons set forth below, the Court finds that Petitioner has failed to overcome the application of a procedural bar to his Ground 9. In addition, the Court finds that Petitioner's claim fails on the merits as well.

In disposing of Petitioner's claim, the OCCA held as follows:

> [Petitioner] first argues that he was denied his right to due process at trial in violation of Brady v. Maryland[FN1] and Napue v. Illinois[FN2] by the prosecutor's failure to disclose material evidence favorable to the defense. All of the evidence at issue concerns the credibility of State's witness, Roy Collins, who testified against [Petitioner] in the second stage of his trial. The alleged misconduct at issue occurred at trial and the legal basis for this claim was available at the time of [Petitioner's] direct appeal and his original application for post-conviction relief. Additionally, the claim could have been presented previously as the factual basis for the claims was available and could have been ascertained through the exercise of reasonable diligence. See 22 O.S.Supp.2006, § 1089(D)(4)(b), (D)(8). The claim is waived.
>
> FN1. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
>
> FN2. 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Simpson, No. PCD-2012-242, slip op. at 4. Petitioner's challenges to the adequacy and independence of Section 1089(D)(8) have already been addressed and rejected in the Court's adjudication of his Ground 4, supra. As for his assertion of cause, Petitioner simply contends that "suppression is 'cause' for any default." Reply, p. 12. However, Petitioner's argument, without more, is unavailing.

A Brady claim is subject to a procedural bar like any other claim, and the cause and prejudice exception requires Petitioner to demonstrate that some external objective factor, unattributable to him, prevented his compliance with the procedural rule in question. Spears, 343 F.3d at 1255. The State's actions may have in fact prohibited Petitioner from raising his Brady claim earlier, but this is a showing he must make. Petitioner must show that even if he had conducted a " 'reasonable and diligent investigation,' " he could not have discovered the evidence earlier because it was "in the hands of the State." Strickler v. Greene, 527 U.S. 263, 287-88 (1999).

Petitioner asserts that the prosecutor possessed (and suppressed) the following material evidence: (1) a videotaped interview of Mr. Collins with reference to the Jason Whitecrow case; (2) Mr. Collins' court records detailing his eleven prior convictions; and (3) Mr. Collins' records from the Oklahoma Department of Corrections. Petition, p. 41. Petitioner states that this is the suppressed material he knows of as of the time of filing his petition; however, makes no assertion that he found this information within the files of the Oklahoma County District Attorney's Office nor does he provide any explanation as to how he discovered it. [16] And, in addition to the three items listed above, Petitioner supports his Brady claim with reference to multiple exhibits, including letters from the University of Oklahoma and Oklahoma Panhandle State University regarding Mr. Collins' attendance; an affidavit from Barry Switzer, the head football coach at the University of Oklahoma from 1973 to 1988; a letter from a former girlfriend of Mr. Collins; affidavits from inmates who were incarcerated with Mr. Collins; and affidavits from businessmen concerning Mr. Collins' employment. It is apparent that Petitioner has been able to learn additional information about Mr. Collins through the investigative efforts of his habeas counsel, and although there is no doubt that Petitioner has uncovered information that challenges Mr. Collins' credibility, Petitioner fails to make any showing that he was prevented from discovering this information sooner. The OCCA determined that the "legal basis for this claim was available at the time of [Petitioner's] direct appeal and his original application for post-conviction relief," Simpson, No. PCD-2012-242, slip op. at 4, and Petitioner has not made any assertions that question this finding. For this reason, Petitioner has failed to demonstrate cause sufficient to overcome the imposition of a procedural bar to his Brady claim.

***22** In addition to failing to show cause, Petitioner has also failed to show prejudice. When a Brady claim has been procedurally defaulted, the cause and prejudice exception dovetails with the Brady analysis, which requires a petitioner to show that the evidence was suppressed by the state and that "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler, 527 U.S. at 281-82. Petitioner asserts that Mr. Collins' testimony "was critically important to prove continuing threat." Petition, p. 41 (internal quotation marks omitted). [17] However, as detailed in Ground 7, supra, Mr. Collins' testimony was not the only evidence of continuing threat, and in addition to the other evidence supporting continuing threat, there was an abundance of evidence supporting the three other aggravating circumstances. And even beyond this, much of the information Petitioner has "discovered" about Mr. Collins was known and explored at trial or is simply more of the same. On direct examination, the prosecutor elicited testimony from Mr. Collins regarding his prior convictions in Oklahoma, Texas, Colorado, and Florida, some of which involved dishonesty. Mr. Collins admitted that he was a liar and a drug abuser, and that while in prison, he worked "illegally" by charging fellow inmates for legal services (J. Tr. VII, 18-31, 38). Mr. Collins acknowledged that he was a "rat" and a "snitch" and that he had helped the State before in the Whitecrow case (J. Tr. VII, 32). On cross-examination, defense counsel questioned Mr. Collins further about his prior convictions, his motivation for testifying, and his assertion that he played football for the University of Oklahoma (J. Tr. VII, 59-80), and through additional testimony, proved that Mr. Collins had not played for the Sooners as he claimed. See Ground 7 & n.13, supra. In light of all of this evidence, the Court concludes that Petitioner has not shown a reasonable probability of another result had this evidence been made known to him. As the Supreme Court found in Strickler, even if Mr. Collins had been "severely impeached or excluded entirely," "[t]he record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death." Strickler, 527 U.S. at 294, 296. For these reasons, the Court concludes that Petitioner's Ground 9 is not only procedurally barred but subject to denial on the merits as well. [18]

**J. Ground 10: Mitigation Limitation.**

In Ground 10, Petitioner argues that he was denied his right to present mitigating evidence. Specifically, Petitioner asserts that the trial court erred when it limited the testimony of his last witness. Petitioner raised this claim in his first post-conviction application. The OCCA found the claim waived because it could have been presented on direct appeal. Simpson, No. PCD-2007-1262, slip op. at 7. The OCCA additionally found that appellate counsel was not ineffective for failing to raise the claim. Id. at 8. Consequently, Respondent asserts that the claim is procedurally barred. Petitioner argues that the waiver applied by the OCCA is neither adequate nor independent, that appellate counsel ineffectiveness satisfies cause, and that a fundamental miscarriage of justice will occur if the Court fails to address the merits of the claim.

The record reflects that prior to defense witness De'Andrea Lagarde taking the stand, the prosecutor asked to approach the bench with defense counsel. The prosecutor began by saying, "Judge, at some point there's a cumulative objection in here" (J. Tr. VII, 214). When defense counsel replied that Ms. Lagarde was his last witness, the trial court inquired as to what her testimony would be (J. Tr. VII, 215). Defense counsel responded as follows:

> She met him a few months after he got out of the penitentiary, known him about four years. They were together when he got shot. She can testify to the same stuff in the hospital, although, I wasn't necessarily going to go into that because that's pretty well established.
>
> She was with him the day the hurricane hit. I was going to have her talk about what their experiences were in getting out of New Orleans. She was with him in Norman before this incident. Just not very long.

(J. Tr. VII, 215). The trial court directed defense counsel not to question Ms. Lagarde about Petitioner's being shot because it was cumulative. When defense counsel stated that he wanted to ask Ms. Lagarde about the effects of Hurricane Katrina like Dr. Massad had testified to, the trial court stated that the witness was not qualified to give that testimony. The trial court concluded by saying that "she can talk about whether she cares about him and will she visit him in prison and all of that" (J. Tr. VII, 216). Ms. Lagarde then gave brief testimony that she had know Petitioner for three or four years, that he had been her boyfriend, that she knew him when he was in and out of the hospital, that they left New Orleans together, that she still loves and cares for him, and that she would go see him in prison if the jury gave him an imprisonment sentence (J. Tr. VII, 217-18).

***23** Petitioner argued in his first post-conviction application that the trial court erred in limiting Ms. Lagarde's testimony. With reference to an affidavit provided by Ms. Lagarde on direct appeal (in support of a Rule 3.11 motion concerning trial counsel's ineffectiveness), Petitioner set forth the testimony Ms. Lagarde could have given. The testimony concerned the conditions she and Petitioner faced when Hurricane Katrina hit and how they made their way out of New Orleans.[19] Original Application for Post Conviction Relief, Case No. PCD-2007-1262, pp. 33-34. As noted above, the OCCA found that because this claim was contained in the trial record, appellate counsel could have raised it on direct appeal. Simpson, No. PCD-2007-1262, slip op. at 7. However, because Petitioner also argued that his appellate counsel was ineffective for failing to raise the claim, the OCCA additionally addressed and denied the merits of this related claim:

> While we find that appellate counsel could have raised these issues on direct appeal, failure to do so did not render counsels' performance deficient. "Appellate counsel is not required to raise every non-frivolous issue." Harris v. State, 2007 OK CR 32, ¶ 5, 167 P.3d 438, 442. Further, even if we were to find counsels' performance deficient, [Petitioner] has not shown a reasonable probability that but for this deficient performance, the result of the trial and sentencing proceedings would have been different. [Petitioner's] argument fails under the Strickland[20] test.

Simpson, No. PCD-2007-1262, slip op. at 8.

Although Petitioner asserts that "[t]he OCCA's adjudication of waiver is neither adequate nor independent," Petitioner offers no further support for this assertion. Reply, p. 13. The Court acknowledges that Petitioner has, in his Procedural Default Statement, challenged the validity of the OCCA's procedural rules with respect to certain trial counsel ineffectiveness claims and in light of Valdez. Petition, pp. 99-100. But because

Ground 10 is not an ineffective assistance of trial counsel claim and because Petitioner's Valdez-based challenge has already been addressed by the Court in Ground 4, supra, the Court finds that Petitioner's challenge here also fails. The Court also concludes that Petitioner's attempt to satisfy the fundamental miscarriage of justice exception with a skeletal, conclusory statement that a miscarriage of justice will occur if this Court declines to hear his Ground 10 falls woefully short of meeting his pleading burden. Petition, p. 59. What remains then is Petitioner's allegation of cause–ineffective assistance of appellate counsel. However, because the OCCA addressed the merits of Petitioner's stated cause, AEDPA deference applies, and Petitioner has not shown that the OCCA acted unreasonably in finding that his appellate counsel was not ineffective for failing to raise this claim. Ryder ex rel. Ryder v. Warrior, 810 F.3d 724, 746 (10th Cir. 2016); Turrentine v. Mullin, 390 F.3d 1181, 1202 (10th Cir. 2004). Therefore, the Court concludes that Petitioner's Ground 10 is procedurally barred.

**K. Ground 11: Mitigating Circumstances Instruction.**

In Ground 11, Petitioner asserts that a uniform jury instruction, coupled with argument from the prosecutors, prevented the jury from considering his mitigating evidence. Petitioner raised this claim on direct appeal but was denied relief. Simpson, 230 P.3d at 903-04. Respondent asserts that Petitioner has failed to demonstrate that the rejection of this claim by the OCCA is contrary to or an unreasonable application of Supreme Court law. The Court agrees.

***24** Petitioner's complaint lies with Instruction No. 13, which in pertinent part, informed the jury that "[m]itigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame" (O.R. III, 604). Petitioner asserts that this instruction, along with arguments made by the prosecutors challenging the mitigating circumstances he put forth, violated Lockett v. Ohio, 438 U.S. 586 (1978), wherein the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604 (footnotes omitted).

In support of his argument, Petitioner directs the Court's attention to the OCCA's decision in Harris v. State, 164 P.3d 1103 (Okla. Crim. App. 2007). In Harris, the OCCA addressed the same issue raised in Petitioner's case, and while the OCCA rejected the argument that "the current uniform jury instruction prohibits jurors from considering mitigating evidence[,]" Harris, 164 P.3d at 1113,[21] it nevertheless acknowledged that there had been instances where prosecutors had played upon the language of the instruction in an attempt to limit a jury's consideration of a defendant's mitigating evidence. Even though the OCCA did not grant relief to Harris, it did, in an effort to "clarify" the instruction and to "discourage improper argument[,]" determine that the instruction should be amended.[22] Id. at 1114. Petitioner requests relief because he "did not receive the benefit of this clarified instruction." Petition, p. 62.

In denying Petitioner relief on this claim, the OCCA specifically acknowledged Harris, but determined as it did in Harris, that relief was unwarranted. In particular, the OCCA held:

> A review of the prosecutor's closing argument concerning the mitigating evidence instruction, the mitigating evidence itself and all instructions concerning mitigating evidence given in this case supports our conclusion that the jurors' consideration of the evidence offered in mitigation was not unfairly limited in this case.

Simpson, 230 P.3d at 904. The Court concludes that Petitioner has failed to show that this decision by the OCCA is contrary to or an unreasonable application of Lockett. In so concluding, the Court notes that the Tenth Circuit has recently addressed this very same issue in Hanson v. Sherrod, 797 F.3d 810, 849-52 (10th Cir. 2015), and likewise denied relief. Ground 11 is therefore denied.

**L. Ground 12: Insufficient Evidence of the HAC Aggravator.**

In Ground 12, Petitioner challenges the evidence supporting the jury's finding of the especially heinous,

atrocious, or cruel aggravator with respect to the murder of Mr. Palmer. The OCCA addressed this claim on direct appeal and denied relief. Simpson, 230 P.3d at 902-03. Petitioner is not entitled to relief on this claim because he has failed to show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law.

***25** When reviewing the sufficiency of evidence supporting an aggravating circumstance, the OCCA applies the standard of review set forth in Jackson v. Virginia, 443 U.S. 307, 319 (1979). Thus, the OCCA " 'reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt.' " Simpson, 230 P.3d at 902 (quoting Washington v. State, 989 P.3d 960, 974 (Okla. Crim. App. 1999)). Jackson applies on habeas review as well. Lewis v. Jeffers, 497 U.S. 764, 781 (1990). "Like findings of fact, state court findings of aggravating circumstances often require a sentencer to 'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " Id. at 782 (quoting Jackson, 443 U.S. at 319). Thus, the Court " 'must accept the jury's determination as long as it is within the bounds of reason.' " Lockett, 711 F.3d at 1243 (quoting Boltz v. Mullin, 415 F.3d 1215, 1232 (10th Cir. 2005)). In addition to the deference afforded a jury's verdict, the AEDPA adds another layer of deference to the Court's review of a sufficiency claim. See Hooks v. Workman, 689 F.3d 1148, 1166 (10th Cir. 2012) ("We call this standard of review 'deference squared.' ") (citation omitted). When reviewing the evidentiary sufficiency of an aggravating circumstance under Jackson, the Court looks to Oklahoma substantive law to determine its defined application. Hamilton, 436 F.3d at 1194.

In denying Petitioner relief, the OCCA held as follows:

> To prove that a murder is especially heinous, atrocious or cruel, the evidence must show that the victim's death was preceded by torture or serious physical abuse. Hogan v. State, 2006 OK CR 19, ¶ 66, 139 P.3d 907, 931. Serious physical abuse is proved by showing that the victim endured conscious physical suffering before dying. Id.
>
> ....
>
> With regard to the murder of Glen Palmer, the evidence showed that Palmer was shot four times. He suffered a grazing gunshot wound to the right shoulder, two superficial gunshot wounds to the left side of his back, and an ultimately fatal gunshot wound to his chest. Although he was initially conscious after being shot, his breathing became labored and he made gurgling sounds as his chest filled with blood before he died. There was testimony that immediately after he had been shot, Palmer was able to speak, was aware that he had been shot and was fearful that the shooters would return. Reviewing the evidence in the light most favorable to the State, we find that the evidence supports a finding that Palmer's death was preceded by physical suffering and mental cruelty.

Simpson, 230 P.3d at 902 (citation omitted). Petitioner has not shown that this determination is an unreasonable one, especially in light of the double deference afforded it. Accordingly, relief is denied on Ground 12.

**M. Ground 13: Conflict of Interest.**

In Ground 13, Petitioner alleges that he was denied the effective assistance of counsel because an investigator who worked on his case had previously worked on co-defendant Dalton's case. Alleging this created an actual conflict of interest, Petitioner contends that he is entitled to relief without a showing of prejudice in accordance with the Supreme Court's decisions in Glasser v. United States, 315 U.S. 60 (1942), Holloway v. Arkansas, 435 U.S. 475 (1978), and Cuyler v. Sullivan, 446 U.S. 335 (1980). Petitioner raised this claim on direct appeal, but was denied relief in a decision which Petitioner argues is both legally and factually unreasonable. Respondent asserts that AEDPA deference demands relief be denied.

In Glasser, 315 U.S. at 70, the Supreme Court held "that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." In Holloway, the Supreme Court addressed the issue of prejudice. From its opinion in Glasser, the Court found that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." Holloway, 435 U.S. at 488. Finally, in Cuyler, 446 U.S. at 350, the Supreme Court held "that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an

actual conflict of interest adversely affected his lawyer's performance."

***26** On direct appeal, Petitioner argued "that his trial counsel was ineffective for failing to adequately investigate, present, or otherwise deal with evidence in four critical areas ...." Brief of Appellant, Case No. D-2007-1055, p. 94. One of these four critical areas was evidence that his investigator had a conflict of interest. Id. at 98-99. Petitioner made additional argument in support of this claim in his Rule 3.11 motion for an evidentiary hearing. Application for an Evidentiary Hearing, Case No. D-2007-1055, pp. 15-18. Attached to the motion were affidavits from both of his trial attorneys and the investigator. These affidavits have been reproduced by Petitioner in his Exhibits 42, 79, and 80. Both of Petitioner's trial attorneys deny having any knowledge that the investigator, Chuck Loughlin, "had been involved in this case in any capacity prior to his assignment to represent [Petitioner]." Petitioner's Exhibits 79 and 80. Additionally, one states that he

> cannot think of a time when Mr. Loughlin made any overt attempt to steer our investigation away from matters potentially damaging to Dalton, or to protect Dalton in any way. Mr. Loughlin always acted as if he was completely loyal to [Petitioner] and worked hard on this case. This situation could be nothing more than an accidental breakdown in communications ....

Petitioner's Exhibit 79. While the other states that he

> cannot think of any time when Mr. Loughlin made any attempt to shield Dalton from attacks or inquiries by [Petitioner's] defense team, or to steer our investigation away from matters potentially damaging to Dalton. Mr. Loughlin always appeared to be loyal to [Petitioner] and worked hard on his case. This situation could be inadvertent ....

Petitioner's Exhibit 80. Mr. Loughlin states in his affidavit that he told both Petitioner and his lead counsel of his previous involvement with Dalton, and he describes his contact with Dalton as follows:

> I met with Dalton in the jail a couple of times, and I worked on gathering some records for him to use in mitigation. I do not recall discussing first stage issues with him. I am not sure how long I was assigned to his case.

Petitioner's Exhibit 42. Mr. Loughlin states that he did not hold back from Petitioner's counsel any memorandums he generated for Dalton, and in fact, he does not even recall that he wrote any. Id. Mr. Loughlin additionally states that he "did the best [he] could possibly do for [Petitioner], and [does] not feel like [his] work on [Petitioner's] case was compromised in any way by the fact [he] previously was assigned to Jonathan Dalton's case." Id.

In addressing Petitioner's claim, the OCCA held as follows:

> Finally, [Petitioner] contends that the defense investigator who was assigned to work on his case had previously worked on co-defendant Dalton's case and therefore, had a conflict of interest. It is not clear how the investigator's alleged conflict of interest rendered trial counsel's performance deficient. The investigator's affidavit submitted in support of the Motion for an Evidentiary Hearing sheds no light on this. The investigator stated in his affidavit that he worked on gathering records for Dalton to use for mitigation and the memorandums he prepared for

> Dalton's case were turned over to [Petitioner's] attorneys in this case. He also stated that he did the best that he could for [Petitioner] and did not feel like the work he did on [Petitioner's] case was compromised by his work on Dalton's case. [Petitioner] has neither shown that counsel were deficient with regard to their use of the investigator nor that any alleged deficiency prejudiced the defense, depriving [Petitioner] of a fair trial with a reliable result. [Petitioner] has not shown that he was denied his constitutional right to the effective assistance of counsel.

Simpson, 230 P.3d at 905. With respect to Petitioner's Rule 3.11 motion, the OCCA offered the following additional analysis:

> ***27** We have thoroughly reviewed [Petitioner's] application and affidavits along with other attached non-record evidence and we conclude that [Petitioner] has failed to show with clear and convincing evidence a strong possibility that counsel was ineffective for failing to identify or use the evidence raised in the motion. Consequently, we also find that [Petitioner] failed to show that counsel's performance was constitutionally deficient and that counsel's performance prejudiced the defense, depriving him of a fair trial with a reliable result. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 674 (1984); Davis, 2005 OK CR 21, ¶ 7, 123 P.3d at 246. [Petitioner] is not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

Id. at 906.

