Capital Case

Case No. _____

In the Supreme Court of the United States

RAYMOND EUGENE JOHNSON,
Petitioner,
v.
TOMMY SHARP, INTERIM WARDEN,*
OKLAHOMA STATE PENITENTIARY,
Respondent.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Dated this 26th of September, 2019

*Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Tommy Sharp, current Interim Warden of Oklahoma State Penitentiary, is automatically substituted for Mike Carpenter, Warden, as Respondent in this case.
** Counsel of Record

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phrase "[w]hoever knowingly benefits," but it also requires any such person to have "participat[ed] in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a)" of the statute (means of force, threats of force, means of serious harm or threats of serious harm, means of the abuse or threatened abuse of law or legal process, or means of any scheme intended to cause the person to believe they would suffer serious harm or physical restraint if they do not comply). Even assuming that Parker and SC & M "knowingly benefited" from Jeffs' wrongful acts in forcing FLDS members to engage in labor or services, the allegations in the complaint are insufficient to link Parker and SC & M to that wrongful conduct. More specifically, the allegations cannot reasonably be read to indicate that Parker and SC & M actually participated in Jeffs' scheme. Simply providing legal services to Jeffs, including drafting the 1998 UEP Trust, is not enough to constitute such participation.

In their appellate reply brief, plaintiffs refer to Jeffs' "scheme" being "facilitated by SC & M's empowerment," and to "SC & M work[ing] to maintain the legalistic construct that served as the latticework that supported the growth of Jeffs' poison ivy." Aplt. Reply Br. at 22–22. These vague allegations, however, are insufficient, taken on their face, to indicate that SC & M knowingly participated in Jeffs' scheme. Again, although it is undisputed that Parker and SC & M drafted the 1998 UEP Trust, plaintiffs do not identify any additional legal or other work that these defendants performed to support Jeffs' scheme.

Thus, in sum, I conclude that plaintiffs have failed to establish that the district court erred in dismissing their TVPRA claim.

I vote to affirm the district court's ruling in its entirety.

Raymond Eugene JOHNSON, Petitioner - Appellant,

v.

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

No. 16-5165

United States Court of Appeals, Tenth Circuit.

March 19, 2019

Background: Following affirmance of his convictions for first degree arson and first degree murder and his death sentence, 272 P.3d 720, state inmate filed petition for writ of habeas corpus. The United States District Court for the Northern District of Oklahoma, No. 4:13-CV-00016-CVE-FHM, Claire V. Eagan, J., 2016 WL 5921081, denied petition, and petitioner appealed.

Holdings: The Court of Appeals, Tymkovich, Chief Judge, held that:

(1) determination that petitioner was not denied effective assistance as result of appellate counsel's failure to appeal district court's exclusion of photographs, portion of audio recording, and video of petitioner preaching as mitigating evidence was reasonable;

* Pursuant to Fed. R. App. P. 43(c)(2), Terry Royal is replaced by Mike Carpenter as the Respondent in this case.

(2) determination that petitioner was not denied effective assistance as result of trial counsel's failure to investigate, develop, and present additional mitigating evidence was reasonable; and

(3) determination that petitioner was not denied effective assistance as result of appellate counsel's failure to appeal prosecutor's misstatements was reasonable.

Affirmed.

1. Criminal Law ⇐1881

Claim of ineffective assistance of counsel under *Strickland* will be sustained only when (1) counsel made errors so serious that counsel was not functioning as "counsel," and (2) deficient performance prejudiced defense. U.S. Const. Amend. 6.

2. Habeas Corpus ⇐486(5)

State court's determination that petitioner was not denied effective assistance of counsel as result of appellate counsel's failure to appeal district court's exclusion of photographs, portion of audio recording, and video of petitioner preaching as mitigating evidence during penalty phase of his capital murder trial was not contrary to, or unreasonable application of, clearly established federal law in *Strickland*, and thus did not warrant federal habeas relief, where excluded photographs were largely cumulative of other photographs court allowed petitioner to introduce, court allowed portion of recording to confirm witness testimony that petitioner had appealing voice, witnesses testified that he preached sermons and participated in other church activities while in prison, and it was unlikely that video would have changed jury's determination. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

3. Habeas Corpus ⇐486(5)

State court's determination that petitioner was not denied effective assistance of counsel during sentencing phase of his capital murder trial as result of trial counsel's failure to investigate, develop, and present additional evidence in form of mitigation witnesses who could testify about his life and background was not contrary to, or unreasonable application of, clearly established federal law in *Strickland*, and thus did not warrant federal habeas relief, where counsel interviewed 21 potential witnesses, which gave counsel thorough knowledge of petitioner's background and criminal history, and counsel made strategic choice to present only nine witnesses who were to give non-cumulative testimony about petitioner's good character, rather than witnesses who would have testified as to his difficult childhood and criminal history. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

4. Criminal Law ⇐1969

Appellate counsel cannot be ineffective for omitting unsuccessful issue on appeal. U.S. Const. Amend. 6.