Petitioner's legal challenge to the OCCA's decision is its application of Strickland as opposed to Holloway. Petitioner argues that although Holloway (and Glasser and Cuyler) involved conflicted attorneys, the holdings of these cases are "so fundamental" that they apply " 'beyond doubt' " to his investigator. Petition, p. 65 (quoting Yarborough v. Alvarado, 541 U.S. 652, 666 (2004)). In Yarborough, the Supreme Court stated that

> Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law. At the same time, the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.

Id. at 666 (citation omitted). However, the Court is unconvinced by Petitioner's argument for Holloway's application. There is a distinct difference between one attorney representing co-defendants and Petitioner using an investigator who had previously done some mitigation work for one of his co-defendants. See Reply, p. 18 n.3 (wherein Petitioner acknowledges that "Loughlin's investigation ... did not appear to have included first stage issues."). As the Tenth Circuit noted in Fairchild,

> "[T]he phrase 'clearly established Federal law, as determined by the Supreme Court of the United States'... refers to the holdings, as opposed to the dicta, of th[e] Court's decisions...." Williams v. Taylor (Terry Williams), 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Federal courts may not "extract clearly established law from the general legal principles developed in factually distinct contexts," House v. Hatch, 527 F.3d 1010, 1017 n. 5 (10th Cir. 2008), and Supreme Court holdings "must be construed narrowly and consist only of something akin to on-point holdings," id. at 1015; see id. at 1016–17.

Fairchild, 784 F.3d at 710. Consequently, the Court cannot fault the OCCA for conducting its analysis under Strickland and denying relief due to the absence of both deficient performance and prejudice, especially under the double deference the AEDPA affords ineffectiveness claims. See Jackson v. Warrior, 805 F.3d 940, 954 (10th Cir. 2015) ("Given that the standards of review under both Strickland and AEDPA are 'highly deferential,' habeas review of ineffective assistance claims is 'doubly so.' ") (quoting Richter, 562 U.S. at 105).

The Court additionally finds that Petitioner is not entitled to relief based upon his allegation that the OCCA neglected and/or misrepresented facts. The OCCA's failure to mention Mr. Loughlin's few meetings with Dalton does not mean that this fact was not considered. The OCCA did not find the absence of personal meetings, and it specifically stated that it had "thoroughly reviewed [Petitioner's] ... affidavits." Simpson, 230 P.3d at 906. Regarding the OCCA's statement that Mr. Loughlin turned over the memorandums he prepared for Dalton, Petitioner is correct that this is a misstatement because although Mr. Loughlin stated he did not hold any memorandums back, he further stated that he did not remember preparing any. Nevertheless, it is clear that the OCCA's decision "was not based on" this determination. See 28 U.S.C. § 2254 (d)(2). In essence, the OCCA found that anything Mr. Loughlin had, he turned over. If he had nothing, he had nothing to turn over. See Hancock v. Trammell, 798 F.3d 1002, 1012 (10th Cir. 2015) ("We can reach the merits of the constitutional claim only if [petitioner] showed that the OCCA rested its decision on a factually mistaken view of the record.").

***28** For the reasons set forth above, the Court finds that Petitioner is not entitled to relief on his Ground 13. Relief is therefore denied.

**N. Ground 14: Ineffective Assistance of Trial Counsel.**

In Ground 14, Petitioner presents a myriad of reasons why his trial counsel was ineffective. Petitioner breaks his extensive ground for relief into three subparts: failure to investigate and present mitigation evidence (three claims), other evidentiary failures (five claims), and failing to preserve the record (eleven claims). Addressing each claim in turn, the Court finds that none of Petitioner's allegations warrant habeas relief.

**Mitigation Evidence**

Petitioner's initial complaint against his trial counsel is the failure to investigate, prepare, and present lay witnesses. Petition, pp. 68-71. Petitioner presented this claim on direct appeal. In his brief and accompanying Rule 3.11 motion, Petitioner argued that in contrast to the evidence which was presented at trial, he "did not come from a happy single-parent home, but grew up surrounded by violence, drugs, and poverty, which included family violence and a mother addicted to drugs." Brief of Appellant, Case No. D-2007-1055, p. 96. In his Rule 3.11 motion, Petitioner expanded upon his argument by referencing nine included affidavits. These affidavits correlate to Petitioner's Exhibits 40 and 45 through 52. Of the nine affidavits, six were from family members (three of whom testified at trial), two were from former girlfriends (one of whom testified at trial), and one was from a clinical psychologist, Dr. Jeri Fritz. The OCCA reviewed Petitioner's claim and the affidavits he provided in support. The OCCA's analyzed the claim as follows:

> In conjunction with this claim, [Petitioner] has filed a Rule 3.11 motion for an evidentiary hearing on the issue of ineffective assistance of counsel asserting that counsel was ineffective for failing to adequately investigate and identify evidence which could have been made available during the trial. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). In accordance with the rules of this Court, [Petitioner] has properly submitted with his motion affidavits supporting his allegations of ineffective assistance of counsel. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). As the rules specifically allow [Petitioner] to predicate his claim on allegations "arising from the record or outside the record or a combination of both," id., it is, of course, incumbent upon this Court, to thoroughly review and consider [Petitioner's] application and affidavits along with other attached non-record evidence to determine the merits of [Petitioner's] ineffective assistance of counsel claim. Our rules require us to do so in order to evaluate whether [Petitioner] has provided sufficient information to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the evidence at issue. Rule 3.11(B)(3)(b), *Rules of the Oklahoma*

*Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). This standard is intended to be less demanding than the test imposed by Strickland and we believe that this intent is realized. Indeed, it is less of a burden to show, even by clear and convincing evidence, merely *a strong possibility* that counsel was ineffective than to show, by a preponderance of the evidence that counsel's performance actually was deficient and that but for the unprofessional errors, the result of the proceeding would have been different as is required by Strickland. Thus, when we review and grant a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we do not make the adjudication that defense counsel actually was ineffective. We merely find that [Petitioner] has shown a strong possibility that counsel was ineffective and should be afforded further opportunity to present evidence in support of his claim. However, when we review and deny a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we necessarily make the adjudication that [Petitioner] has not shown defense counsel to be ineffective under the more rigorous federal standard set forth in Strickland.

***29** In the present case, [Petitioner] specifically asserts in his application for an evidentiary hearing on his claim of ineffective assistance of counsel that defense counsel was ineffective for failing to investigate and present (1) additional mitigating evidence that [Petitioner] endured a miserable life of poverty and parental neglect during his childhood and adolescence .... We have thoroughly reviewed [Petitioner's] application and affidavits along with other attached non-record evidence and we conclude that [Petitioner] has failed to show with clear and convincing evidence a strong possibility that counsel was ineffective for failing to identify or use the evidence raised in the motion. Consequently, we also find that [Petitioner] failed to show that counsel's performance was constitutionally deficient and that counsel's performance prejudiced the defense, depriving him of a fair trial with a reliable result. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 674 (1984); Davis, 2005 OK CR 21, ¶ 7, 123 P.3d at 246. [Petitioner] is not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

Simpson, 230 P.3d at 905-06.

Petitioner argues that this decision by the OCCA is unreasonable, but in so doing, he references three additional affidavits presented in his first application for post-conviction relief, Petitioner's Exhibits 53, 54 and 82, and eighteen more affidavits presented in his second application for post-conviction relief, Petitioner's Exhibits 41, 55 through 69, 83, and 84. These affidavits were presented in support of expanded claims that his trial counsel was ineffective for failing to investigate and present mitigation evidence. The OCCA found that Petitioner waived these expanded claims by failing to include them on direct appeal and/or present them in his first application for post-conviction relief. Simpson, No. PCD-2012-242, slip op. at 5; Simpson, No. PCD-2007-1262, slip op. at 5-6. In accordance with Pinholster, these twenty-one additional affidavits, which were not before the OCCA when it addressed the merits of the claim on direct appeal, cannot be considered by the Court in determination of Petitioner's request for habeas relief. Pinholster, 563 U.S. at 181 (review under Section 2254(d) "is limited to the record that was before the state court that adjudicated the claim on the merits").

"[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance ...." Burt v. Titlow, 571 U.S____, 134 S. Ct. 10, 18 (2013). Whether counsel has provided constitutional assistance is a question to be reviewed under the familiar standard set forth in Strickland, which the OCCA did in denying Petitioner relief. To obtain relief, Strickland requires a defendant to show not only that his counsel performed deficiently, but that he was prejudiced by it. Strickland, 466 U.S. at 687. A defendant must show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." Id. The assessment of counsel's conduct is "highly deferential," and a defendant must overcome the strong presumption that counsel's actions constituted " 'sound trial strategy.' " Id. at 689 (citation omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...." Id. at 690.

As Strickland cautions, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Therefore, "[a]

fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. Within "the wide range of reasonable professional assistance," "[t]here are countless ways to provide effective assistance in any given case[, and] [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id.

***30** As for prejudice, Strickland requires a defendant to show that his counsel's errors and omissions resulted in actual prejudice to him. Id. at 687. In order to make a threshold showing of actual prejudice, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Where, as here, the claim is the omission of mitigating evidence, the proper assessment of actual prejudice includes consideration of all of the mitigating and aggravating evidence. This includes not only the aggravating and mitigating evidence presented at trial in light of the omitted mitigation evidence which a defendant asserts should have been admitted, "but also what the prosecution's response to that evidence would have been." Wilson v. Trammell, 706 F.3d 1286, 1305-06 (10th Cir. 2013) (discussing the application of Wong v. Belmontes, 588 U.S. 15 (2009)).

In Richter, the Supreme Court addressed the limitations of the AEDPA as specifically applied to a claim of ineffective assistance of counsel that a state court has denied on the merits. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Richter, 562 U.S. at 101 (internal quotation marks and citation omitted). The Supreme Court bluntly acknowledged that "[i]f this standard is difficult to meet, that is because it was meant to be." Id. at 102.

> [The AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no further. 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 (internal quotation marks and citation omitted). When these limits imposed by the AEDPA intersect with the deference afforded counsel under Strickland, a petitioner's ability to obtain federal habeas relief is even more limited.

> Surmounting Strickland's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.
>
> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so[.] The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

***31** Richter, 562 U.S. at 105 (internal quotation marks and citations omitted).

At its core, Petitioner's challenge to the OCCA's decision is that it is unreasonable because it is never reasonable for trial counsel to fail to investigate, present, and prepare mitigation evidence. However, when a petitioner challenges the mitigation case put on by his trial counsel, it is not enough to simply show that more could have been done. The two-prong Strickland standard applies, and because the OCCA applied Strickland and evaluated the merits of Petitioner's claim, including the non-record evidence he presented in his Rule 3.11 motion, Richter makes it clear that to overcome the heightened deference afforded by Strickland and the AEDPA, Petitioner must do more than simply show the existence of other potentially mitigating evidence.

Having reviewed the mitigation evidence which Petitioner alleges trial counsel should have utilized, that information which Petitioner presented on direct appeal, the Court finds that Petitioner has failed to show that all fairminded jurists would disagree with the OCCA's assessment. Frost, 749 F.3d at 1225-26; Stouffer, 738 F.3d at 1221. Petitioner's evidence addresses the environment in which he was raised. However, some of this information the jury already knew: that Petitioner's mother was only fifteen years old when she became pregnant with him; that because of his mother's young age, his grandmother helped raise him; that his father was never a part of his life; that he was a good child, sweet and well-mannered; that he was not beaten or abused; [23] that he dropped out of school when he was in the eighth grade; that at age sixteen, he was sentenced as an adult and sent to prison for seven and a half years for a home invasion and robbery; that when he got out of prison, he was the victim of a drive-by shooting which nearly took his life; that a result of the shooting, he was in a coma for four months, and that even after his release from the hospital, his injuries required significant medical attention; that after this experience, he developed PTSD which manifested itself in fear and paranoia (he was afraid to even answer a knock at the door, afraid someone was coming to finish him off); and that he was a victim of Hurricane Katrina and came to Oklahoma as a result of being evacuated from New Orleans' Ninth Ward.

Petitioner's additional evidence highlights what it was like for him to grow up in New Orleans' Ninth Ward, an area stricken with poverty and crime and lacking in positive male role models. While this evidence speaks to the fact that Petitioner was not raised in a middle class home in the suburbs, it is not completely mitigating because it implies that Petitioner was a product of his surroundings. This evidence shows that his mother was not only young, but that she used drugs, [24] and while Petitioner looked up to an uncle, he was far from a good role model as he, too, was on drugs and involved in criminal activity. [25] This same evidence shows that Petitioner struggled in school, failed the sixth grade, and then began cutting class until he eventually dropped out; that he was arrested for burglary at the age of thirteen, and although he was ultimately found not guilty, he was charged for another burglary a year later for which he received three years probation [26] (and these incidents occurred before the home invasion and robbery that sent him to prison for seven years at the age of sixteen); that he was sexually active at a young age and fathered two children by age sixteen; that he began smoking pot at age eleven and was a regular cocaine user by age sixteen; that in addition to using drugs, by the age of fourteen, he sold them as well; and that due to the dangers involved in dealing drugs, he acquired and possessed weapons to protect himself (his first such weapons being 25mm and 38mm caliber handguns).

***32** Although Petitioner's evidence may have "permit[ted] an inference that he is not as morally culpable for his behavior, it also might [have] suggest[ed] that [Petitioner], as a product of his environment, is likely to continue to be dangerous in the future." Ladd v. Cockrell, 311 F.3d 349, 360 (5th Cir. 2002). See Pinholster, 563 U.S. at 1410 (acknowledging that new evidence relating to the substance abuse and criminal activity of the petitioner's family "is also by no means clearly mitigating, as the jury might have concluded that [petitioner] was simply beyond rehabilitation"). Given the double-edged nature of Petitioner's new evidence, as well the abundance of evidence supporting multiple aggravating circumstances, the Court finds that the OCCA's decision is reasonable. Although Petitioner's new evidence highlights additional mitigation evidence, it simply does not equate to a finding by this Court that the OCCA's decision denying him relief amounts to a extreme malfunction which the AEDPA is designed to correct.

Petitioner's second claim of trial counsel ineffectiveness is the "Failure to Employ and Utilize Properly the Services of Mental Health Services." Petition, p. 71. Petitioner's particular complaint is that trial counsel failed with respect to Dr. Massad.

> Trial counsel were ineffective for failing to utilize [Dr. Massad] and failing to seek a more comprehensive assessment of not only the general effects PTSD has on a person's mind, but of the discrete components of trauma that defined [Petitioner's] life and mind and the effects these had on his behavior and thinking that night.

Id. at 73-74. In support of this claim, Petitioner references Dr. Fritz's affidavit, which was included in his Rule 3.11 motion on direct appeal, along with an affidavit from Dr. Massad and six more affidavits from various experts, Petitioner's Exhibits 70 through 76. These seven additional affidavits were presented to the OCCA for the first time in his second application for post-conviction relief.

There is a dispute between the parties as to when this claim was raised in state court proceedings. Respondent asserts that this claim was not included in the claim Petitioner made on direct appeal, but that it was raised for the first time in Petitioner's second application for post-conviction relief. Petitioner contends that it was a part of his direct appeal claim and that the OCCA acted unreasonably in denying him relief on it; however, Petitioner fails to make any citation and/or reference to the direct appeal record which supports his contention. Having reviewed both Petitioner's brief on direct appeal and his Rule 3.11 motion, the Court agrees with Respondent that this claim was not presented to the OCCA within the claim he raised on direct appeal.

On direct appeal, Petitioner argued that trial counsel failed to investigate and present "additional mitigating evidence showing that [Petitioner] endured a miserable life of poverty and parental neglect during his childhood and adolescence, and that his circumstances in those years were far worse than the relatively benign picture of his life presented at trial." Application for Evidentiary Hearing [Rule 3.11 motion], Case No. D-2007-1055, p. 1. In his supporting argument, Petitioner detailed the new mitigating evidence he was able to obtain from his relatives and he argued that "[t]he testimony of these relatives would have provided powerful support to Dr. Phillip Massad's testimony regarding [his] Post Traumatic Stress Disorder." Id. at 8. Nowhere within Petitioner's direct appeal claim does Petitioner allege that his trial attorneys were ineffective for their handling of Dr. Massad or failing to do more with mental health experts. Petitioner's argument on direct appeal that Dr. Massad's testimony could have been strengthened with additional mitigation evidence that his trial attorneys could have obtained from his relatives (and former girlfriends) does not encompass the claim Petitioner now presents. The claim Petitioner raises here was raised for the first time in his second post-conviction application and the OCCA found the claim waived due to Petitioner's failure to raise it on direct appeal or in his first post-conviction application. Simpson, No. PCD-2012-242, slip op. at 5. Although Petitioner attempts to overcome the application of a procedural bar to his claim based on the ineffectiveness of his trial, appellate, and post-conviction counsel, Reply, p. 21, for reasons previously discussed, these allegations do not constitute sufficient cause. See Ground 4, supra. Therefore, the Court concludes that Petitioner's second challenge to the effectiveness of his trial counsel is procedurally barred from review.

***33** Petitioner also claims that his trial counsel was ineffective for failing to learn that the two surviving victims, Mr. Johnson and Ms. Emerson, were opposed to the death penalty. Petitioner's Exhibits 3 and 77. Petitioner contends that had the jury heard this evidence in mitigation, there is a strong possibility he would have been spared a death sentence. Petitioner raised this claim in his first post-conviction application. The OCCA found the claim waived because it could have been presented on direct appeal. Simpson, No. PCD-2007-1262, slip op. at 5-6. In response to Respondent's argument that this claim is procedurally barred, Petitioner argues that appellate counsel ineffectiveness serves as cause. However, affording appropriate deference to the OCCA's merits determination that appellate counsel was not ineffective for failing to raise his claim in his direct appeal, id. at 8, the Court concludes that Petitioner has failed to show sufficient cause to overcome the imposition of a procedural bar to his claim. See Ground 10, supra.

**Other Evidence**

With respect to other evidence, Petitioner first faults his trial counsel for conceding guilt in opening statement. Petitioner raised this claim on direct appeal, but was denied relief. Simpson, 230 P.3d at 905-06. While Petitioner argues that the OCCA's decision is unreasonable, Respondent counters that all fairminded jurists would not agree.

The record reflects that trial counsel gave a short opening statement in which he first highlighted Petitioner's personal circumstances. Counsel told the jury that Petitioner was a Hurricane Katrina victim, that he had a criminal past, and that he was the victim of a shooting, one which required an extended hospital stay. Counsel then stated, "When he came up here, he thought he could get a fresh start. It turned out he was bringing his troubles with him" (J. Tr. II, 227). Counsel then detailed the events that led up to the shooting before admitting that "Kendrick didn't do the right thing." Counsel continued:

> Jonathan Dalton was driving the car and Kendrick was sitting in the passenger seat, Latango Robertson was sitting in the back seat and they followed these three guys and eventually caught up with them and Kendrick shot into the car. And I know you're not going to like that.
>
> And in a normal case this is the point at which I would say, "Well, ladies and gentlemen, once you've heard all the evidence I'm going to ask you to find my client not guilty." I have a hard time doing that in this case because of what I just told you. And so, we're going to turn to the second stage of this case, in that part of the case. Bill Campbell [co-counsel] and I will cross-examine witnesses in this portion and we ask you to listen closely to that. We're going to have some points we want to make. I thank you for your attention.

(J. Tr. II, 228-29). On direct appeal, and in conjunction with his Rule 3.11 motion, Petitioner provided the OCCA with affidavits from both of his trial attorneys regarding opening statement and their trial strategy. In these affidavits, both attorneys acknowledge that their intended defense theory was Petitioner's PTSD and further state that "[i]t would be contradictory to assert that [Petitioner] was not the shooter, and then argue that PTSD reduced his ability to form malice aforethought when he fired the weapon." Both state that Petitioner was advised of this strategy and had no objection to it. In addition, although the trial court ruled just prior to the start of the trial that PTSD evidence would not be allowed in the first stage, see Ground 2, supra, both attorneys state that they proceeded with their original defense strategy so that their second stage case, "which would be based to a significant degree by the PTSD evidence, would not appear to be in conflict with [Petitioner's] first stage defense." Petitioner's Exhibits 79 and 80.

In denying Petitioner relief, the OCCA held as follows:

> The record reflects that during opening statements, defense counsel conceded that [Petitioner] was the shooter in the homicides. This concession was apparently made, with the consent of [Petitioner], in order to remain consistent with the intended defense built around [Petitioner's] claim of PTSD. After defense counsel told the jury that [Petitioner] was the shooter, he also told them that because of this concession, he would have a hard time asking them to find [Petitioner] not guilty and would turn, at some point, to the second stage of trial. This second comment, [Petitioner] argues, was tantamount to a complete concession of guilt and was not made with [Petitioner's] knowing and intelligent consent. We disagree. With this comment, defense counsel did not concede that [Petitioner] was guilty of First Degree Murder. Rather, when the whole of the comments are taken together, it is clear that defense counsel, in accord with his claim that [Petitioner] suffered from PTSD, conceded that his client would be guilty of a lesser form of homicide. The concession made by defense counsel with the consent of [Petitioner] cannot be found to constitute ineffective assistance of counsel.

***34** Simpson, 230 P.3d at 905. [27]

Petitioner disagrees with the OCCA's characterization of his counsel's comments. Petitioner contends that the comments were a clear admission of guilt to first degree murder. Petitioner asserts that his consent to the trial strategy developed by his counsel did not extend that far, and that in any event, when the PTSD evidence was not allowed in the first stage, counsel should have either revised their strategy or obtained a new consent from him. Petitioner asserts that he was prejudiced by the error. Petition, pp. 77-78; Reply, pp. 22-23.

In Florida v. Nixon, 543 U.S. 175 (2004), the Supreme Court acknowledged that conceding guilt in the first stage of a capital proceeding may be a reasonable trial strategy.

> Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible."
>
> Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in "a useless charade."

Id. at 190-92 (citations omitted) (footnote omitted). The Court additionally found that while counsel should discuss trial strategy with their client, they are not required to obtain their client's express consent before conceding guilt. Id. at 189, 192. See Lockett, 711 F.3d at 1247 (acknowledging this holding in Nixon). Whether counsel was ineffective in conceding guilt is a determination to be made under the Strickland standard. Id. at 192. See Lockett, 711 F.3d at 1246-49 (applying Nixon and Strickland to find that the OCCA reasonably denied a petitioner's ineffectiveness claim based on a concession of guilt).

Petitioner has not shown that the OCCA acted unreasonably in denying him relief under Strickland. In opening statement, trial counsel admitted that Petitioner shot into the victims' car. Given the facts and circumstances of Petitioner's crimes, see Ground 7, supra (discussing the first stage evidence as it related to the aggravating circumstances), which included the testimony of his two co-defendants, this was a reasonable strategy without prejudice to Petitioner. Irrespective of the fact that the PTSD evidence was not allowed in the first stage, admitting Petitioner's participation not only played into Petitioner's second stage case, but it was also consistent with a voluntary intoxication defense, for which the jury was instructed and for which counsel argued in closing in an effort to convince the jury to find Petitioner guilty of the lesser-included offense of first degree manslaughter (O.R. III, 563-68; J. Tr. VI, 83-97). Accordingly, the Court denies relief for this claim.

***35** Next, Petitioner faults his trial counsel for failing to impeach Mr. Collins with information obtained from Jason Spike, who was incarcerated with both Petitioner and Mr. Collins in the Oklahoma County Jail. Relying upon an affidavit from Mr. Spike contained in his Rule 3.11 motion, Petitioner raised this claim on direct appeal. [28] However, the OCCA denied relief as follows:

> Next [Petitioner] argues that trial counsel was ineffective for failing to call a witness to impeach Collins' credibility by testifying that Collins was an opportunist who would lie and perjure himself in order to get a better deal for himself. This information was basically revealed at trial through both direct and cross-examination of Collins. While defense counsel certainly could have called this witness, [Petitioner] has not shown a reasonable probability that, but for counsel's alleged unprofessional error in not doing so,

> the result of the proceeding would have been different.

Simpson, 230 P.3d at 905. [29]

In his challenge to the OCCA's holding, Petitioner argues that although trial counsel was able to demonstrate that Mr. Collins lied about his "football glory," the testimony which could have been presented through Mr. Spike was far more powerful because it was a "straight forward rebuttal of the key issue of dangerousness." Petition, pp. 79-80. But here again, Petitioner views Mr. Collins' testimony in isolation, overlooking all of the other evidence which supported the jury's finding that he was a continuing threat, the evidence supporting the other aggravating circumstances, and the information about Mr. Collins that came out at trial. See Grounds 7 and 9, supra. In light of all of the presented evidence, it was not unreasonable for the OCCA to find that Petitioner's trial counsel was not ineffective for failing to present Mr. Spike as a witness.

Petitioner's third complaint relates to the alleged conflict of interest which arose because Petitioner used the same investigator who assisted one of his co-defendants. This claim has been thoroughly addressed in Ground 13, supra, and need not be restated here. For the reasons set forth therein, relief is denied here as well.

In his fourth complaint, Petitioner argues that his trial counsel was ineffective for failing to present evidence to counter the State's assertion that the weapon he used was a semi-automatic. In his fifth complaint, Petitioner asserts that his trial counsel was ineffective for failing to object to the instructions given with respect to Count 4. Both of these claims were raised by Petitioner in his first application for post-conviction relief. The OCCA found these claims waived because they could have been presented on direct appeal. Simpson, No. PCD-2007-1262, slip op. at 4-5. The OCCA additionally determined that his appellate counsel was not ineffective for failing to raise these claims on direct appeal. Id. at 8. As previously noted in Ground 10, supra, because the OCCA addressed the merits of Petitioner's stated cause, AEDPA deference applies, and because Petitioner has not shown the OCCA's Strickland determination is unreasonable, he has not overcome the application of a procedural bar to these claims. Ryder, 810 F.3d at 746; Turrentine, 390 F.3d at 1202.

**Failing to Preserve the Record**

***36** Of the eleven allegations relating to trial counsel's failure to preserve the record, eight [30] were raised on direct appeal and denied by the OCCA in large part because the underlying claim lacked merit:

> [Petitioner] first argues that trial counsel was ineffective for failing to object to the introduction of inadmissible evidence, improper tactics and argument of the prosecutors, the trial court's rulings precluding the admission of defense evidence and the submission of improper jury instructions and verdict forms. These alleged failings concern issues raised and addressed above. We found in Proposition I, that the evidence of [Petitioner's] PTSD was inadmissible in first stage of trial and properly precluded. We found in Proposition III that an instruction on Second Degree Depraved Mind Murder was not warranted by the evidence. In Proposition V, we found that while the letters at issue were in fact hearsay for which no exception applied, the information contained within them was cumulative to properly admitted evidence and thus, their admission was harmless. In Proposition VI, we found that none of the alleged improper comments made by the prosecutor could be found to have affected the jury's finding of guilt or assessment of punishment. We found in Proposition VII, that the jury instructions, when taken as a whole, adequately stated the applicable law on the defense of voluntary intoxication and the

> prosecutor's arguments were largely correct and proper statements of the law. In Proposition VIII, we found that Detective George did not give improper opinion testimony or improperly vouch for the credibility of other witnesses. In Proposition XI, we found that the heinous, atrocious or cruel aggravating circumstance was proven beyond a reasonable doubt as to the murder of Glen Palmer. Although this aggravating circumstance was stricken as to the murder of Anthony Jones, [Petitioner's] jury did not consider improper aggravating evidence in deciding punishment. In Proposition XII, we found that the jurors' consideration of the evidence offered in mitigation in this case was not unfairly limited. Most of these alleged failings do not reflect a deficient performance by defense counsel and [Petitioner] has not shown a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

Simpson, 230 P.3d at 904. Given the lack of merit to the underlying claims, trial counsel cannot be deemed ineffective for their actions (or inactions) with respect thereto, and the decision of the OCCA rejecting these claims cannot be judged unreasonable as to warrant AEDPA relief. Hanson, 797 F.3d at 837, 839 (refusing to analyze a petitioner's ineffectiveness claim based on trial counsel's failure to object to instances of prosecutorial misconduct where the underlying instances of alleged misconduct were without merit). See Freeman v. Attorney General, 536 F.3d 1225, 1233 (11th Cir. 2008) ("A lawyer cannot be deficient for failing to raise a meritless claim ...."); Snow v. Sirmons, 474 F.3d 693, 724-25 (10th Cir. 2007) (trial counsel was not ineffective for failing to object to certain evidence that the OCCA found admissible); Spears, 343 F.3d at 1249 (trial counsel was not ineffective for failing to object to the giving of a flight instruction where the OCCA found that sufficient evidence supported the giving of the instruction).

***37** Related to his Ground 16, infra, Petitioner's seventh allegation concerns trial counsel's failure to life qualify the jury. Although Petitioner raised this claim in his direct appeal brief, the OCCA overlooked the issue in its original opinion, but subsequently granted rehearing to address it. Simpson, 239 P.3d at 155. Relief was denied as follows:

> We find that even if trial counsel's performance was deficient for failing to "life qualify" the jury, there has been no showing of any resulting prejudice to [Petitioner]. See Neill v. Gibson, 278 F.3d 1044, 1054–56 (10th Cir. 2001) (to prevail on a claim of ineffective assistance of counsel for failing to life qualify the jury, an appellant must show "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

Id. Petitioner does not even address the OCCA's holding, but states only that trial counsel's error denied him a fair trial. Petition, p. 89. Because Petitioner has failed to show that the OCCA acted unreasonably in denying this claim, relief is unwarranted. See Thomas v. Horn, 570 F.3d 105, 121-22 (3rd Cir. 2009) (denying a petitioner habeas relief based on his trial counsel's failure to life qualify all the jurors and finding, among other reasons, that denial was warranted because the petitioner had failed to provide "a shred of evidence suggesting any probability that, had his trial counsel life-qualified every juror, at least one juror would have voted to sentence [him] to life imprisonment").

Petitioner's tenth allegation faults his trial counsel for not objecting to references to his prior conviction which were made from the start of trial. Petitioner raised this claim in his first application for post-conviction relief. The OCCA found the claim waived because it could have been raised on direct appeal. Simpson, No. PCD-2007-1262, slip op. at 3-4. The OCCA also found that his appellate counsel was not ineffective for failing to raise the claim. Id. at 8. Again, as noted above, because the OCCA addressed the merits of Petitioner's stated cause, AEDPA deference applies and Petitioner can only overcome the application of a procedural bar to his claim if he shows that all fairminded jurists would agree that the OCCA got it wrong. Given the great evidence of guilt, the

Court finds that all reasonable jurists would not disagree with the OCCA's determination. Therefore, this claim is procedurally barred.

Petitioner's final allegation is trial counsel's failure to object to the trial court's announcement that he was in custody and would be escorted by a deputy to all proceedings. Petitioner raised this claim in his second application for post-conviction relief. The OCCA found the claim waived due to Petitioner's failure to raise it on direct appeal or in his first post-conviction application. Simpson, No. PCD-2012-242, slip op. at 5. Like the underlying substantive claim, Ground 4, supra, which was also presented to the OCCA in Petitioner's second post-conviction application, Petitioner's assertion that his default should be excused due to the ineffective assistance of all of his prior counsel–trial, appellate, and post-conviction–lacks merit. Therefore, this claim is also procedurally barred.

***38** For the foregoing reasons, the Court concludes that Petitioner is not entitled to relief on his fourteenth ground for relief.

**O. Ground 15: Ineffective Assistance of Appellate Counsel.**

In Ground 15, Petitioner faults his appellate counsel and his post-conviction counsel for failing "to fully develop and present all instances of prior [trial] counsel's ineffectiveness" as set forth in his Ground 14. Petition, p. 92. In addressing Petitioner's Ground 14, the Court has for all practical purposes adjudicated this ground as well. Either trial counsel was not ineffective and therefore appellate counsel was not ineffective for failing to raise an unmeritorious claim, or the trial counsel ineffectiveness claim was procedurally barred and appellate counsel's alleged ineffectiveness with respect thereto was not sufficient cause. As to the alleged ineffectiveness of his post-conviction counsel, the Court has likewise shown that this claim does not state a claim upon which federal habeas relief may be granted. For all of these reasons, Petitioner's Ground 15 is hereby denied.

**P. Ground 16: Inadequate Voir Dire.**

In Ground 16, Petitioner asserts that the voir dire conducted in his case was constitutionally inadequate because the trial court did not sua sponte ask the prospective jurors whether they would automatically impose the death penalty. Petitioner raised this claim on direct appeal and was denied relief. Simpson, 230 P.3d at 901-02. Petitioner asserts that the OCCA's holding is an unreasonable application of Morgan v. Illinois, 504 U.S. 719 (1992). Petitioner also challenges the OCCA's factual determination that he did not make a request to life qualify the jury. For the following reasons, Ground 16 is denied.

In Morgan, the Supreme Court found that the "[p]etitioner was entitled, *upon his request*, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." Morgan, 504 U.S. at 736 (emphasis added). [31] In denying Petitioner relief on this claim, the OCCA acknowledged the holding of Morgan and its adherence to it. However, the OCCA correctly stated that "neither the United States Supreme Court nor this Court has held that the trial court is required to ask life qualifying questions to the jury absent a request to do so," and in the absence of "legal authority to the contrary," the OCCA denied Petitioner relief. Simpson, 230 P.3d at 902. Because the OCCA directly applied the holding of Morgan, Petitioner's claim is completely without merit. [32]

***39** Regarding Petitioner's factual challenge to the OCCA's holding, the Court notes that in its evaluation of Petitioner's claim, the OCCA found as follows:

> The record reflects that after the trial court and both parties had completed voir dire and the panel had been passed for cause, the trial court noted on the record that defense counsel had not requested that the court voir dire the jurors on whether they would automatically impose the death penalty. The trial court noted additionally that such an inquiry would have been required by law if a request had been made.

Id. Referencing a memorandum of law he filed some five months before trial regarding his objection to the State's death qualification of the jury and discussing "the Structure and Scope of Appropriate Voir Dire in a

Capital Case," Petitioner asserts that this shows he made a request to life qualify the jury (O.R. I, 86-107). The Court disagrees. First, this filing is more akin to a law review article than a motion or a request. But even if it is construed as a request, the fact remains that Petitioner, unlike Morgan, was not prohibited from life qualifying the jury. In Morgan, defense counsel, during voir dire, requested the trial court to ask the following question: " 'If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?' " The trial court denied the request. Morgan, 504 U.S. at 723. In Petitioner's case, he never even attempted to ask life-qualifying questions. In light of Morgan, he was permitted to, but he simply did not. Second, when the trial court made its statement regarding the absence of a request, Petitioner presented no challenge to the same (J.Tr. II, 202). Surely if the trial court had misrepresented the facts or if trial counsel desired to ask the prospective jurors more questions, counsel would have spoken up at that time. Third, on appeal, not once but twice, Petitioner acknowledged to the OCCA in his filings that he had made no such request at trial. Brief of Appellant, Case No. D-2007-1055, p. 75 ("Here, the trial court did not refuse a request by defense counsel to have jurors questioned as to whether they would automatically impose death upon a finding of guilt."); Reply Brief of Appellant, Case No. D-2007-1055, p. 16 ("Appellant made clear in his brief in chief that his situation was different from that in Morgan, in that his complaint was not that a defense request to life qualify was denied but rather that the trial court erred in failing to qualify the jury even absent such a request."). For all these reasons, Petitioner has failed to show that the OCCA's decision is factually unreasonable.

Ground 16 is denied.

**Q. Ground 17: Count 4 Stipulation.**

In Ground 17, Petitioner contends that the trial court violated his constitutional rights when it informed the jury that he had stipulated to possession of a firearm after former felony conviction (Count 4) and that the only issue the jury needed to determine with respect to Count 4 was punishment. Petitioner asserts that the trial court's action amounted to a directed verdict for the State on Count 4. Petitioner raised this claim in his first post-conviction application, but the OCCA declined to address it because Petitioner could have raised it on direct appeal. Simpson, No. PCD-2007-1262, slip op. at 6-7. The OCCA additionally found that appellate counsel was not ineffective for failing to raise the claim on direct appeal. Id. at 8. Like Ground 4, Respondent asserts that the claim is procedurally barred, and Petitioner argues that the OCCA's finding of waiver is neither adequate nor independent, that appellate counsel ineffectiveness satisfies cause, and that a fundamental miscarriage of justice will occur if the Court fails to address the merits of the claim.

***40** For the same reasons set forth in Ground 4, supra, the Court concludes that Petitioner's challenges to the OCCA's application of Section 1089 to his claim are without merit. The Court additionally finds that, as in his Ground 10, Petitioner's simple reference to the fundamental miscarriage of justice exception is insufficient to meet it. Petition, p. 96. And finally, Petitioner has not demonstrated cause by placing blame on his appellate counsel. Giving appropriate deference to the OCCA's merits determination that appellate counsel was not ineffective for failing to raise his Ground 17 in his direct appeal, see Ground 10, supra, the Court concludes that Petitioner has failed to show sufficient cause to overcome the imposition of a procedural bar to his claim. See Johnson v. Cowley, 40 F.3d 341, 344-46 (10th Cir. 1994) (rejecting a petitioner's claim that the trial court's instructions resulted in a directed verdict and finding that "the fact of a former conviction used for enhancement purposes is an evidentiary fact to which a defendant can stipulate like any other fact"). Therefore, the Court concludes that Petitioner's Ground 17 is procedurally barred.

**R. Ground 18: Cumulative Error.**

In his final ground, Petitioner argues for relief based on cumulative error. "Under cumulative error review, a court 'merely 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.' " Jackson, 805 F.3d at 955 (quoting Hamilton, 436 F.3d at 1196). [33]

The record reflects that Petitioner raised a cumulative error claim on direct appeal and in both of his applications for post-conviction relief. On direct appeal, the OCCA found two errors, the one set forth in his Ground 7, supra, regarding the admission of the letters written by Mr. Collins, and the HAC aggravator as it related to Mr. Jones

(see n.2, supra). Simpson, 230 P.3d at 898, 903. In denying Petitioner cumulative error relief, the OCCA found "that although [Petitioner's] trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require relief because they did not render his trial fundamentally unfair, taint the jury's verdict, or render sentencing unreliable. Any errors were harmless beyond a reasonable doubt, individually and cumulatively." Simpson, 230 P.3d at 906. In both of his post-conviction proceedings, the OCCA found no errors to support a cumulative error analysis. Simpson, No. PCD-2012-242, slip op. at 8; Simpson, No. PCD-2007-1262, slip op. at 8-9.

In his petition, Petitioner makes no argument that the OCCA acted unreasonably in denying him relief, but instead presents only a generic claim for relief. Petition, pp. 97-98. In his reply, Petitioner provides a little more insight into his claim by arguing his entitlement to relief based on errors found harmless by the OCCA and errors found by this Court. Reply, p. 25. However, of the seventeen other grounds for relief presented by Petitioner, only Ground 7 was found to be harmless by the OCCA and by this Court, and this Court has found no other errors. Consequently, the only issue that needs to be addressed here is whether the OCCA unreasonably denied Petitioner relief when it rejected the cumulative error argument he raised on direct appeal.

The Court finds nothing unreasonable with the OCCA's decision. Having thoroughly analyzed Petitioner's Ground 7, the Court harbors no doubt to as its harmlessness. Regarding the stricken HAC aggravator with respect to Mr. Jones, the OCCA analyzed the error as follows:

> We must now consider what relief, if any, is required. "An invalidated sentencing factor ... will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Brown v. Sanders, 546 U.S. 212, 220, 126 S.Ct. 884, 892, 163 L.Ed.2d 723 (2006). "If the jury could have properly considered the evidence used to support the invalidated aggravator anyway because it also supported a separate and valid aggravator, the death sentence will stand." Jackson, 2006 OK CR 45, ¶ 44, 146 P.3d at 1164. Under such circumstances, the jury has not considered any improper evidence and has not weighed any improper aggravating evidence against the mitigating evidence in arriving at its sentence. Id. Since there was really no evidence presented to the jury in support of the especially heinous, atrocious or cruel aggravating circumstance with regard to the murder of Anthony Jones, we find that [Petitioner's] jury did not consider improper aggravating evidence in deciding punishment. Thus, the jury's weighing process of mitigating evidence against aggravating circumstances was not skewed. See Jackson, 2006 OK CR 45, ¶ 45, 146 P.3d at 1164. This claim is rejected.

***41** Simpson, 230 P.3d at 903. The OCCA's analysis of the HAC error is reasonable, as is its determination that Petitioner suffered no greater injury when this error is considered in tandem with the erroneous admission of hearsay with respect to Mr. Collins. Relief is therefore denied as to Petitioner's Ground 18.

### V. Motions for Discovery and Evidentiary Hearing.

Petitioner has filed a motion for discovery (Doc. 42) as well as a motion for an evidentiary hearing (Doc. 51). For the following reasons, the Court finds that both should be denied.

Petitioner's discovery request relates to his Ground 9 and his allegation that the prosecution withheld Brady material. The vast majority of his motion concerns Mr. Collins and Petitioner's contention that the State withheld evidence which could have been used to impeach him. In denying Petitioner relief on this ground, the Court has found that it is both procedurally barred and unmeritorious. In reaching this conclusion, the Court has considered the wealth of information which Petitioner has provided regarding Mr. Collins' credibility. In his discovery request, Petitioner searches for more like-kind evidence. However, the Court has concluded that even if Mr. Collins had been severely impeached (or his testimony excluded entirely), the balance of the evidence supports the conclusion that Petitioner would have been sentenced to death in any event. See Ground 9, supra. Thus, even if Petitioner were to find additional evidence affecting Mr. Collins' credibility, it would not affect the Court's conclusion. See Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (requiring good cause to obtain discovery authorization).