5. Habeas Corpus ⇐486(5)

State court's determination that petitioner was not denied effective assistance of counsel as result of appellate counsel's failure to appeal prosecutor's misstatements during penalty phase of his capital murder trial regarding definition of "mitigating evidence" was not contrary to, or unreasonable application of, clearly established federal law in *Strickland*, and thus did not warrant federal habeas relief, where jury instructions clearly defined mitigating circumstances and explained jury's responsibility, and prosecutor made many statements throughout mitigation stage that cured his misstatements. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. NO. 4:13-CV-00016-CVE-FHM)

Thomas D. Hird, Assistant Federal Public Defender (Sarah M. Jernigan, Assistant Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Oklahoma City, Oklahoma, for Petitioner-Appellant.

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

Before TYMKOVICH, Chief Judge, LUCERO, and MATHESON, Circuit Judges.

TYMKOVICH, Chief Judge.

Oklahoma charged Raymond Johnson with one count of first-degree arson and two counts of first-degree murder for the deaths of his former girlfriend, Brooke Whitaker, and the couple's seven-month-old daughter. The charges stemmed from Johnson's brutal attack on Whitaker with a hammer, after which he doused her with gasoline and set her house on fire, killing both victims. The jury convicted Johnson on all three counts. The Oklahoma jury subsequently concluded that the mitigating evidence did not outweigh four aggravating circumstances surrounding the murders. The jury sentenced Johnson to death.

Johnson has since sought to overturn his sentence first in Oklahoma state court and now in federal court. In this habeas petition filed under 28 U.S.C. § 2254, Johnson alleges ineffective assistance of trial and appellate counsel. The district court denied relief, and we granted a certificate of appealability on four issues: (1) whether Johnson's appellate counsel was ineffective for failing to challenge the exclusion of certain mitigating evidence; (2) whether his trial counsel was ineffective for failing to investigate and develop certain mitigating evidence and present additional witnesses, and whether his appellate counsel was ineffective for failing to raise the issues on direct appeal; (3) whether Johnson's appellate counsel was ineffective for failing to raise claims of prosecutorial misconduct; and (4) cumulative error.**

Under the Antiterrorism and Effective Death-Penalty Act, we may grant Johnson habeas relief only if the Oklahoma Court of Criminal Appeals unreasonably applied federal law in denying his claims. 28 U.S.C. § 2254(d)(1). This is not a burden Johnson can satisfy here.

We therefore AFFIRM the district court's denial of Johnson's petition for a writ of habeas corpus.

I. Background

Raymond Johnson lived with his girlfriend Brooke Whitaker and their infant daughter for several months in 2007. During that time Johnson also became involved with another woman, Jennifer Walton, and he decided to move out of Whitaker's house in June 2007, staying for a time in a homeless shelter. By the time Johnson and Whitaker broke off

** We deny Johnson's motion to expand his certificate of appealability to include a claim that the trial court's jury-selection process violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. We agree with the district court that no reasonable jurist could grant relief on the claim and, therefore, the issue is not "adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (citation omitted).

their relationship, Walton was already pregnant with Johnson's child.

On June 22, 2007, Walton dropped Johnson off at Whitaker's home so he could retrieve some clothing. Instead of picking up his clothes and leaving, Johnson waited at the house until the early morning hours when Whitaker returned from work. The two got into an argument, and according to the information Johnson later gave police, Whitaker got a knife and threatened to stab him. Johnson responded by striking her on the head with a hammer. Whitaker fell to the floor and begged Johnson to call 911. He refused because he did not want to return to prison. He instead delivered at least five more blows to the head with the hammer, went to the outside shed to retrieve a gasoline can, and doused Whitaker and the house in gas—including the room where the baby slept. Johnson then lit Whitaker on fire and fled.

Johnson called Walton and asked her to pick him up behind Whitaker's house. He told Walton when she arrived that a friend had killed Whitaker with a hammer. Walton later recalled that Johnson had blood on his clothes and he smelled like gasoline. She also recalled noticing smoke pour out of Whitaker's front window. Johnson afterward asked Walton to drive him back to Whitaker's still-burning house so he could search for Whitaker's cell phone, which he had used to call Walton, because he was afraid he had left fingerprints on it. Johnson searched outside the house for the phone when they returned, but he could not find it.

Firefighters arrived at Whitaker's house shortly after 11:00 a.m. on June 23, 2007. The house was completely filled with smoke, and when they ventilated the house they found Whitaker's seven-month-old daughter behind a couch. The infant was dead. Firefighters also found Whitaker unconscious with extensive burns on her body. Paramedics reestablished a pulse, and she was rushed to the hospital. Shortly after arriving, Whitaker died. The medical examiner later determined that she died of blunt force trauma to the head and smoke inhalation.