Petitioner's request for discovery on this basis is therefore denied.

Petitioner also requests discovery in an effort to learn whether the prosecution knew that the surviving victims, Mr. Johnson and Ms. Emerson, were opposed to the death penalty. In support of his request, Petitioner asserts that "Oklahoma County prosecutors normally solicit, or at least often obtain such recommendations from victims and victims' family members." Doc. 42 at 5. In their affidavits, both of these witnesses state their opinion and further state that defense counsel never asked them about it; however, neither make any statement that they told the State this information. Petitioner's Exhibits 3 and 77. In addition, Petitioner fails to show how this information, if obtained, would support his entitlement to relief. See Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (equating "good cause" to a pleading of specific allegations showing that a petitioner would be entitled to relief if the facts are fully developed).

In addition to his discovery request, Petitioner requests an evidentiary hearing with respect to his Grounds 9, 13 (conflict of interest), 14 (ineffective assistance of trial counsel), and 15 (ineffective assistance of appellate counsel). "The purpose of an evidentiary hearing is to resolve conflicting evidence." Anderson v. Attorney General of Kansas, 425 F.3d 853, 860 (10th Cir. 2005). If there is no conflict, or if the claim can be resolved on the record before the Court, then an evidentiary hearing is unnecessary. Id. at 859.

For the reasons set forth above, it is clear that an evidentiary hearing is unwarranted on Ground 9 to resolve Petitioner's Brady/Napue claim related to Mr. Collins. Again, because the Court has concluded that Petitioner would not be entitled to relief even if Mr. Collins' testimony was completely discounted or excluded, there is no reason to explore this claim any further. As for his Grounds 13, 14, and 15, Petitioner has simply not shown why an evidentiary hearing is warranted. In the first instance, many of the claims contained within these grounds are procedurally barred, and an evidentiary hearing is unnecessary to make this legal determination. See McCleskey v. Zant, 499 U.S. 467, 494 (1991) ("The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard."). In addition, as to the claims which the Court addressed on the merits, the Court has given due consideration to the materials Petitioner provided to the OCCA in support and determined that no relief under Section 2254 is warranted. Consequently, the Court is precluded by the AEDPA and Pinholster from entertaining new evidence on these claims. Pinholster, 563 U.S. at 185 ("evidence introduced in federal court has no bearing on § 2254(d)(1) review"); Jones v. Warrior, 805 F.3d 1213, 1222 (10th Cir. 2015) (citing Pinholster and denying a request for an evidentiary hearing due to a petitioner's failure to satisfy Section 2254(d)); Wood v. Trammell, No. CIV-10-829-HE, 2015 WL 6621397, at *36 (W.D. Okla. Oct. 30, 2015) ("petitioner is not entitled to an evidentiary hearing on claims in which this court has denied relief pursuant to Section 2254(d) because those claims are reviewed in light of the record before the OCCA").

## VI. Conclusion.

***42** 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 his requested relief. Accordingly, Petitioner's Petition (Doc. 23), motion for discovery (Doc. 42), and motion for an evidentiary hearing (Doc. 51) are hereby **DENIED**. A judgment will enter accordingly.

IT IS SO ORDERED this 25th day of May, 2016.

### All Citations

Not Reported in Fed. Supp., 2016 WL 3029966

Footnotes

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

2 The record reflects that the jury was erroneously instructed on this aggravator with respect to Mr. Jones because the State never alleged its application to his murder. This error was remedied on appeal. Simpson v. State, 230 P.3d 888, 903 & n.10 (Okla. Crim. App.), reh'g granted, 239 P.3d 155 (Okla. Crim. App. 2010).

3 In both the petition and reply, Petitioner continues to assert that additional pages are needed to adequately present his claims. Petition, pp. 63 n.26, 64 n.28; Reply, p. 19 n.4. In the course of this proceeding, Petitioner made three separate requests for an extension of the page limitations imposed by General Order 10-1. Docs. 19, 21, and 61. All three requests were denied. Docs. 20, 22, and 62. Petitioner has given the Court no reason to question its previous orders. General Order 10-1, which permits a 100-page petition and a 25-page reply, is both generous and reasonable, and although it allows for additional pages upon a showing of good cause, Petitioner has failed to make this showing.

4 Here, and in his Ground 14, Petitioner has alleged that his trial counsel was ineffective for failing to request this instruction. Petition, pp. 9-10, 86-87. This claim will be considered among the many other allegations Petitioner makes against his trial counsel in Ground 14.

5 In Brown, the Tenth Circuit held "that psychological or psychiatric evidence that negates the essential element of specific intent can be admissible." Brown, 326 F.3d at 1147 (footnote omitted). However, "[t]he admission of such evidence will depend upon whether the defendant clearly demonstrates how such evidence would negate intent rather than 'merely present a dangerously confusing theory of defense more akin to justification and excuse.' " Id. (quoting United States v. Cameron, 907 F.2d 1051, 1067 (11th Cir. 1990)). See also United States v. Barrett, 797 F.3d 1207, 1216-17 (10th Cir. 2015) (relying on Brown to reject a claim of ineffective assistance of counsel for failing to present evidence of the defendant's mental defects which would not have shown the inability to form specific intent, but only " 'what he perceived and what his (diminished) intent was in the midst of an unannounced raid led by an unmarked vehicle' ").

6 The OCCA found that although there were instances when the prosecutor made a general reference to criminal intent, the prosecutor also "argued to the jury, in the context of the voluntary intoxication defense, that the evidence show[ed] that [Petitioner] had the specific 'intent to kill' when he committed the crime." Simpson, 230 P.3d at 900.

7 See Bland, 459 F.3d at 1012; Medlock v. Ward, 200 F.3d 1314, 1323 (10th Cir. 2000); Smallwood v. Gibson, 191 F.3d 1257, 1267 (10th Cir. 1999); Moore v. Reynolds, 153 F.3d 1086, 1096-97 (10th Cir. 1998).

8 In its adjudication of Petitioner's second post-conviction application, the OCCA specifically rejected Petitioner's request for relief under Valdez. Simpson, No. PCD-2012-242, slip op. at 3-4.

9 Petitioner has not alleged the fundamental miscarriage of justice exception. See Reply, p. 4 (arguing only cause in an effort to overcome his procedural default of this ground).

10 This remains unchanged by the Supreme Court's decisions in Trevino v. Thaler, 569 U.S____, 133 S. Ct. 1911 (2013), and Martinez v. Ryan, 566 U.S____, 132 S. Ct. 1309 (2012). Fairchild, 784 F.3d at 719-23; Banks, 692 F.3d at 1147-48.

11 A different standard applies when a petitioner asserts the denial of a specific constitutional right. "When specific guarantees of the Bill of Rights are involved, ... special care [is taken] to assure that prosecutorial conduct in no way impermissibly infringes them." Donnelly, 416 U.S. at 643. "[A] claim that the misconduct effectively deprived the defendant of a specific constitutional right ... may be the basis for habeas relief without proof that the entire proceeding was unfair." Paxton v. Ward, 199 F.3d 1197, 1217 (10th Cir. 1999).

12 First stage evidence was incorporated into the second stage (J. Tr. VII, 17).

13 In closing argument, the State conceded that based on Evan Gatewood's testimony, it was clear that Mr. Collins had lied about playing football for the University of Oklahoma (J. Tr. VIII, 16, 19, 22).

14 Defense counsel noted in second stage opening statement that Petitioner's New Orleans school records were unobtainable due to Hurricane Katrina (J. Tr. VII, 12).

15 On appeal, Petitioner claimed that Detective George also vouched for co-defendants Dalton and Robertson.

16 In his motion for discovery, by which he seeks to obtain all of the District Attorney's files relating to his case, Petitioner states only that he has discovered exculpatory evidence which the prosecution did not disclose. As in his petition, he offers no detail as to how he learned of this evidence. Doc. 42 at 3.

17 Specifically, Petitioner states that "Collins was the sole witness to imply [Petitioner] had killed before, was remorseless and arrogant, and willing to contract with Collins to kill or threaten witnesses." Petition, p. 41. See also Petition, p. 52. While the Court agrees with Petitioner that Mr. Collins testified regarding Petitioner's lack of remorse and desire to harm the witnesses who would be testifying against him, the Court has been unable to find any implication that Mr. Collins made regarding Petitioner having killed before (and Petitioner has provided no citation to the record in support of this assertion).

18 This includes Petitioner's additional claim under Napue. In addition to being procedurally barred, Petitioner has not shown that the prosecution knowingly presented false testimony or permitted false testimony to go uncorrected. See Napue, 360 U.S. at 269. In fact, the record is clear that when defense counsel did catch Mr. Collins in a lie, the prosecutor readily acknowledged the same before the jury. See n.13, supra.

19 Petitioner has since obtained another affidavit from Ms. Lagarde (Petitioner's Exhibit 41) in which Ms. Lagarde provides additional information beyond her Hurricane Katrina experiences with Petitioner. However, as Respondent aptly notes,

this affidavit was not presented to the OCCA in its adjudication of the claim in his first post-conviction application. Response, pp. 65-66. Therefore, the Court cannot consider it. Pinholster, 563 U.S. at 181-82.

20 Strickland v. Washington, 466 U.S. 668 (1984).

21 The OCCA "emphasize[d] that the language of the current instruction itself is not legally inaccurate, inadequate, or unconstitutional." Harris, 164 P.3d at 1114.

22 Thereafter, and in accordance with the language proposed in Harris, 164 P.3d at 1114, the instruction, OUJI-CR (2d) 4-78, was amended in pertinent part as follows: "Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty."

23 For the most part, Petitioner's new evidence does not call into question this testimony. However, in 2008, Petitioner did self-report that he was sexually violated by a family friend on one occasion when he was thirteen years old. Petitioner's Exhibit 50 (filed under seal).

24 The extent to which her drug usage affected Petitioner is not entirely clear. While his mother admits to smoking cigarettes laced with crack, she denies doing so in the home and doubts that it had any affect on her sons. Petitioner's Exhibit 45. However, two of her relatives state that it was obvious that she had a drug addiction and that it negatively affected Petitioner. Petitioner's Exhibits 47 and 51.

25 When Petitioner was a toddler, his uncle was shot at home by one of his aunt's boyfriends. Although Petitioner was nearby in the bathtub when this occurred, Petitioner's evidence does not show what affect this had on him, or that, given his age, he was even aware of what had occurred. Petitioner's Exhibits 45 and 46.

26 According to Petitioner, his uncles taught him how to commit burglaries and how not to get caught by the police. Petitioner's Exhibit 50.

27 It is clear that the OCCA considered the affidavits of trial counsel in its determination of this claim. Simpson, 230 P.3d at 905-06.

28 Petitioner presented an expanded version of this claim in his second application for post-conviction relief. Tying this expanded version to his Brady claim, Petitioner claimed in a footnote there, as he does here, that trial counsel was ineffective for failing to obtain any additional impeachment evidence that fell outside of the prosecution's duty to disclose. Petition, p. 79 n.38; Verified Successive Application for Post-Conviction Relief, Case No. PCD-2012-242, pp. 32-33 & n.20. The OCCA found this expanded claim waived. Simpson, No. PCD-2012-242, slip op. at 5.

29 It is clear that the OCCA considered Mr. Spike's affidavit in its determination of this claim. Simpson, 230 P.3d at 905-06.

30 Petitioner's numbers 1 through 6, 8, and 9. These eight relate to Petitioner's Grounds 1 through 3, 6 through 8, 11, and 12.

31 In arriving at this holding, the Supreme Court set forth the following analysis:

> [T]he belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law. Any juror who would impose death regardless of facts and circumstances of conviction cannot follow the dictates of law. It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life **must be permitted** on *voir dire* to ascertain whether his prospective jurors function under such misconception.

Id. at 735-36 (emphasis added) (footnote omitted) (citations omitted).

32 Petitioner additionally contends that the OCCA's decision is an unreasonable application of Hicks v. Oklahoma, 447 U.S. 343 (1980). Petitioner argues: "Permitting the trial judge to ignore not only the principles of Morgan, but also Oklahoma law designed to prevent violations of Morgan arbitrarily, deprived [Petitioner] of his 14th Amendment due process rights to a fair and impartial trial." Petition, p. 95. As discussed herein, there was no Morgan violation, and in addition, Petitioner has failed to make a showing that Oklahoma law extends further than Morgan. Although the OCCA noted the prudence in asking whether a prospective juror would automatically impose the death penalty, and even encouraged it as a best practice, it is not a state law requirement. Simpson, 230 P.3d at 902 & n.8.

33 In Eizember, the Tenth Circuit recently acknowledged its "murky" position "on 'whether the need to conduct a cumulative-error analysis is clearly established federal law' for AEDPA purposes ...." Eizember, 803 F.3d at 1148 n.8 (quoting Hooks, 689 F.3d at 1194 n.24).

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**February 22, 2019**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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KENDRICK ANTONIO SIMPSON,

Petitioner - Appellant,

v.

MIKE CARPENTER, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 16-6191

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**ORDER**

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Before **LUCERO**, **HOLMES**, and **McHUGH**, Circuit Judges.

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Appellant's petition for rehearing is denied.

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

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

230 P.3d 888, 2010 OK CR 6
**(Cite as: 230 P.3d 888)**

Court of Criminal Appeals of Oklahoma.
Kendrick Antonio **SIMPSON**, Appellant
v.
**STATE** of Oklahoma, Appellee.

No. D-2007-1055.
March 5, 2010.

**Background:** Defendant was convicted by jury in the District Court, Oklahoma County, Twyla Mason Gray, J., of first degree murder with malice aforethought, discharging a firearm with intent to kill, and possession of a firearm after former conviction of a felony, and he appealed.

**Holdings:** The Court of Criminal Appeals, C. Johnson, P.J., held that:
(1) exclusion of evidence of defendant's post traumatic stress disorder (PTSD) did not deprive defendant of his constitutional right to present a defense;
(2) evidence was sufficient to support finding by a rational trier of fact that defendant shot at victim's car with the intent to kill the individuals inside so as to sustain defendant's first degree murder conviction;
(3) defendant was not entitled to instruction on second degree depraved mind murder as lesser included offense of first degree murder with malice aforethought;
(4) officer's testimony about his interview with defendant was admissible, as it was officer's perceptions in conjunction with his training and experience; and
(5) evidence did not support heinous, atrocious or cruel aggravating circumstance.

Affirmed.

West Headnotes

**[1] Criminal Law 110 474.1**

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474.1 k. Intent. Most Cited Cases

Clinical psychologist could not testify that murder defendant's post traumatic stress disorder (PTSD) precluded him from forming the intent to kill, and accordingly, the evidence that defendant suffered from PTSD was neither relevant to the intent element of the crime charged nor was it relevant to his defense of voluntary intoxication, which required a showing that defendant's intoxication rendered it impossible to form the intent element of the crime charged, and thus, evidence of defendant's PTSD would be excluded, and the exclusion of this evidence did not deprive defendant of his constitutional right to present a defense.

**[2] Constitutional Law 92 4677**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4677 k. Right to present witnesses; compulsory process. Most Cited Cases

**Witnesses 410 2(1)**

410 Witnesses
410I In General
410k2 Right of Accused to Compulsory Process
410k2(1) k. In general. Most Cited Cases

Defendant's due process right under the Fifth Amendment and to compulsory process under the Sixth Amendment includes the right to present witnesses in his or her own defense, and the right to offer the testimony of witnesses is in plain terms the right to present a defense. U.S.C.A. Const.Amends. 5, 6.

**[3] Criminal Law 110 661**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and scope of proof. Most Cited Cases

The accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

**[4] Criminal Law 110 511.2**

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

Accomplice testimony must be corroborated with evidence, which standing alone tends to link the defendant to the commission of the crime charged.

**[5] Criminal Law 110 511.1(2.1)**

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.1 In General
110k511.1(2) Quantum of Proof Required
110k511.1(2.1) k. In general. Most Cited Cases

**Criminal Law 110 511.2**

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

An accomplice's testimony need not be corroborated in all material respects, but requires at least one material fact of independent evidence which tends to connect the defendant with the commission of the crime.

**[6] Criminal Law 110 511.3**

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.3 k. Circumstantial evidence. Most Cited Cases

Circumstantial evidence can be adequate to corroborate the accomplice's testimony.

**[7] Criminal Law 110 511.2**

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

While all evidence concerning the actual shooting was provided through accomplices' testimony, additional evidence connecting defendant with the commission of the crimes was provided through the testimony of other witnesses, and thus, accomplices' testimony was properly corroborated.

**[8] Homicide 203 542**

203 Homicide
203II Murder
203k539 First Degree, Capital, or Aggravated Murder
203k542 k. Deliberation and premedita-

tion. Most Cited Cases

**Homicide 203 ⚿543**

203 Homicide
203II Murder
203k539 First Degree, Capital, or Aggravated Murder
203k543 k. Sufficiency of deliberation; time required. Most Cited Cases

First degree murder requires deliberate intent to end human life, which can be instantly formed and inferred from the fact of the killing.

**[9] Homicide 203 ⚿1141**

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1138 First Degree, Capital, or Aggravated Murder
203k1141 k. Intent or mens rea. Most Cited Cases

Evidence was sufficient to support, beyond a reasonable doubt, the finding by a rational trier of fact that defendant shot at victim's car with the intent to kill the individuals inside so as to sustain defendant's first degree murder conviction; evidence showed that defendant threatened to "chop up" victim and others and then he followed through with this threat by having accomplice drive up beside victim's car while he shot approximately twenty rounds at the car, hitting and killing victim and his passenger.

**[10] Criminal Law 110 ⚿1038.3**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.3 k. Necessity of requests. Most Cited Cases

If a defendant convicted of the charged offense complains that the trial court should have given, sua sponte, some lesser offense instruction, appellate court will consider whether the trial court's omission amounts to plain error.

**[11] Homicide 203 ⚿1456**

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1456 k. Degree or classification of homicide. Most Cited Cases

Defendant was not entitled to instruction on second degree depraved mind murder as lesser included offense of first degree murder with malice aforethought because instruction on second degree depraved mind murder was not warranted by the evidence; in light of the testimony that defendant threatened to "chop" up victim and his companions, instructed accomplice to follow victim's car and then shot as many as twenty rounds at the moving vehicle with an assault rifle, the evidence did not reasonably support the conclusion that defendant did not intend to kill the men in the car.

**[12] Homicide 203 ⚿1393**

203 Homicide
203XII Instructions
203XII(B) Sufficiency
203k1393 k. Recklessness, wantonness, or extreme indifference. Most Cited Cases

To warrant an instruction on depraved mind murder, the evidence must reasonably support the conclusion that the defendant committed an act so imminently dangerous to another person or persons as to evince a state of mind in disregard for human life, but without the intent of taking the life of any particular individual.

**[13] Criminal Law 110 ⚿650**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in

General
110k650 k. Experiments and tests. Most Cited Cases

In murder prosecution, demonstration which showed that a semi-automatic weapon could have been used was relevant, and its probative value was not substantially outweighed by danger of unfair prejudice; investigator who performed demonstration testified that, when AK-47 fully automatic rifle was used, a single pull of trigger would fire weapon until the trigger was released, and he testified that, when semi-automatic weapon was used, each pull of trigger fired single shot, and he demonstrated quick, repeated firing of semi-automatic assault rifle, and his testimony and demonstration showed jury that either weapon could have been used by defendant, and neither investigator's testimony nor his demonstration misled jury to believe that defendant used semi-automatic rather than a fully-automatic weapon. 12 Okl.St.Ann. § 2401.

**[14] Criminal Law 110 ⚿419(12)**

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(12) k. Written statements. Most Cited Cases

**Criminal Law 110 ⚿1169.2(6)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(6) k. Admissions, declarations, and hearsay; confessions. Most Cited Cases

Letters that inmate had written to the police and the prosecutor's office revealing admissions defendant had made to inmate while in jail were hearsay for which no exception applied, and while the letters were inadmissible hearsay, the information contained therein was cumulative to properly admitted evidence, and in light of inmate's admissible testimony, the introduction of this inadmissible hearsay was harmless error. 12 Okl.St.Ann. § 2801.

**[15] Criminal Law 110 ⚿662.8**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-of-court statements and hearsay in general. Most Cited Cases

**Criminal Law 110 ⚿662.9**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.9 k. Availability of declarant. Most Cited Cases

A testimonial out-of-court statement offered against an accused to establish the truth of the matter asserted may be admitted only where the declarant is unavailable and where the accused has had a prior opportunity to cross-examine the witness, and when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. U.S.C.A. Const.Amend. 6.

**[16] Criminal Law 110 ⚿662.8**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-of-court statements and hearsay in general. Most Cited Cases

Letters that inmate had written to the police and the prosecutor's office revealing admissions defendant had made to inmate while in jail did not

pose a Confrontation Clause problem, as inmate testified at trial and was subject to cross-examination. U.S.C.A. Const.Amend. 6.

**[17] Criminal Law 110 1171.1(1)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(1) k. Conduct of counsel in general. Most Cited Cases

Appellate court will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair.

**[18] Criminal Law 110 1037.1(2)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular statements, arguments, and comments. Most Cited Cases

Although defendant alleged that prosecutor argued facts not in evidence, engaged in unnecessary ridicule of defendant, contrasted defendant's situation with that of the victims', appealed to justice and sympathy for the victims and their families, and improperly shifted the burden of proof, given the magnitude of the State's evidence against defendant, any inappropriate comments not objected to did not deprive defendant of a fair trial or affect the jury's finding of guilt or assessment of punishment, and thus, there was no plain error.

**[19] Criminal Law 110 1038.1(4)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(4) k. Elements of offense and defenses. Most Cited Cases

While voluntary intoxication instruction, defining voluntary intoxication as the state in which one's mental powers have been overcome through intoxication, rendering it impossible to form a criminal intent, utilized “criminal intent” language, it did not render the instructions, as a whole, inaccurate or inadequate, and defendant's jury was, in fact, advised, in another instruction, that malice aforethought was the proper intent to apply to the voluntary intoxication defense, and because the jury instructions, when taken as a whole, adequately stated the applicable law on the defense of voluntary intoxication, there was no plain error.

**[20] Criminal Law 110 53**

110 Criminal Law
110VI Capacity to Commit and Responsibility for Crime
110k52 Intoxication
110k53 k. In general. Most Cited Cases

**Criminal Law 110 55**

110 Criminal Law
110VI Capacity to Commit and Responsibility for Crime
110k52 Intoxication
110k55 k. Existence of specific intent essential to offense. Most Cited Cases

A defense of voluntary intoxication requires that a defendant, first, be intoxicated and, second, be so utterly intoxicated, that his mental powers are overcome, rendering it impossible for a defendant to form the specific criminal intent element of the

crime.

**[21] Criminal Law 110 452(1)**

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k449 Witnesses in General
110k452 Special Knowledge as to Subject-Matter
110k452(1) k. In general. Most Cited Cases

Police officer's opinion testimony, that, in his experience, it was not odd for suspects to deny involvement in commission of a crime, that it was not odd for suspects to tell circumstances surrounding the crime but omit facts of the actual crime, and that he thought defendant told him parts that defendant thought the police knew, but left out the parts about the shooting and the stuff defendant did not think the police knew, was admissible, as it was officer's perceptions in conjunction with his training and experience, and officer's testimony, which did not purport to be scientific in nature, was not subject to the requirements of *Daubert*.

**[22] Witnesses 410 318**

410 Witnesses
410IV Credibility and Impeachment
410IV(A) In General
410k318 k. Corroboration of unimpeached and uncontradicted witness. Most Cited Cases

Detective neither gave explicit personal assurances of witnesses' veracity nor did he implicitly indicate that information not presented at trial supported witnesses' testimony, and thus, detective did not improperly vouch for the credibility of other witnesses and the admission of his testimony was not an abuse of discretion.

**[23] Witnesses 410 318**

410 Witnesses
410IV Credibility and Impeachment
410IV(A) In General
410k318 k. Corroboration of unimpeached and uncontradicted witness. Most Cited Cases

Evidence is impermissible vouching only if the jury could reasonably believe that a witness is indicating a personal belief in another witness's credibility, either through explicit personal assurances of the witness's veracity or by implicitly indicating that information not presented to the jury supports the witness's testimony.

**[24] Criminal Law 110 438(4)**

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(4) k. Depiction of places; scene of crime. Most Cited Cases

**Criminal Law 110 438(5.1)**

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(5) Depiction of Injuries or Dead Bodies
110k438(5.1) k. In general. Most Cited Cases

Photographs of the murder victims and the crime scene were relevant and their probative value was not substantially outweighed by the danger of unfair prejudice, and thus, there was no abuse of discretion in the trial court's decision to admit the photographs, and defendant was not deprived of his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and Oklahoma Constitution by the admission of these photographs. U.S.C.A. Const.Amends. 6, 8, 14; Const. Art. 2, §§ 7, 9, 20.

**[25] Jury 230 131(10)**

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

In murder case, trial court did not abuse its discretion in declining to ask the potential jurors during voir dire life qualifying question sua sponte.

**[26] Sentencing and Punishment 350H 1684**

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

To prove that a murder is especially heinous, atrocious or cruel, so as to constitute aggravating circumstance, the evidence must show that the victim's death was preceded by torture or serious physical abuse, and serious physical abuse is proved by showing that the victim endured conscious physical suffering before dying.

**[27] Criminal Law 110 1144.13(7)**

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(7) k. Particular issues or elements. Most Cited Cases

**Criminal Law 110 1159.5**

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.5 k. Particular issues or elements. Most Cited Cases

When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, appellate court reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt.

**[28] Sentencing and Punishment 350H 1684**

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

Evidence supported a finding that victim's death was preceded by physical suffering and mental cruelty so as to support finding of heinous, atrocious or cruel aggravating circumstance for sentencing purposes; victim was shot four times, he suffered a grazing gunshot wound to shoulder, two superficial gunshot wounds to side of his back, and an ultimately fatal gunshot wound to his chest, and although he was initially conscious after being shot, his breathing became labored and he made gurgling sounds as his chest filled with blood before he died, and there was testimony that, immediately after he had been shot, victim was able to speak, was aware that he had been shot and was fearful that the shooters would return.

**[29] Sentencing and Punishment 350H 1684**

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

Evidence in murder case did not show that victim's death was preceded by torture or that he endured conscious physical suffering before dying, and thus, evidence did not support heinous, atrocious or cruel aggravating circumstance for sentencing purposes; victim's death was nearly immediate, he suffered numerous gunshot wounds including wounds to his head and chest, victim's injuries were not survivable and he likely died within seconds

after being shot, and he was not conscious after being shot.

**[30] Sentencing and Punishment 350H 1659**

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1659 k. Effect of applying invalid factor. Most Cited Cases

Invalidated sentencing factor will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

**[31] Sentencing and Punishment 350H 1659**

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1659 k. Effect of applying invalid factor. Most Cited Cases

If the jury could have properly considered the evidence used to support the invalidated sentencing aggravator anyway because it also supported a separate and valid aggravator, the death sentence will stand.

**[32] Sentencing and Punishment 350H 1658**

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

Since there was no evidence presented to the jury in support of the especially heinous, atrocious or cruel aggravating circumstance with regard to the murder of victim, the jury did not consider improper aggravating evidence in deciding punishment, and thus, the jury's weighing process of mitigating evidence against aggravating circumstances was not skewed by invalidated aggravator.

**[33] Sentencing and Punishment 350H 1789(3)**

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

Although defendant argued that the definition of mitigating circumstances given to the jury was unconstitutional as it impermissibly limited the jury's consideration of mitigating evidence, there was no plain error since review of the prosecutor's closing argument concerning the mitigating evidence instruction, the mitigating evidence itself and all instructions concerning mitigating evidence given in case indicated that the jurors' consideration of the evidence offered in mitigation was not unfairly limited.

**[34] Criminal Law 110 1961**

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

While defendant showed that additional mitigation witnesses could have been called and others that were called could have given additional testimony, he did not show a reasonable probability that, but for counsel's alleged unprofessional error in not presenting this evidence, the result of the proceeding would have been different, and thus, defendant did not show that his counsel was ineffective. U.S.C.A. Const.Amend. 6.

**[35] Criminal Law 110 1943**

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1941 Argument and Conduct of Defense Counsel
110k1943 k. Admissions or concessions. Most Cited Cases

Defense counsel, in accord with his claim that murder defendant suffered from post traumatic stress disorder (PTSD), conceded that his client would be guilty of a lesser form of homicide, and the concession made by defense counsel with the consent of defendant could not be found to constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

**[36] Criminal Law 110 1935**

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1935 k. Impeachment or contradiction of witnesses. Most Cited Cases

While defense counsel could have called witness to impeach credibility of inmate, who testified that defendant had confessed to committing the crime while they were in jail, defendant did not show a reasonable probability that, but for counsel's alleged unprofessional error in not doing so, the result of the proceeding would have been different, and thus, counsel was not ineffective. U.S.C.A. Const.Amend. 6.

**[37] Criminal Law 110 1891**

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

Defendant did not show that defense counsel were deficient with regard to his use of defense investigator, who had previously worked on co-defendant's case, or that any alleged deficiency prejudiced the defense, depriving defendant of a fair trial with a reliable result, and thus, defendant did not show that he was denied his constitutional right to the effective assistance of counsel. U.S.C.A. Const.Amend. 6.

**[38] Criminal Law 110 1181.5(6)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(6) k. Counsel for accused. Most Cited Cases

When appellate courts review and grant request for evidentiary hearing on claim of ineffective assistance of counsel under the standard set forth in rule, allowing defendant to predicate his claim on allegations arising from record or outside the record, appellate courts do not make adjudication that defense counsel actually was ineffective, and instead, appellate courts merely find that defendant has shown strong possibility that counsel was ineffective and should be afforded further opportunity to present evidence in support of his claim; however, when appellate courts review and deny request for an evidentiary hearing, courts make the adjudication that defendant has not shown defense counsel to be ineffective under *Strickland*. U.S.C.A. Const.Amend. 6; Court of Criminal Appeals Rule 3.11, 22 O.S.A. Ch. 18, App.

**[39] Criminal Law 110 1181.5(6)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause

110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(6) k. Counsel for accused. Most Cited Cases

Defendant failed to show with clear and convincing evidence a strong possibility that counsel was ineffective for failing to identify or use the evidence raised in the motion, and consequently, defendant failed to show that counsel's performance was constitutionally deficient and that counsel's performance prejudiced the defense, depriving him of a fair trial with a reliable result, and thus, defendant was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6; Court of Criminal Appeals Rule 3.11(B)(3)(b), 22 O.S.A. Ch. 18, App.

**[40] Criminal Law 110 1186.1**

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

Although defendant's trial was not error free, any errors and irregularities, even when considered in the aggregate, did not require relief because they did not render his trial fundamentally unfair, taint the jury's verdict, or render sentencing unreliable; any errors were harmless beyond a reasonable doubt, individually and cumulatively.

**[41] Sentencing and Punishment 350H 1788(5)**

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of review. Most Cited Cases

Murder defendant's death sentence was not imposed because of any arbitrary factor, passion, or prejudice because his conviction and death sentence were not the result of the introduction of improper evidence, witness testimony, prosecutorial misconduct or trial court error and aggravating circumstances outweighed the mitigating circumstance. 21 Okl.St.Ann. § 701.13.

***893** An Appeal from the District Court of Oklahoma County; The Honorable Twyla Mason Gray , District Judge.Stephen Deutsch, Jennifer Chance, Assistant District Attorneys, Oklahoma City, OK, attorneys for the State at trial.

William Campbell, Larry Tedder, Oklahoma City, OK, attorneys for the defendant at trial.

William H. Luker, Kathleen M. Smith, Oklahoma Indigent Defense System, Norman, OK, attorneys for appellant on appeal.

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

***OPINION***

C. JOHNSON, Presiding Judge.

¶ 1 Appellant, Kendrick Antonio Simpson, was tried by a jury and convicted of First Degree Murder with Malice Aforethought (Counts I and II), Discharging a Firearm with Intent to Kill (Count III) and Possession of a Firearm After Former Conviction of a Felony (Count IV) in the District Court of Oklahoma County, Case No. CF 2006-496. The State filed a Bill of Particulars alleging four aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence; (2) the defendant knowingly created a great risk of death to more than one person; (3) the murder was especially heinous, atrocious, or cruel; and (4) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

FN1 The jury found Appellant guilty on each count charged and found the existence of all alleged aggravating circumstances as to each of Counts I and II. It assessed punishment at death on Counts I and II, life imprisonment on Count III and ten years imprisonment on Count IV. The trial court sentenced Appellant accordingly. From this Judgment and Sentence Appellant has appealed.FN2

FN1. 21 O.S.2001, § 701.12(1)(2)(4)(7).

FN2. Appellant's Petition in Error was filed December 20, 2007. Appellant's Brief in Chief was filed October 27, 2008. Appellee's Brief was filed February 24, 2009. Appellant's Reply Brief was filed March 13, 2009. This matter was submitted to this Court on March 6, 2009. Oral Argument was held on September 29, 2009.

**I. FACTS**

¶ 2 On the evening of January 15, 2006, Jonathan Dalton, Latango Robertson and Appellant decided to go to Fritzi's hip hop club in Oklahoma City. Prior to going to the club, the three drove in Dalton's white Monte Carlo to Appellant's house so that Appellant could change clothes. While at his house, Appellant got an assault rifle which he brought with him.FN3 Before going to Fritzi's, the men first went to a house party where they consumed alcohol and marijuana. When they left the party, Appellant put the assault rifle into the trunk of the Monte Carlo, which could be accessed through the back seat.

FN3. There was testimony that this weapon was an AK-47 or SKS assault rifle.

¶ 3 The three arrived at Fritzi's between midnight and 1:00 a.m. on January 16. Once inside, they went to the bar to get a drink. Appellant and Dalton also took a drug called ***894** "Ecstasy." After getting their drinks, Dalton and Robertson sat down at a table while Appellant walked around. When Appellant walked by London Johnson, Anthony Jones and Glen Palmer, one of the three apparently said something to him about the Chicago Cubs baseball cap that he was wearing. Appellant went back to the table and told Dalton and Robertson that some guy had given him a hard time about his cap. At some point, Appellant approached Johnson, Jones and Palmer again. During this encounter, Appellant told them that he was going to "chop" them up.FN4 After making this threat, Appellant walked away. He returned a short time later and walked up to Palmer. Appellant extended his hand and said, "We cool." Palmer hit Appellant in the mouth knocking him to the floor. Appellant told Dalton and Robertson that he wanted to leave and the three of them left the club.

FN4. Johnson testified at trial that this meant to him that Appellant was going to shoot at them with a "chopper" which was an AK-47.

¶ 4 Out in the parking lot, Appellant, Dalton and Robertson went to Dalton's Monte Carlo. Before leaving, they talked with some girls who had come out of the club and were parked next to them. The girls told the men to follow them to a 7-11 located at NW 23rd Street and Portland. When they arrived at the store, Appellant, Dalton and Robertson backed into a parking space toward the back door and the girls pulled in next to the pumps. While the men were sitting in the Monte Carlo, they saw Johnson, Jones and Palmer drive into the parking lot in Palmer's Chevy Caprice. They recognized Palmer as the person who had hit Appellant at Fritzi's. Dalton told Appellant to "chill out" but Appellant was mad and wanted to retaliate against Palmer. When Palmer drove out of the parking lot onto 23rd Street and merged onto I-44, Appellant told Dalton to follow them.

¶ 5 While they were following the Chevy, Appellant, who was sitting in the front passenger seat, told Robertson, who was sitting in the back seat, to give him the gun. He told Robertson that if he had to get the gun himself, there was going to be trouble. Robertson reached through the back seat into the trunk and retrieved the gun for Appellant.

Dalton followed the Chevy as it exited the interstate onto Pennsylvania Avenue. He pulled the Monte Carlo into the left lane beside the Chevy as they drove on Pennsylvania Avenue and Appellant pointed the gun out his open window and started firing at the Chevy.

¶ 6 When the Chevy was hit with bullets, Palmer was driving, Jones was sitting in the front passenger seat and Johnson was in the back seat. Johnson heard about twenty rapid gun shots and got down on the floor of the car. He did not see the shooter but noticed a white vehicle drive up beside them. The Chevy jumped the curb and hit an electric pole and fence before coming to a stop. Palmer and Jones had been shot. Jones had been shot in the side of his head and torso and was unconscious. Palmer had been shot in the chest. He was initially conscious and able to talk but soon lost consciousness when he could no longer breathe. Johnson tried to give both Jones and Palmer CPR but was unsuccessful. He flagged down a car that was driving by and asked the driver to get help. Both Palmer and Jones died at the scene from their gunshot wounds.

¶ 7 After he fired at the Chevy, Appellant said, "I'm a monster. I just shot the car up." He added, "They shouldn't play with me like that." Dalton kept driving until they reached a residence in Midwest City where he was staying. They dropped the gun off and switched cars, and then Dalton, Robertson and Appellant went to meet some girls they had talked to at Fritzi's.

## II. OPPORTUNITY TO PRESENT A COMPLETE DEFENSE

[1] ¶ 8 Prior to trial, the defense filed a notice of intent to offer evidence of mental and/or psychological defect, deficiency, diminishment, and/or other such and related condition of defendant. Dr. Phillip Massad, a clinical psychologist, conducted a psychological evaluation of Appellant and issued a report in which he found it more likely than not that Appellant suffered from Post Traumatic***895** Stress Disorder (PTSD). The State filed a motion to preclude the defense from offering testimony about Appellant's PTSD in the first stage of trial. A hearing was held on this motion and the trial court granted the State's motion. Appellant complains in his first proposition that this ruling was in error and violated his constitutional right to present a complete defense.

[2][3] ¶ 9 It is true, as Appellant asserts, that the United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986). A defendant's due process right under the Fifth Amendment and to compulsory process under the Sixth Amendment includes the right to present witnesses in his or her own defense. *United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir.2005); *see also Washington v. Texas*, 388 U.S. 14, 18-19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). "The right to offer the testimony of witnesses ... is in plain terms the right to present a defense.... This right is a fundamental element of due process of law." *Washington*, 388 U.S. at 19, 87 S.Ct. at 1923. *See also Coddington v. State*, 2006 OK CR 34, ¶ 46, 142 P.3d 437, 450-51. It is also true, however, that "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275, citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). Further, the admissibility of evidence is within the discretion of the trial court, which will not be disturbed absent a clear showing of abuse, accompanied by prejudice to the accused. *Jackson v. State*, 2006 OK CR 45, ¶ 48, 146 P.3d 1149, 1165.

¶ 10 Whether Appellant was denied the right to present a defense ultimately turns on whether the evidence at issue was admissible. In order to be admissible, evidence must be relevant. 12 O.S.2001, § 2402. " 'Relevant evidence' means evidence having

any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2001, § 2401. Appellant argues that the evidence that he suffered from PTSD was relevant to the issue of his intent at the time of the offense. The transcript of the hearing on the State's motion to preclude defense testimony about PTSD in the first stage of trial reveals that after speaking with Dr. Massad and reviewing his report, the prosecutor believed that Dr. Massad would not be able to testify that Appellant's PTSD precluded Appellant from forming the intent to kill. Contrary to this, the defense counsel believed that Dr. Massad would testify that "it is possible that the PTSD affected him to the extent that he was not able to form the specific intent." Although Dr. Massad did not testify at the motion hearing, he did testify during the second stage of Appellant's trial. At trial, Dr. Massad testified that although PTSD, especially when combined with alcohol and drug usage, could make a person hypersensitive and increase the likelihood that they would overreact to a situation, he acknowledged that he had not administered tests on Appellant to determine whether Appellant knew what he was doing at the time of the shooting. Thus, Dr. Massad could not testify as to how Appellant's PTSD could affect his intent at the time of the crime.

¶ 11 The record before this Court supports the prosecutor's position that Dr. Massad could not testify that Appellant's PTSD precluded him from forming the intent to kill. Accordingly, the evidence that Appellant suffered from PTSD was neither relevant to the intent element of the crime charged nor was it relevant to his defense of voluntary intoxication, which requires a showing that Appellant's intoxication rendered it impossible to form the intent element of the crime charged. *Jackson v. State*, 1998 OK CR 39, ¶ 67, 964 P.2d 875, 892. The trial court's ruling precluding the defense from presenting this evidence during the first stage of trial was not an abuse of discretion and did not deprive Appellant of his constitutional right to present a defense. There was no error here.

***896 III. SUFFICIENCY OF THE EVIDENCE**

¶ 12 Appellant argues in Proposition II that the evidence presented at trial was insufficient to prove beyond a reasonable doubt all of the elements of First Degree Murder. We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04, *citing Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560, 571 (1979). Further, a reviewing court must accept all reasons, inferences, and credibility choices that tend to support the verdict. *Warner v. State*, 2006 OK CR 40, ¶ 35, 144 P.3d 838, 863.

[4][5][6] ¶ 13 Appellant first complains in this proposition that the only evidence implicating him in commission of the crimes for which he was convicted in this case was the trial testimony of Jonathan Dalton and Latango Robertson. This accomplice testimony, he asserts, was not sufficiently corroborated. "A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." 22 O.S.2001, § 742. Rather, accomplice testimony must be corroborated with evidence, which standing alone tends to link the defendant to the commission of the crime charged. *Pink v. State*, 2004 OK CR 37, ¶ 15, 104 P.3d 584, 590. An accomplice's testimony need not be corroborated in all material respects but requires "at least one material fact of independent evidence which tends to connect the defendant with the commission of the crime." *Cummings v. State*, 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830. "Further, circumstantial evidence can be adequate to corroborate the accomplice's testimony." *Id.*

[7] ¶ 14 It is clear that both Dalton and

 

Robertson were accomplices. [FN5] *Anderson v. State*, 1999 OK CR 44, ¶ 23, 992 P.2d 409, 418. Thus, it was indeed necessary that Dalton's and Robertson's testimony be properly corroborated. While all evidence concerning the actual shooting was provided through Dalton's and Robertson's testimony, additional evidence connecting Appellant with the commission of the crimes was provided through the testimony of other witnesses. Although Appellant denied committing the crimes, he admitted to police that he was with Dalton and Robertson at Fritzi's and that he had been hit in the face at the club on the night that the crimes occurred. London Johnson, the surviving victim, testified about Appellant's altercation with Palmer at the club and testified specifically about Appellant's threat to "chop" up Palmer, Jones and Johnson. This, Johnson stated, was a threat to shoot at them with an AK-47 or machine gun. Other witnesses placed Appellant, Dalton and Robertson inside Dalton's Monte Carlo in the parking lot at Fritzi's after the incident in the club. One witness testified that Appellant was not the driver and the other witness testified that Appellant was not in the back seat. These witnesses saw the Monte Carlo again a short time later at the 7-11 and watched it follow Palmer's Chevy Caprice when Palmer left the convenience store parking lot. This evidence provided the necessary independent evidence of at least one material fact tending to connect Appellant with the shooting. Thus, the accomplices' testimony was properly corroborated.

> FN5. The trial court instructed the jury that Dalton and Robertson were accomplices as a matter of law. Both Dalton and Robertson were initially charged, along with Appellant, with two counts of First Degree Murder and one count of Discharging a Firearm with Intent to Kill, but prior to trial they each entered guilty pleas to the crime of Accessory After the Fact.

[8][9] ¶ 15 Appellant also alleges in this proposition that the evidence, when viewed in the light most favorable to the State, was insufficient to prove beyond a reasonable doubt all of the elements of First Degree Murder. Appellant argues specifically that the evidence did not show his intent to kill, but rather, supports a finding that he intended to terrorize Palmer, Jones and Johnson by shooting at their car. "First Degree Murder requires deliberate intent to end human***897** life, which can be instantly formed and inferred from the fact of the killing." *Jones v. State*, 2006 OK CR 17, ¶ 8, 134 P.3d 150, 154. *See also Hogan v. State*, 2006 OK CR 27, ¶ 22, 139 P.3d 907, 919. The evidence presented at trial showed that Appellant threatened to "chop up" Palmer, Jones and Johnson, and then he followed through with this threat by having Dalton drive up beside Palmer's car while he shot approximately twenty rounds at the car, hitting and killing Palmer and Jones. This evidence was sufficient to support, beyond a reasonable doubt, the finding by a rational trier of fact that Appellant shot at Palmer's car with the intent to kill the individuals inside. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. *See also Powell v. State*, 2000 OK CR 5, ¶¶ 47-50, 995 P.2d 510, 523-24.

## IV. LESSER INCLUDED OFFENSE INSTRUCTIONS

[10][11] ¶ 16 In his third proposition, Appellant argues that the trial court erred in failing to instruct the jury, *sua sponte*, on the lesser crime of Second Degree Depraved Mind Murder. Again, we review a trial court's decision on the submission of lesser included offense instructions for an abuse of discretion. *Jackson*, 2006 OK CR 45, ¶ 24, 146 P.3d at 1159. Further, if a defendant convicted of the charged offense complains that the trial court should have given, *sua sponte*, some lesser offense instruction, this Court will consider whether the trial court's omission amounts to plain error. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670.

[12] ¶ 17 It is true that the trial court must instruct on any lesser included offense warranted by the evidence. *Jones*, 2006 OK CR 17, ¶ 6, 134 P.3d at 154, *citing Shrum v. State*, 1999 OK CR 41, 991

 

P.2d 1032 (lesser included instructions should be given if supported by any evidence). An underlying requirement of *Shrum,* however, is that a lesser offense instruction should not be given unless the evidence would support a conviction for the lesser offense. *Jones,* 2006 OK CR 17, ¶ 6, 134 P.3d at 154. *See also Harris v. State,* 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750 (to determine whether lesser-included offense instructions are warranted, this Court looks at whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser). "To warrant an instruction on depraved mind murder, the evidence must reasonably support the conclusion that the defendant committed an act so imminently dangerous to another person or persons as to evince a state of mind in disregard for human life, but without the intent of taking the life of any particular individual." *Jackson,* 2006 OK CR 45, ¶ 26, 146 P.3d at 1160.

¶ 18 Appellant argues that an instruction on this lesser offense was warranted because at most, the evidence showed that he simply fired into the car in which Palmer, Jones and Johnson were riding. He asserts that while there was evidence that he may have been seeking revenge for being hit in the face, there was no evidence that he intended to kill his victims. Thus, he claims that this was a classic case of depraved mind murder. We find otherwise. In light of the testimony that Appellant threatened to "chop" up Palmer and his companions, instructed Dalton to follow Palmer's car and then shot as many as twenty rounds at the moving vehicle with an assault rifle, we find that the evidence did not reasonably support the conclusion that Appellant did not intend to kill the men in the Chevy. An instruction on Second Degree Depraved Mind Murder was not warranted by the evidence and the trial court did not abuse its discretion in declining to give this instruction *sua sponte.* There was no plain error here.

**V. FIREARMS DEMONSTRATION**

[13] ¶ 19 During the first stage of trial, the State conducted a firearms demonstration in which the jury was transported to an Oklahoma City Police Department firing range and an investigator for the Oklahoma County District Attorney's Office, Gary Eastridge, demonstrated the use of an AK-style semi-automatic weapon. Defense counsel objected to this demonstration and his objection ***898** was overruled.[FN6] Appellant complains in his fourth proposition that this ruling was in error. Again, the admissibility of evidence is within the discretion of the trial court, which will not be disturbed absent a clear showing of abuse, accompanied by prejudice to the accused. *Jackson,* 2006 OK CR 45, ¶ 48, 146 P.3d at 1165.

FN6. The record is clear that while defense counsel objected to the demonstration, he did not object to the investigator's testimony.

¶ 20 Because the weapon used in the shooting was never recovered, it is not known whether it was a fully automatic or a semi-automatic firearm. Appellant contends that the demonstration of a semi-automatic weapon mislead the jury to believe that he had used this type of weapon in the shooting and bolstered the State's assertion that he shot with the intent to kill as he would have had to purposefully pull the trigger of a semi-automatic weapon many times to discharge as many bullets as were reported to have been fired. Thus, he argues, this demonstration was misleading and prejudicial.

¶ 21 The investigator who performed the demonstration testified that when an AK-47 fully automatic rifle is used, a single pull of the trigger will fire the weapon until the trigger is released. He testified that when a semi-automatic weapon is used, each pull of the trigger fires a single shot. He demonstrated a quick, repeated firing of a semi-automatic assault rifle. The testimony and demonstration showed the jury that either weapon could have been used by Appellant. Neither the investigator's testimony nor his demonstration misled the jury to believe that Appellant used a semi-automatic rather than a fully-automatic weapon.

The demonstration which showed that a semi-automatic weapon could have been used was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2001, §§ 2401, 2403. The trial court did not abuse its discretion in overruling Appellant's objection to the demonstration.

**VI. HEARSAY AND CONFRONTATION**

[14] ¶ 22 During the second stage of trial, Roy Collins, a man who had shared a cell with Appellant in the Oklahoma County Jail, testified for the State. During direct examination of this witness, the prosecutor introduced into evidence, and asked Collins to read to the jury, five letters that he had written to the police and the prosecutor's office revealing admissions Appellant had made to him in jail. These letters were read and admitted without objection from defense counsel. In his fifth proposition, Appellant contends that the admission of the letters into evidence and the reading of them to the jury was error. As there was no objection at trial, we review only for plain error on appeal. *Jones v. State*, 2009 OK CR 1, ¶ 52, 201 P.3d 869, 884.

¶ 23 Appellant first complains in this proposition that the letters were inadmissible hearsay. Appellant is correct. The letters were hearsay for which no exception applied. *See Malone v. State*, 2007 OK CR 34, ¶ 58, 168 P.3d 185, 210; 12 O.S.2001, § 2801. However, the record reveals that Collins' testimony prior to the introduction of the letters provided the jury substantially the same information as was contained within the letters. Collins testified that Appellant had confessed to committing the crime, had shown no remorse for his actions and had even laughed about the crime and wanted to kill and threaten potential witnesses. Thus, while the letters were inadmissible hearsay, the information contained therein was cumulative to properly admitted evidence. In light of Collins' admissible testimony, we find that the introduction of this inadmissible hearsay was harmless error.

[15][16] ¶ 24 Appellant also argues in this proposition that the letters were testimonial in nature and therefore, their admission violated his Sixth Amendment right to confrontation. Under *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004), a testimonial out-of-court statement offered against an accused to establish the truth of the matter asserted may be admitted only where the declarant is unavailable and where the accused has had a prior ***899** opportunity to cross-examine the witness. *Crawford* states, however, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59 n. 9, 124 S.Ct. at 1369 n. 9, *citing California v. Green*, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). *See also Stouffer v. State*, 2006 OK CR 46, ¶ 70, 147 P.3d 245, 264. The letters did not pose a Confrontation Clause problem as Collins testified at trial and was subject to cross-examination.

**VII. PROSECUTORIAL MISCONDUCT**

[17][18] ¶ 25 In Proposition VI, Appellant complains that prosecutorial misconduct deprived him of his right to a fair trial. "This Court will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair." *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. The Appellant concedes that all but one of the comments complained of were not met with objection at trial. We review the comments not objected to for plain error only. *Matthews v. State*, 2002 OK CR 16, ¶ 38, 45 P.3d 907, 920.

¶ 26 The alleged instances of misconduct include allegations that the prosecutor argued facts not in evidence, engaged in unnecessary ridicule of Appellant, contrasted Appellant's situation with that of the victims', appealed to justice and sympathy for the victims and their families and improperly shifted the burden of proof. Many of these comments, including the single comment met with objection, fell within the broad parameters of effective advocacy and do not constitute error. *Martinez v.*

*State*, 1999 OK CR 33, ¶ 44, 984 P.2d 813, 825. We review those comments bordering upon impropriety within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *DeRosa v. State*, 2004 OK CR 19, ¶ 53, 89 P.3d 1124, 1145. Given the magnitude of the State's evidence against Appellant this Court finds that any inappropriate comments not objected to did not deprive Appellant of a fair trial or affect the jury's finding of guilt or assessment of punishment. There was no plain error here.

**VIII. VOLUNTARY INTOXICATION**

[19] ¶ 27 In his seventh proposition, Appellant complains that he was denied his right to a fair trial because the jury instructions and the prosecutor's arguments on voluntary intoxication did not state the applicable law. Regarding the jury instructions, this Court has held that, "[j]ury instructions are a matter committed to the sound discretion of the trial court whose judgment will not be disturbed as long as the instructions, taken as a whole, fairly and accurately state the applicable law." *Dill v. State*, 2005 OK CR 20, ¶ 11, 122 P.3d 866, 869. Further, where, as here, the instructions were not met with objection by the defense, all but plain error will be deemed waived. *Watts v. State*, 2008 OK CR 27, ¶ 9, 194 P.3d 133, 136-37.

[20] ¶ 28 "A defense of voluntary intoxication requires that a defendant, first, be intoxicated and, second, be so utterly intoxicated, that his mental powers are overcome, rendering it impossible for a defendant to form the specific criminal intent ... element of the crime." *McElmurry v. State*, 2002 OK CR 40, ¶ 72, 60 P.3d 4, 23, *quoting Jackson v. State*, 1998 OK CR 39, ¶ 67, 964 P.2d 875, 892. When the crime is that of First Degree Malice Murder, the specific intent is malice aforethought, or the intent to kill. 21 O.S.2001, § 701.7(A). Appellant argues that the jury instructions on voluntary intoxication given in the present case were erroneous because the instruction defining the intent element of the defense contained an erroneous legal standard. The instruction, he complains, referred generally to "a criminal intent" and did not advise the jury of the specific intent element of the crime of First Degree Murder. Thus, he complains, the instructions led the jury to believe that Appellant could not be entitled to the defense of voluntary intoxication if he could have formed any criminal intent-either general or specific.

***900** ¶ 29 The record reflects that the instruction at issue, based upon Oklahoma Uniform Jury Instruction 8-39, was given as follows:

> *Incapable Of Forming Specific Criminal Intent*- The state in which one's mental powers have been overcome through intoxication, rendering it impossible to form a criminal intent.

While it is true that this instruction utilized the "criminal intent" language, we find that it did not render the instructions, as a whole, inaccurate or inadequate. Appellant's jury was advised, in Instruction 31, that malice aforethought was the proper intent to apply to the voluntary intoxication defense:

> The crimes in Counts 1 and 2 of Murder In The First Degree have as an element the specific criminal intent Malice Aforethought. A person in [sic] entitled to the defense of voluntary intoxication if that person was incapable of forming the specific criminal intent because of his intoxication.

This is the same instruction that this court recently reaffirmed as proper and legally sufficient in *Malone*, 2007 OK CR 34, ¶ 30, 168 P.3d at 198. Appellant's jury was adequately advised that malice aforethought was the proper intent to apply to the voluntary intoxication defense.

¶ 30 Appellant argues in conjunction with this claim, that the prosecutor's closing argument to the jury referenced the incorrect law on the defense of voluntary intoxication and this argument, coupled with the jury instructions on voluntary intoxication, created plain error which requires reversal. Not-

 

ably, none of the argument complained of was met with objection at trial. Accordingly, all but plain error has been waived. *Howell v. State*, 2006 OK CR 28, ¶ 11, 138 P.3d 549, 556.

¶ 31 Appellant complains specifically that the prosecutor told the jury that they had to find Appellant's actions rendered it impossible for him to form "a criminal intent" without referencing the specific intent of malice aforethought or intent to kill. The record reveals that when addressing the defense of voluntary intoxication, the prosecutor sometimes referred generally to "criminal intent." However, the record also reveals that the prosecutor argued to the jury, in the context of the voluntary intoxication defense, that the evidence show that Appellant had the specific "intent to kill" when he committed the crime.

¶ 32 Because the jury instructions, when taken as a whole, adequately stated the applicable law on the defense of voluntary intoxication and because the prosecutor's arguments were largely correct and proper statements of the law, we find no plain error here. Appellant's argument warrants no relief.

**IX. OPINION TESTIMONY**

¶ 33 Oklahoma City Police Detective John George testified for the State in both stages of Appellant's trial. Appellant argues in his eighth proposition that Detective George gave improper opinion testimony that invaded the province of the jury and improperly vouched for the credibility of State's witnesses. The trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion and will not be reversed absent a clear abuse of discretion. *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813. However, as Appellant concedes, most evidence at issue in this proposition was not met with objection by defense counsel and therefore, as to this testimony, all but plain error has been waived. *Id.*

[21] ¶ 34 The record reflects that on direct examination, Detective George testified about his interview with Appellant at the police station after the shooting. He testified that in his experience as a police officer, it was not odd for suspects to deny involvement in the commission of a crime as "[p]eople don't want to tend to confess to a homicide." He also agreed that it was not odd for suspects to tell circumstances surrounding the crime but omit the facts of the actual crime. He stated, "I believe he told us parts that he thought we knew, like the fight at the club and everything, but left out obviously the parts about the shooting, the stuff he didn't think we knew." Appellant argues that testimony that Appellant was being untruthful was improper as it was tantamount to giving an opinion that Appellant was guilty. We disagree. It is well settled that ***901** "[p]olice officers are allowed to give opinion testimony based on their training and experience." *Andrew v. State*, 2007 OK CR 23, ¶ 80, 164 P.3d 176, 196, *citing Berry v. State*, 1988 OK CR 83, ¶ 6, 753 P.2d 926, 929-30; *McCoy v. State*, 1985 OK CR 49, ¶ 14, 699 P.2d 663, 665-66. We find that this testimony was admissible as it was properly based on Detective George's perceptions in conjunction with his training and experience. Further, despite Appellant's argument to the contrary, we find that this testimony, which did not purport to be scientific in nature, was not subject to the requirements of *Daubert*.[FN7] *See Malone*, 2007 OK CR 34, ¶ 82 n. 153, 168 P.3d at 217 n. 153.

FN7. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[22] ¶ 35 Appellant next complains that Detective George improperly vouched for the credibility of other State's witnesses. George testified that initially, Appellant's statement was consistent with the statements given by co-defendants Dalton and Robertson and all of them originally omitted the part of the evening involving the shooting and the type of car they were driving that night. George then testified, "They told us the same stories before and after, as we just heard, and then they filled in the middle once they [Dalton and Robertson] decided to cooperate and tell us the truth." Appellant

 

also complains that Detective George improperly vouched for the credibility of State's witness Roy Collins. During the second stage of trial, Detective George testified that Roy Collins had given the police details about the case that the police did not know prior to interviewing him.

[23] ¶ 36 Evidence is impermissible vouching only if the jury could reasonably believe that a witness is indicating a personal belief in another witness's credibility, "either through explicit personal assurances of the witness's veracity or by implicitly indicating that information not presented to the jury supports the witness's testimony." *Warner v. State*, 2006 OK CR 40, ¶ 24, 144 P.3d 838, 860. In the present case, Detective George neither gave explicit personal assurances of these witnesses' veracity nor did he implicitly indicate that information not presented at trial supported these witnesses' testimony. Detective George did not improperly vouch for the credibility of other witnesses and the admission of his testimony was not an abuse of discretion.

## X. PREJUDICIAL PHOTOGRAPHS

[24] ¶ 37 In his ninth proposition, Appellant argues for the first time on appeal that the introduction of irrelevant, inflammatory and highly prejudicial photographs of the victims and the crime scene deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution. The admission of photographs is within the trial court's discretion and will not be disturbed absent abuse of discretion. *Browning v. State*, 2006 OK CR 8, ¶ 32, 134 P.3d 816, 837. As counsel had no objection at trial, we review for plain error only. *Williams*, 2008 OK CR 19, ¶ 69, 188 P.3d at 223.

¶ 38 This Court has held that photographs may be relevant to show the nature and location of wounds, corroborate the medical examiner's testimony, or show the crime scene. *Browning*, 2006 OK CR 8, ¶ 32, 134 P.3d at 837. We have noted many times that while gruesome crimes make for gruesome crime-scene photographs, the issue is whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *Pavatt v. State*, 2007 OK CR 19, ¶ 55, 159 P.3d 272, 290; 12 O.S.2001, §§ 2401-2403. The photographs at issue in the present case were relevant and their probative value was not substantially outweighed by the danger of unfair prejudice. We find no abuse of discretion in the trial court's decision to admit the photographs. Appellant was not deprived of his constitutional rights by the admission of these photographs.

## XI. VOIR DIRE

[25] ¶ 39 Appellant argues in his tenth proposition that he was denied his constitutional***902** right to an adequate voir dire and a fair and impartial jury. This Court reviews the manner and extent of a trial court's voir dire under an abuse of discretion standard. *Williams*, 2008 OK CR 19, ¶ 27, 188 P.3d at 217, *citing Littlejohn v. State*, 2004 OK CR 6, ¶ 49, 85 P.3d 287, 301.

¶ 40 The record reflects that after the trial court and both parties had completed voir dire and the panel had been passed for cause, the trial court noted on the record that defense counsel had not requested that the court voir dire the jurors on whether they would automatically impose the death penalty. The trial court noted additionally that such an inquiry would have been required by law if a request had been made. Appellant argues that the trial court's understanding that it was not required to life qualify the jury *sua sponte* was inconsistent with Oklahoma law. He asserts that the trial court is required to life qualify the jury in all death penalty cases even absent a request to do so. Appellant's argument is not based upon statutory authority or case law, but rather rests upon the Notes on Use regarding the life qualifying question in the Oklahoma Uniform Jury Instructions. The Notes on Use advise that the life qualifying question be asked in all cases where the death penalty is being sought, not because such is mandated by law, but rather because, "the Committee believes that the in-

terests of justice and judicial economy will be best served if the trial court asks this question." Rule 1-5 (Alternative 2) OUJI-CR(2d).[FN8]

FN8. We certainly agree with the Committee that it is always prudent to ask this question when the death penalty is sought, and we strongly encourage trial courts to do so.

¶ 41 In *Morgan v. Illinois*, 504 U.S. 719, 735-36, 112 S.Ct. 2222, 2233, 119 L.Ed.2d 492 (1992), the United States Supreme Court held that a capital defendant must be permitted on voir dire to find out whether prospective jurors believe that the death penalty should automatically be imposed upon conviction for first degree murder. The Supreme Court ruled that upon request, either defense counsel or the trial court must ask prospective jurors whether they would automatically impose a sentence of death. *Morgan*, 504 U.S. at 729, 112 S.Ct. at 2229. This Court has adhered to and followed this ruling numerous times.[FN9] However, neither the United States Supreme Court nor this Court has held that the trial court is required to ask life qualifying questions to the jury absent a request to do so. Absent legal authority to the contrary, we cannot find that the trial court abused its discretion in declining to ask the potential jurors the life qualifying question *sua sponte*.

FN9. *See Hanson v. State*, 2003 OK CR 12, ¶ 6, 72 P.3d 40, 46-47; *McCarty v. State*, 1998 OK CR 61, ¶ 77, 977 P.2d 1116, 1135; *Fitzgerald v. State*, 1998 OK CR 68, ¶ 31, 972 P.2d 1157, 1170-71; *Cannon v. State*, 1998 OK CR 28, ¶¶ 4-7, 961 P.2d 838, 844.

## XII. ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE

[26][27] ¶ 42 Appellant argues in his eleventh proposition that the evidence was insufficient to establish beyond a reasonable doubt the especially heinous, atrocious or cruel aggravating circumstance as to the murders of both Palmer and Jones. To prove that a murder is especially heinous, atrocious or cruel, the evidence must show that the victim's death was preceded by torture or serious physical abuse. *Hogan v. State*, 2006 OK CR 19, ¶ 66, 139 P.3d 907, 931. Serious physical abuse is proved by showing that the victim endured conscious physical suffering before dying. *Id.* "When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, this Court reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt." *Washington v. State*, 1999 OK CR 22, ¶ 44, 989 P.2d 960, 974.

[28] ¶ 43 With regard to the murder of Glen Palmer, the evidence showed that Palmer was shot four times. He suffered a grazing gunshot wound to the right shoulder, two superficial gunshot wounds to the left side of his back, and an ultimately fatal gunshot wound to his chest. Although he was initially conscious after being shot, his breathing ***903** became labored and he made gurgling sounds as his chest filled with blood before he died. There was testimony that immediately after he had been shot, Palmer was able to speak, was aware that he had been shot and was fearful that the shooters would return. Reviewing the evidence in the light most favorable to the State, we find that the evidence supports a finding that Palmer's death was preceded by physical suffering and mental cruelty. *Jones*, 2009 OK CR 1, ¶¶ 77-79, 201 P.3d at 889.

[29] ¶ 44 With regard to the murder of Anthony Jones, the evidence showed that his death was nearly immediate. Jones suffered numerous gunshot wounds including wounds to his head and chest. The Medical Examiner testified that Jones injuries were not survivable and he likely died within seconds after being shot. Johnson testified that Jones was not conscious after being shot and Johnson could not detect a pulse when he checked Jones. The evidence does not show, beyond a reasonable doubt and in a light most favorable to the

 

State, that Jones' death was preceded by torture or that he endured conscious physical suffering before dying. Accordingly, Appellant's argument that the especially heinous, atrocious or cruel aggravating circumstance must be stricken with regard to the murder of Anthony Jones is well taken and we so hold.[FN10]

> FN10. The State makes no argument to the contrary, noting, along with Appellant, that the record indicates that the heinous, atrocious or cruel aggravating circumstance was intended to only be alleged with regard to Palmer's murder. The 2nd Amended More Definite and Certain Statement to Support Allegations Contained in the Bill of Particulars In Re: Punishment explains how this aggravating circumstance applies to Palmer's murder and makes no mention of Jones. That the jury was erroneously instructed on this aggravating circumstance with regard to Jones' murder was brought to the trial court's attention at formal sentencing by the prosecutor who opined that it would be stricken on appeal. Defense counsel did not disagree and the trial court acknowledged the error, dismissing it as a scrivener's error.

[30][31][32] ¶ 45 We must now consider what relief, if any, is required. "An invalidated sentencing factor ... will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Brown v. Sanders,* 546 U.S. 212, 220, 126 S.Ct. 884, 892, 163 L.Ed.2d 723 (2006). "If the jury could have properly considered the evidence used to support the invalidated aggravator anyway because it also supported a separate and valid aggravator, the death sentence will stand." *Jackson,* 2006 OK CR 45, ¶ 44, 146 P.3d at 1164. Under such circumstances, the jury has not considered any improper evidence and has not weighed any improper aggravating evidence against the mitigating evidence in arriving at its sentence. *Id.* Since there was really no evidence presented to the jury in support of the especially heinous, atrocious or cruel aggravating circumstance with regard to the murder of Anthony Jones, we find that Appellant's jury did not consider improper aggravating evidence in deciding punishment. Thus, the jury's weighing process of mitigating evidence against aggravating circumstances was not skewed. *See Jackson,* 2006 OK CR 45, ¶ 45, 146 P.3d at 1164. This claim is rejected.

**XIII. MITIGATING EVIDENCE INSTRUCTION**

[33] ¶ 46 In his twelfth proposition, Appellant argues that the definition of mitigating circumstances given to the jury in this case was unconstitutional as it impermissibly limited the jury's consideration of mitigating evidence. This Court has consistently upheld constitutional challenges to the instruction at issue.[FN11] However, as Appellant correctly asserts, in *Harris v. State,* 2007 OK CR 28, ¶¶ 24-28, 164 P.3d 1103, 1113-14, this Court recognized that while the instruction on mitigating evidence did not unconstitutionally limit the evidence the jury could consider as mitigating, it was subject to misuse by prosecutors in closing argument.[FN12] ***904** This is what Appellant argues happened in the present case. However, as the record reflects no objection to the alleged offending argument, this Court will review only for plain error on appeal. *Jones,* 2009 OK CR 1, ¶ 76, 201 P.3d at 888. A review of the prosecutor's closing argument concerning the mitigating evidence instruction, the mitigating evidence itself and all instructions concerning mitigating evidence given in this case supports our conclusion that the jurors' consideration of the evidence offered in mitigation was not unfairly limited in this case.

> FN11. *See Malone,* 2007 OK CR 34, ¶ 87, 168 P.3d at 219; *Primeaux v. State,* 2004 OK CR 16, ¶ 90-96, 88 P.3d 893, 909-10; *Williams v. State,* 2001 OK CR 9, ¶ 109,

 

22 P.3d 702, 727.

FN12. This Court referred the matter to the Oklahoma Uniform Jury Instruction Committee (Criminal) for an amendment to remedy the problem. *Harris,* 2007 OK CR 28, ¶¶ 26-27, 164 P.3d at 1114.

**XIV. INEFFECTIVE ASSISTANCE OF COUNSEL**

¶ 47 In his thirteenth proposition, Appellant argues that he was denied his Sixth Amendment right to the effective assistance of counsel for several alleged failings of his trial attorney. This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. It is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding. Rather, an appellant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶ 48 In support of his proposition, Appellant first argues that trial counsel was ineffective for failing to object to the introduction of inadmissible evidence, improper tactics and argument of the prosecutors, the trial court's rulings precluding the admission of defense evidence and the submission of improper jury instructions and verdict forms. These alleged failings concern issues raised and addressed above. We found in Proposition I, that the evidence of Appellant's PTSD was inadmissible in first stage of trial and properly precluded. We found in Proposition III that an instruction on Second Degree Depraved Mind Murder was not warranted by the evidence. In Proposition V, we found that while the letters at issue were in fact hearsay for which no exception applied, the information contained within them was cumulative to properly admitted evidence and thus, their admission was harmless. In Proposition VI, we found that none of the alleged improper comments made by the prosecutor could be found to have affected the jury's finding of guilt or assessment of punishment. We found in Proposition VII, that the jury instructions, when taken as a whole, adequately stated the applicable law on the defense of voluntary intoxication and the prosecutor's arguments were largely correct and proper statements of the law. In Proposition VIII, we found that Detective George did not give improper opinion testimony or improperly vouch for the credibility of other witnesses. In Proposition XI, we found that the heinous, atrocious or cruel aggravating circumstance was proven beyond a reasonable doubt as to the murder of Glen Palmer. Although this aggravating circumstance was stricken as to the murder of Anthony Jones, Appellant's jury did not consider improper aggravating evidence in deciding punishment. In Proposition XII, we found that the jurors' consideration of the evidence offered in mitigation in this case was not unfairly limited. Most of these alleged failings do not reflect a deficient performance by defense counsel and Appellant has not shown a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

[34] ¶ 49 Next, Appellant complains that defense counsel was ineffective for failing to adequately investigate and present additional evidence of innocence. He first specifically complains that counsel was ineffective for failing to investigate and present additional mitigating evidence. While Appellant has shown this Court that additional mitigation ***905** witnesses could have been called and others that were called could have given additional testimony, he has not shown a reasonable probability that, but for counsel's alleged unprofessional error in not presenting this evidence, the result of the proceeding would have been different.

[35] ¶ 50 The next allegation of ineffective assistance of counsel concerns a concession made by defense counsel in opening statements. The record reflects that during opening statements, defense counsel conceded that Appellant was the shooter in the homicides. This concession was apparently made, with the consent of Appellant, in order to remain consistent with the intended defense built around Appellant's claim of PTSD. After defense counsel told the jury that Appellant was the shooter, he also told them that because of this concession, he would have a hard time asking them to find Appellant not guilty and would turn, at some point, to the second stage of trial. This second comment, Appellant argues, was tantamount to a complete concession of guilt and was not made with Appellant's knowing and intelligent consent. We disagree. With this comment, defense counsel did not concede that Appellant was guilty of First Degree Murder. Rather, when the whole of the comments are taken together, it is clear that defense counsel, in accord with his claim that Appellant suffered from PTSD, conceded that his client would be guilty of a lesser form of homicide. The concession made by defense counsel with the consent of Appellant cannot be found to constitute ineffective assistance of counsel.

[36] ¶ 51 Next Appellant argues that trial counsel was ineffective for failing to call a witness to impeach Collins' credibility by testifying that Collins was an opportunist who would lie and perjure himself in order to get a better deal for himself. This information was basically revealed at trial through both direct and cross-examination of Collins. While defense counsel certainly could have called this witness, Appellant has not shown a reasonable probability that, but for counsel's alleged unprofessional error in not doing so, the result of the proceeding would have been different.

[37] ¶ 52 Finally, Appellant contends that the defense investigator who was assigned to work on his case had previously worked on co-defendant Dalton's case and therefore, had a conflict of interest. It is not clear how the investigator's alleged conflict of interest rendered trial counsel's performance deficient. The investigator's affidavit submitted in support of the Motion for an Evidentiary Hearing sheds no light on this. The investigator stated in his affidavit that he worked on gathering records for Dalton to use for mitigation and the memorandums he prepared for Dalton's case were turned over to Appellant's attorneys in this case. He also stated that he did the best that he could for Appellant and did not feel like the work he did on Appellant's case was compromised by his work on Dalton's case. Appellant has neither shown that counsel were deficient with regard to their use of the investigator nor that any alleged deficiency prejudiced the defense, depriving Appellant of a fair trial with a reliable result. Appellant has not shown that he was denied his constitutional right to the effective assistance of counsel.

[38] ¶ 53 In conjunction with this claim, Appellant has filed a Rule 3.11 motion for an evidentiary hearing on the issue of ineffective assistance of counsel asserting that counsel was ineffective for failing to adequately investigate and identify evidence which could have been made available during the trial. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2007). In accordance with the rules of this Court, Appellant has properly submitted with his motion affidavits supporting his allegations of ineffective assistance of counsel. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2007). As the rules specifically allow Appellant to predicate his claim on allegations "arising from the record or outside the record or a combination of both," *id.*, it is, of course, incumbent upon this Court, to thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence to determine the merits of Appellant's ineffective assistance of counsel claim. Our rules require us to do so ***906** in order to evaluate whether Appellant has provided sufficient information to show this Court by clear and convincing evidence that there is a strong possibility trial

 

counsel was ineffective for failing to utilize or identify the evidence at issue. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). This standard is intended to be less demanding than the test imposed by *Strickland* and we believe that this intent is realized. Indeed, it is less of a burden to show, even by clear and convincing evidence, merely a *strong possibility* that counsel was ineffective than to show, by a preponderance of the evidence that counsel's performance actually was deficient and that but for the unprofessional errors, the result of the proceeding would have been different as is required by *Strickland.* Thus, when we review and grant a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we do not make the adjudication that defense counsel actually was ineffective. We merely find that Appellant has shown a strong possibility that counsel was ineffective and should be afforded further opportunity to present evidence in support of his claim. However, when we review and deny a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we necessarily make the adjudication that Appellant has not shown defense counsel to be ineffective under the more rigorous federal standard set forth in *Strickland.*

[39] ¶ 54 In the present case, Appellant specifically asserts in his application for an evidentiary hearing on his claim of ineffective assistance of counsel that defense counsel was ineffective for failing to investigate and present (1) additional mitigating evidence that Appellant endured a miserable life of poverty and parental neglect during his childhood and adolescence; (2) new evidence showing that trial counsel did not obtain Appellant's knowing and intelligent consent or acquiescence to counsel's concession that Appellant was the shooter and that counsel could not ask the jury to render a not guilty verdict; (3) additional evidence from a witness available to trial counsel but not called at trial showing that State's witness Roy Collins had admitted to him that he was going to 'snitch on' Appellant to get a better deal in his own case; and (4) evidence of a defense trial investigator's conflict of interest because of a previous assignment as an investigator for a codefendant. We have thoroughly reviewed Appellant's application and affidavits along with other attached non-record evidence and we conclude that Appellant has failed to show with clear and convincing evidence a strong possibility that counsel was ineffective for failing to identify or use the evidence raised in the motion. Consequently, we also find that Appellant failed to show that counsel's performance was constitutionally deficient and that counsel's performance prejudiced the defense, depriving him of a fair trial with a reliable result. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 674 (1984); *Davis*, 2005 OK CR 21, ¶ 7, 123 P.3d at 246. Appellant is not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

## XV. CUMULATIVE ERROR

[40] ¶ 55 Finally, Appellant claims that trial errors, when considered cumulatively, deprived him of a fair sentencing determination. This Court has recognized that when there are "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 was to deny the defendant a fair trial." *DeRosa*, 2004 OK CR 19, ¶ 100, 89 P.3d at 1157, *quoting Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. Upon review of Appellant's claims for relief and the record in this case we conclude that although his trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require relief because they did not render his trial fundamentally unfair, taint the jury's verdict, or render sentencing unreliable. Any errors were harmless beyond a reasonable doubt, individually and cumulatively.

## XVI. MANDATORY SENTENCE REVIEW

[41] ¶ 56 Title 21 O.S.2001, § 701.13 requires this Court to determine "[w]hether ***907** the sentence of death was imposed under the influence of

passion, prejudice or any other arbitrary factor; and whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance." After conducting this review, this Court may order any corrective relief that is warranted or affirm the sentence. 21 O.S.2001, § 701.13(E).

¶ 57 We have reviewed the record in this case in conjunction with Appellant's claims for relief and have found that his conviction and death sentence were not the result of the introduction of improper evidence, witness testimony, prosecutorial misconduct or trial court error. We therefore find Appellant's death sentence was not imposed because of any arbitrary factor, passion or prejudice.

¶ 58 The jury's finding that Appellant had been previously convicted of a felony involving the use or threat of violence, knowingly created a great risk of death to more than one person and that there existed a probability that he would commit criminal acts of violence that would constitute a continuing threat to society is amply supported by the evidence. Further, the jury's finding that Palmer's murder was especially heinous, atrocious, or cruel is also amply supported by the evidence. Appellant's jury did not consider any improper aggravating evidence in deciding punishment. Weighing the valid aggravating circumstances and evidence against the mitigating evidence, we find, as did the jury below, that the aggravating circumstances outweigh the mitigating circumstances. The Judgment and Sentence of the district court is **AFFIRMED.**

**DECISION**

¶ 59 The Judgment and Sentence of the district court is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

A. JOHNSON, V.P.J., LUMPKIN, CHAPEL and LEWIS, JJ.: concur.

Okla.Crim.App.,2010.

Simpson v. State
230 P.3d 888, 2010 OK CR 6

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**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

KENDRICK A. SIMPSON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

**NOT FOR PUBLICATION**

Case No. PCD 2007-1262

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

**C. JOHNSON, PRESIDING JUDGE:**

Petitioner, Kendrick Antonio Simpson, was tried by a jury and convicted of First Degree Murder with Malice Aforethought (Counts I and II), Discharging a Firearm with Intent to Kill (Count III) and Possession of a Firearm After Former Conviction of a Felony (Count IV) in the District Court of Oklahoma County, Case No. CF 2006-496. The jury found Simpson guilty on each count charged and assessed punishment at death on Counts I and II, life imprisonment on Count III and ten years imprisonment on Count IV. The trial court sentenced Simpson accordingly. He appealed his convictions to this Court in Case No. D-2007-1055. We affirmed Simpson's Judgment and Sentence in *Simpson v. State*, 2010 OK CR 6, 230 P.3d 888.

Simpson now seeks post-conviction relief in this Court, raising eight propositions of error. None of these claims merit relief. Under the Capital Post-Conviction Procedure Act, the only claims that may be raised are those that "[w]ere not and could not have been raised in a direct appeal" and that also "[s]upport a conclusion either that the outcome of the trial would have been



**Exhibit E**

different but for the errors or that the defendant is factually innocent." 22 O.S.Supp.2006, § 1089(C)(1) & (2). "This Court will not consider issues which were raised on direct appeal and are barred by *res judicata*, or issues which have been waived because they could have been, but were not, raised on direct appeal." *Cummings v. State*, 1998 OK CR 60, ¶ 2, 970 P.2d 188, 190. The burden is on the applicant to show that his claim is not procedurally barred. *See* 22 O.S.Supp.2006, § 1089(C). For purposes of post-conviction, a claim 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, or
>
> 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.Supp.2006, § 1089(D)(4)(b)(1) & (2).

Simpson argues in his first proposition that trial counsel's performance during both stages of trial was deficient and deprived him of his rights to a fair trial and reliable sentencing proceeding in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Claims of ineffective assistance of counsel are governed by the two-part *Strickland* test that requires a petitioner to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's performance prejudiced the defense, depriving the petitioner of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. To prove

deficient performance, Simpson must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. "Judicial scrutiny of counsel's performance is highly deferential." *Davis,* 2005 OK CR 21, ¶ 7, 123 P.3d at 246; *see also Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. If Simpson demonstrates that counsel's performance was deficient, he must also show prejudice before this Court may rule in his favor. *Davis,* 2005 OK CR 21, ¶ 7, 123 P.3d at 246. To show prejudice, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. "This Court may address the performance and prejudice components in any order and need not address both if a petitioner fails to make the requisite showing for one." *Davis,* 2005 OK CR 21, ¶ 7, 123 P.3d at 246.

Simpson directs this Court's attention in Proposition I to numerous alleged failings of trial counsel. He begins by arguing that trial counsel was constitutionally ineffective for not objecting after the trial court informed the jury when reading the Information that Simpson had been charged in Count IV, with Possession of a Firearm After Former Conviction of a Felony. Additionally he complains that defense counsel improperly referenced this prior conviction during voir dire, did not take adequate steps to ascertain whether

this information prejudiced any potential jurors, and did not object to subsequent references to this prior conviction by the trial court and the prosecution. Because this allegation of ineffective assistance of trial counsel could have been raised on direct appeal, this claim has been waived for review on post conviction appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

Next, Simpson alleges that trial counsel was ineffective for failing to adequately challenge or rebut the prosecution's claim that the weapon used in the shooting was a semi-automatic rather than a fully automatic firearm. He specifically argues that trial counsel should have objected to the prosecutor's characterization of the weapon used as a semi automatic firearm and the prosecutor's argument to this effect and that defense counsel should have cross examined the witness who conducted the firearms demonstration. He also complains that counsel should have investigated and produced witnesses to the crime and expert witnesses who could have provided evidence supporting the conclusion that the weapon used was a fully automatic firearm. Simpson claims that if trial counsel had presented such evidence, the jury would have convicted him, if at all, on lesser offenses not punishable by death. Again, this claim of ineffective assistance of trial counsel is waived because it could have been presented on direct appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

Simpson next alleges that his trial counsel was ineffective for failing to require that the jury be instructed in the first stage of trial on the offense of Possession of a Firearm After Former Conviction of a Felony. At the conclusion



**Exhibit E**

of the first stage of trial, the jury was only given verdict forms for the two counts of First Degree Murder with Malice Aforethought and Discharging a Firearm with Intent to Kill. When the prosecutor noted this omission before the start of second stage, defense counsel stipulated that the State had met its burden of proof for Possession of a Firearm After Former Conviction of a Felony and accordingly, the only issue for the jury to decide with regard to this crime was the punishment. As this issue could have been presented on direct appeal, this claim of ineffective assistance of trial counsel is waived. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

Simpson also argues that trial counsel was ineffective in the second stage of trial for stipulating to his prior violent felony conviction without obtaining his consent on the record. Again, this claim of ineffective assistance of trial counsel is waived because it could have been presented on direct appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

Finally, Simpson argues that defense counsel was ineffective in the second stage of trial for failing to investigate and present victim impact evidence and for failing to investigate and present mitigating evidence. He specifically complains that counsel did not interview London Johnson and Annie Emerson and discover that both of them were opposed to Simpson receiving the death penalty. He also complains that counsel failed to contact and interview Ronald Burks, Noel Watts and Sujith Matthew Jacob. Two of these individuals were Simpson's childhood friends who could have provided mitigating evidence about his childhood experiences and the other was a



**Exhibit E**

voluntary minister who visited Simpson while he was in the Oklahoma County jail and could have testified about Simpson's religious conversion while in jail. Again, these claims of ineffective assistance of trial counsel are waived for review on post conviction appeal because they could have been presented on direct appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

Simpson argues in his second proposition of error that the trial court violated his Sixth, Eighth and Fourteenth Amendment rights to a fair trial and reliable sentencing by failing to conduct a bifurcated trial. He specifically complains that Count IV, Possession of a Firearm After Former Conviction of a Felony, should have been tried in the second stage of trial rather than the first stage so that the jury's consideration of the charges of First Degree Murder with Malice Aforethought and Discharging a Firearm with Intent to Kill would not be tainted by their knowledge of his prior felony conviction. This claim is based upon the record and is waived for review on post conviction appeal because it could have been presented on direct appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

In his third proposition, Simpson complains that he was denied his Sixth and Fourteenth Amendment rights to a fair trial when the trial court improperly directed a verdict on Count IV, Possession of a Firearm After Former Conviction of a Felony. He asserts that the trial court invaded the province of the jury by instructing the jury during the second stage of trial that they did not need to decide the issue of Simpson's guilt or innocence on the charge of Possession of a Firearm After Former Conviction of a Felony because

the parties had stipulated to his guilt on this Count. Again, this claim is based upon the record and is waived because it could have been presented on direct appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

In Proposition IV, Simpson asserts that the trial court improperly limited his ability to present mitigating evidence in violation of his Eighth and Fourteenth Amendment rights. He specifically complains that the trial court limited the testimony of Simpson's last mitigation witness to "whether she cares about him and will she visit him in prison." Thus, he claims, the direct examination of this witness, who Simpson asserts could have testified about her relationship with him and her experiences with him during hurricane Katrina, was improperly limited by the trial court. This claim is based on the record and is waived because it could have been presented on direct appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

Simpson complains in his fifth proposition that the trial court's failure to provide a complete record of the proceedings leading to his convictions and sentence of death constitutes a violation of his rights under the Fifth, Sixth, eighth and Fourteenth Amendments of the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution. He argues that the trial court should have required that the firearms demonstration be recorded. Simpson contends that despite the fact that those who attended the demonstration agreed that the record was adequate, the failure to record the demonstration hindered appellate review of the same. Again, this record based

claim is waived because it could have been presented on direct appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

In his sixth proposition Simpson argues that because execution of the severely mentally ill serves no retributive or deterrent function, his death sentence violates the Eighth Amendment ban on cruel and unusual punishments. This claim could have been presented on direct appeal and is waived for review on post conviction appeal. *See* 22 O.S.Supp.2006, § 1089(D)(4)(b)(1).

In his seventh proposition Simpson argues generally that appellate counsel was constitutionally ineffective for failing to raise on direct appeal all instances of ineffective assistance of trial counsel alleged in Proposition I and the record issues presented in Propositions II through VI. While we find that appellate counsel could have raised these issues on direct appeal, failure to do so did not render counsels' performance deficient. "Appellate counsel is not required to raise every non-frivolous issue." *Harris v. State*, 2007 OK CR 32, ¶ 5, 167 P.3d 438, 442. Further, even if we were to find counsels' performance deficient, Simpson has not shown a reasonable probability that but for this deficient performance, the result of the trial and sentencing proceedings would have been different. Simpson's argument fails under the *Strickland* test.

Simpson claims in his final proposition that the accumulation of error on appeal and in post-conviction requires relief. "No authority allows this Court to consider, on post-conviction, errors raised on direct appeal which were not also raised as error in the post-conviction claim." *Harris v State,* 2007 OK CR 32, ¶



**Exhibit E**

20, 167 P.3d at 445. We have determined that neither trial nor appellate counsel were ineffective. All other claims are barred from review. There is no cumulative error to consider.

Simpson requests an evidentiary hearing generally on any controverted, previously unresolved issues of fact that may arise in connection with his application for post conviction relief. Additionally, he requests an evidentiary hearing specifically to develop his ineffective assistance of counsel claims. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2010). We find that an evidentiary hearing is not warranted after review of Simpson's application and supporting materials. *See* Rule 9.7 (D), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2010). Simpson's request is therefore denied.

**DECISION**

After reviewing Simpson's application for post-conviction relief and motion for evidentiary hearing we conclude: (1) there exist no controverted, previously unresolved factual issues material to the legality of Simpson's confinement; (2) Simpson's grounds for review have no merit or are barred from review; and (3) the Capital Post-Conviction Procedure Act warrants no relief in this case. Accordingly, Simpson's Application for Post-Conviction Relief and Motion for Evidentiary Hearing are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**OPINION BY C. JOHNSON, P.J.**
A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR
SMITH, J.: CONCUR

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**Exhibit E**

**LUMPKIN, JUDGE: CONCUR IN RESULT**

I concur in the results reached by the Court in this case, but write to point out the requirement for appellants to raise allegations at the first opportunity is more than a requirement established by this Court's rules. In *Berget v. State*, 1995 OK CR 66, ¶ 16, 907 P.2d 1078, 1084, this Court analyzed and confirmed the requirement for an appellant to raise allegations of ineffective assistance of counsel at the first opportunity, i.e. trial counsel ineffectiveness on direct appeal. The opinion is well reasoned and points out the need to raise this type of an allegation of error while the facts are still fresh. This perspective is different from the federal courts, who allow appellants to group stale allegations of both direct appeal and post-conviction appeal into claims before those courts. The opinion in *Berget* pointed out and analyzed the differences between Oklahoma procedures and procedures utilized in the federal courts. *Id.* 1995 OK CR 66, ¶¶ 13-14, 907 P.2d at 1083. Our process for requiring an appellant to raise claims at the first opportunity is based on a sound legal basis as set out in *Berget* and this Court should apply that precedent consistently, as has been done in this case.

**IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA**

| | | |
|---|---|---|
| KENDRICK ANTONIO SIMPSON, | ) | |
| | ) | |
| Petitioner, | ) | NOT FOR PUBLICATION |
| | ) | |
| -vs- | ) | No. PCD-2012-242 |
| | ) | |
| STATE OF OKLAHOMA, | ) | |
| | ) | |
| Respondent.) | | |

**OPINION DENYING SECOND APPLICATION FOR POST-CONVICTION RELIEF AND REQUEST FOR AN EVIDENTIARY HEARING**

**C. JOHNSON, JUDGE:**

Petitioner, Kendrick Antonio Simpson, was tried by a jury and convicted of First Degree Murder with Malice Aforethought (Counts I and II), Discharging a Firearm with Intent to Kill (Count III) and Possession of a Firearm After Former Conviction of a Felony (Count IV) in the District Court of Oklahoma County, Case No. CF 2006-496. The jury found Simpson guilty on each count charged and assessed punishment at death on Counts I and II, life imprisonment on Count III and ten years imprisonment on Count IV. The trial court sentenced Simpson accordingly. He appealed his convictions to this Court in Case No. D-2007-1055. We affirmed Simpson's Judgment and Sentence in *Simpson v. State*, 2010 OK CR 6, 230 P.3d 888. The Supreme Court denied certiorari in *Simpson v. Oklahoma*, ___ U.S. ___, 131 S.Ct. 1009, 178 L.Ed.2d 838 (2011). Simpson's original application for post-conviction relief was denied by this Court in *Simpson v. State*, Case No. PCD-2007-1262, (opinion not for publication) (October 13, 2010).

Before us is Simpson's second application for post-conviction relief. This Court's review of claims on post-conviction in capital cases is set by 22 O.S.Supp.2006, § 1089. Under § 1089, applicants have very few grounds on which to challenge their convictions:

> The only issues that may be raised in an application for post-conviction relief are those that:
>
> (1) were not or could not have been raised in a direct appeal; and
>
> (2) 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.Supp.2006, § 1089 (C).

> We have often stated the limits of our review in post-conviction:
>
> On review, this Court must 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...." We will not treat the post-conviction process as a second appeal, and will apply the doctrines of *res judicata* and waiver where a claim either was, or could have been, raised in the petitioner's direct appeal.

*Browning v. State,* 2006 OK CR 37, ¶ 2, 144 P.3d 155, 156 (footnotes omitted).

The merits of a second or successive post-conviction application will not be considered by this Court unless the following criteria are met:

> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
>
> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, 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, and (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S.Supp.2006, § 1089(D)(8). Additionally, under the rules of this Court, a second or successive post-conviction application will not be considered unless 1) it contains claims which were not and could not have been previously presented in the original application because the factual or legal basis for the claim was unavailable, and 2) it is filed within sixty days after discovery of the previously unavailable claim. *See* 22 O.S.Supp.2006, § 1089(D)(8) and (9); Rule 9.7 (G), *Rules of the Oklahoma Court of Criminal Appeals.*

**1.**

**Request for Relief Under *Valdez v. State***

Simpson acknowledges that a potential obstacle to review of his claims is procedural bar and to overcome this procedural bar, he argues that the failure of this Court to review his claims and grant relief would create a miscarriage of justice under *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11. We reaffirm the conclusion that this Court has the authority to review any error raised which has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. *Id. See also* 20 O.S.2011, § 3001.1. However, Simpson's situation does not present the unique and compelling difficulties found in *Valdez*. Simpson's claims stem from ordinary investigative decisions like those made by trial counsel in every case.

Counsel may or may not demonstrate strategic reasons for those decisions, but the decisions are not affected by the actions of others, such as the lack of involvement by a consulate. The probability of a miscarriage of justice in *Valdez* concerned a serious substantive issue underlying the finding of ineffective assistance of counsel. Simpson can present no such substantive issue. Simpson shows neither a probability of a miscarriage of justice, nor that he was deprived of a substantial constitutional or statutory right. We decline to exercise our inherent power to override all procedural bars and grant relief.

**2.**

**Suppression of Material Evidence**

Simpson first argues that he was denied his right to due process at trial in violation of *Brady v. Maryland*[1] and *Napue v. Illinois*[2] by the prosecutor's failure to disclose material evidence favorable to the defense. All of the evidence at issue concerns the credibility of State's witness, Roy Collins, who testified against Simpson in the second stage of his trial. The alleged misconduct at issue occurred at trial and the legal basis for this claim was available at the time of Simpson's direct appeal and his original application for post-conviction relief. Additionally, the claim could have been presented previously as the factual basis for the claims was available and could have been ascertained through the exercise of reasonable diligence. See 22 O.S.Supp.2006, § 1089(D)(4)(b), (D)(8). This claim is waived.

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[1] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
[2] 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

**3.**

**Ineffective Assistance of Trial Counsel**

Simpson claims that trial counsel was constitutionally ineffective for failing to: (1) investigate and present mitigation evidence; (i.e., failing to investigate, prepare and present lay witnesses and for failing to employ and utilize properly the services of mental health experts); (2) obtain additional evidence to impeach State's witness and jailhouse snitch, Roy Collins; and (3) preserve the record by objecting to improper prosecutorial comments and objecting to announcement of custody and deputy escort. "A claim of ineffective assistance of trial counsel is appropriate for post-conviction review if it has a factual basis that could not have been ascertained through the exercise of reasonable diligence on or before the time of the direct appeal." *Coddington v. State*, 2011 OK CR 21, ¶ 3, 259 P.3d 833, 835. It is apparent from Simpson's argument, the record and the materials submitted with his application, that the basis for each of these claims was available to defense counsel at the time of trial. They were, accordingly, available well before Simpson's direct appeal and original application for post-conviction relief, and are therefore waived. *Id.*; 22 O.S.Supp.2006, § 1089(D)(4)(b), (D)(8).

**4.**

**Ineffective Assistance of Appellate Counsel**

Simpson alleges that both direct appeal counsel and post-conviction counsel were ineffective for failing to raise every instance of ineffective

assistance of trial counsel as well as all errors found within and outside the record.

Regarding the claim that appellate counsel was ineffective, we note that "[t]he issue of ineffective assistance of appellate counsel, like any other claim, must be raised at the first available opportunity." *Hatch v. State*, 1996 OK CR 37, ¶ 48, 924 P.2d 284, 294. Because the factual and legal basis for this claim was available at the time of his direct appeal, Simpson could have raised the issue in his first application for post-conviction relief, but did not. Accordingly, the claim is not properly before this Court in this subsequent application for post-conviction relief. *Id.*; 22 O.S.Supp.2006, §§ 1089(D)(4)(b), (D)(8).

With regard to Simpson's complaint that his first post-conviction counsel was ineffective, we note that ordinarily claims of ineffective assistance of original post-conviction counsel may be raised for the first time in a subsequent post-conviction application. *See Hale v. State*, 1997 OK CR 16, ¶ 9, 934 P.2d 1100, 1102. However, such claims, if not presented timely, will be deemed waived. As noted above, a second or successive post-conviction application will not be considered unless 1) it contains claims which were not and could not have been previously presented in the original application because the factual or legal basis for the claim was unavailable, and 2) it is filed within sixty days after discovery of the previously unavailable claim. *See* 22 O.S.Supp.2006, § 1089(D) (8) and (9); Rule 9.7 (G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). Simpson's original application for post-conviction relief was decided in an unpublished opinion

handed down on October 13, 2010. As the alleged failings of post-conviction counsel became apparent on or before this date, this was the latest date at which the factual basis for the claim regarding the effectiveness of post-conviction counsel should have been discovered. Thus, a timely second application for post-conviction relief should have been filed within sixty days of October 13, 2010. Simpson's second application for post-conviction relief was filed on March 16, 2012, almost a year and a half after the latest date upon which the factual basis of his claim against post-conviction counsel should have been discovered with the exercise of reasonable diligence. This claim is waived.

**5.**

**Trial Court Error**

Simpson claims that the trial court erred in announcing to the jury that the deputy was present in the courtroom because Simpson was in custody and needed to be escorted to all of his court proceedings. This alleged error occurred at trial and as it is based neither on newly-discovered facts nor on new controlling legal authority, it is therefore barred from review in this post-conviction application. 22 O.S.Supp.2006, § 1089(D).

**6.**

**Prosecutorial Misconduct**

Simpson next argues that the prosecutor relied upon improper "tricks" in seeking his conviction. He complains that the prosecutor made comments which improperly appealed to community interest, justice and sympathy.

Again, these alleged errors occurred at trial and are based neither on newly-discovered facts nor on new controlling legal authority. They are, therefore, barred from review in this post-conviction application. 22 O.S.Supp.2006, § 1089(D).

**7.**

**Accumulation of Errors**

Simpson finally claims that an accumulation of errors identified in this post-conviction application requires relief. Having determined that all of Simpson's claims are waived, we find no basis for granting post-conviction relief on this claim of cumulative error. *Cf. Coddington*, 2011 OK CR 21, ¶ 22, 259 P.3d 833, 840; *Slaughter v. State*, 1998 OK CR 63, ¶ 27, 969 P.2d 990, 999.

**8.**

**Evidentiary Hearing**

Simpson argues that an evidentiary hearing is required to resolve any controverted, previously unresolved issues of fact that may arise in connection with his successive post-conviction application. Having determined that none of the issues raised in this application are within the scope of review afforded by the Capital Post Conviction Act, Simpson's request for an evidentiary hearing is denied. *See Hatch*, 1996 OK CR 37, ¶ 59, 924 P.2d at 296 ("If a claim is not within the scope of issues this Court is permitted to review under 22 O.S.Supp.1995, § 1089(C), this Court is without authority to order a hearing on the issue.").

**DECISION**

Simpson's Second Application for Capital Post-Conviction Relief and Request for Evidentiary Hearing 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.

**ATTORNEY FOR PETITIONER**

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**OPINION BY**: C. JOHNSON, J.
LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
A. JOHNSON, J.: CONCUR

**LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART**

I concur that Petitioner's Second Application for Capital Post-Conviction Relief and Request for Evidentiary Hearing should be denied but I am compelled to dissent to the discussion of *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703.

I maintain that *Valdez* was wrongly decided. *Id.*, 2002 OK CR 20, ¶ 1, 46 P.3d at 711 (Lumpkin, P.J., concurring in part/dissenting in part). However, the *dicta* set forth in the present Opinion stating that this Court has the "inherent power to override all procedural bars and grant relief" is in disrespect of the law. This was not the holding in *Valdez*. *Id.*, 2002 OK CR 20, ¶ 28, 46 P.3d at 710-11. To disregard the historical limitations of waiver and *res judicata*, the plain and ordinary language of the Oklahoma Post-Conviction Procedure Act, established precedent, as well as the rules of this Court is *ultra vires* to the authority of this Court.

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 review within 22 O.S.2011, § 1080. Section 1089 governs post-conviction proceedings where the defendant is under a sentence of death. The capital post-conviction statute only authorizes this Court to review issues 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). "All grounds for relief that were available to the applicant before the last date on which an application could be timely filed not included in a timely application shall be deemed waived." 22 O.S.2011, § 1089(D)(2).

> This Court has "repeatedly stated that Oklahoma's Post–Conviction Procedure Act is not an opportunity to raise new issues, resubmit claims already adjudicated, or assert claims that could have been raised on direct appeal." *Rojem v. State*, 925 P.2d 70, 72–73 (Okl.Cr.1996) (emphasis added). Complaints concerning the performance of trial counsel are barred on post-conviction when the claim was raised on direct appeal. *Patton v. State*, 989 P.2d 983, 988 (Okl.Cr.1999); *Darks v. State*, 954 P.2d 169, 172 (Okl.Cr.1998); *Hale v. State*, 934 P.2d 1100, 1102 (Okl.Cr.1997); *Smith v. State*, 878 P.2d 375, 378 (Okl.Cr.1994). Accordingly, the doctrine of *res judicata* bars re-litigation of the issue of ineffective assistance of counsel in this case. As that issue is barred from consideration in this subsequent Post–Conviction Application, there is no legal basis to remand this case for resentencing.
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> The legal doctrines of waiver and *res judicata* have been developed through the ages to ensure finality of judgments. By disregarding binding authority, in order to assist a defendant in litigating issues already decided or waived, this Court disregards the concept of the Rule of Law.

*Valdez*, 2002 OK CR 20, ¶¶ 5-6, 46 P.3d at 711-12 (Lumpkin, P.J., concurring in part/dissenting in part).

Further, the rules of this Court limit the scope of review afforded in a capital post-conviction proceeding in accordance with § 1089(C). Rule 9.7(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013). "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. (2013).

This Court should adhere to the historical limitations of waiver and *res judicata,* the statutory requirements of 22 O.S.2011, § 1089, as well as Rule 9.7, and consistently apply the doctrines of waiver and *res judicata* to all post-conviction applications.

Turning to the present case, I agree that Appellant's claims are waived as he cannot show the claims could not have been presented to this Court previously. I further note that the great majority of the exhibits attached to the application indicate that the legal and factual basis for Petitioner's claims were available more than sixty days preceding the filing of the present application contrary to Rule 9.7(G)(3), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2013). Thus, Petitioner's claims are waived.

Petitioner's claims in Propositions Two, Three, and Five are also barred by *res judicata.* Petitioner raised claims of ineffective assistance of trial counsel and prosecutorial misconduct in his direct appeal. He raised a claim of ineffective assistance of appellate counsel in his original application for post-conviction relief. Since the issues were previously raised and denied, Petitioner's claims are parsed. *Bryan v. State*, 1997 OK CR 69, ¶ 4, 948 P.2d 1230, (Lumpkin, J., concurring in results) (finding that the Court should not address on the merits the petitioner's single proposition of error parsed into sub-parts, part to be alleged on direct appeal and part on post-conviction

because the issued is barred by *res judicata*). "Absent the showing of some objective factor, external to the defense, which impeded direct appeal counsel's ability to raise the issue, we should not entertain attempts to parse the claim." *Lewis v. State*, 1998 OK CR 34, ¶ 5, 970 P.2d 1177, (Lumpkin, J., concurring in result), *citing Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). As Petitioner has not shown any objective factor, external to the defense, with impeded his ability to raise the issues in either his direct appeal or original application for post-conviction relief, his parsed claims are barred by *res judicata*.