Investigators found Whitaker's cell phone in the living room and discovered that two calls had been placed to Jennifer Walton. Police interviewed Walton the same day, and she acknowledged what she knew. Police then set up surveillance around the house where Johnson was staying and arrested him as he left the house that same evening. He waived his Miranda rights and confessed to killing Whitaker and attempting to burn down the house.

The evidence that Johnson committed the murders was significant, so his trial essentially proceeded as a second-stage sentencing case. The government argued Johnson deserved the death penalty based on four aggravating circumstances: (1) Johnson knowingly presented a great risk of death to more than one person; (2) the murders were especially heinous, atrocious, or cruel; (3) Johnson was previously convicted of a violent felony; and (4) he posed a continuing threat to society. *See* 21 Okla. Stat. § 701.12; Johnson stipulated to the third factor since he had previously served ten years in prison for first-degree manslaughter. The government supported the other three factors by presenting evidence that investigators found gasoline on the infant's diaper, inferring that Johnson intended to kill both victims. The government also argued Whitaker had suffered significantly; she cried out in horrible pain after Johnson repeatedly struck her, and blood evidence from the scene confirmed that Whitaker retained consciousness and moved even after Johnson lit her on fire.

Attempting to avoid the death penalty, Johnson's trial counsel presented nine witnesses, most of whom testified that during

his previous stint in prison Johnson was an effective Christian preacher and had organized church events and choirs. Trial counsel sought to demonstrate with this evidence that within the structured environment of prison, Johnson could help other prisoners develop and progress through religious activity. Jurors should spare Johnson's life, counsel argued, so he could accomplish this mission.

In the end, the jury found in favor of all four aggravating factors, found that the mitigating circumstances did not outweigh the aggravating factors, and voted to impose the death penalty. The Oklahoma Court of Criminal Appeals (OCCA) affirmed Johnson's conviction and sentence on direct appeal. *See Johnson v. State*, 272 P.3d 720 (Okla. Crim. App. 2012).

Johnson later filed a petition for post-conviction relief with the OCCA alleging the same claims of ineffective assistance of trial and appellate counsel he asserts here. The OCCA denied his petition in an unpublished opinion. *See Johnson v. State*, No. PCD-2009-1025, slip op. (Okla. Crim. App. Dec. 14, 2012). Johnson filed a second post-conviction petition, which the OCCA denied on procedural grounds. *See Johnson v. State*, No. PCD-2014-123, slip op. (Okla. Crim. App. May 21, 2014). The court stated that Oklahoma law requires a petitioner to file a second post-conviction petition within sixty days of when a claim against post-conviction counsel could have been discovered with the exercise of reasonable diligence. *Id.*

Seeking federal relief, Johnson filed a 28 U.S.C. § 2254 habeas petition in the Northern District of Oklahoma, setting out the six claims originally presented to the OCCA in his first post-conviction petition. The district court denied relief. The district court did, however, issue a certificate of appealability on three grounds dealing with ineffective assistance of trial and appellate counsel. We agreed to hear those claims and granted a certificate on one additional issue, cumulative error.

We ultimately agree with the district court that no relief is warranted. The OCCA reasonably applied federal law in denying Johnson's post-conviction petition, so we affirm the district court's dismissal of his § 2254 petition.

II. Analysis

Johnson alleges three errors at trial and on direct appeal: (1) that the jury should have seen and heard certain additional evidence the court excluded, including photographs, an audio recording, and a video; (2) that trial counsel should have investigated and developed certain mitigating evidence and presented additional witnesses, and that appellate counsel should have raised these failings on direct appeal; and (3) that the prosecutor misstated the law surrounding mitigating evidence. He brings all these claims (as he must, given the posture of the case), through the lens of ineffective assistance of counsel. He also brings a cumulative error claim, contending that even if individually the failings of trial and appellate counsel did not render his trial unfair, the cumulative effect of the errors did.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this case. AEDPA "circumscribes our review of federal habeas claims that were adjudicated on the merits in state-court proceedings." *Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012). Under AEDPA, a federal court may grant relief to a state prisoner only if he has established

> that the state court's adjudication of the claim on the merits (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"; 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."

Littlejohn v. Trammell, 704 F.3d 817, 824 (10th Cir. 2013) (quoting 28 U.S.C. § 2254(d)).

This standard is "highly deferential [to] state-court rulings" and demands that those rulings "be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam). "If this standard is difficult to meet, that is because it was meant to be. . . . It 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 [Supreme Court] precedents. It goes no further." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (citations omitted).

[1] The burden on the petitioner is particularly difficult when he is pursuing an ineffective assistance of counsel claim. This is because the state court must unreasonably apply *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A *Strickland* claim will be sustained only when (1) "counsel made errors so serious that counsel was not functioning as 'counsel' " and (2) "the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. 2052. Thus, "[t]he 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." *Richter*, 562 U.S. at 105, 131 S.Ct. 770 (citations omitted).

Federal courts, therefore, "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." *Id.* Our only task, then, is to determine whether reasonable jurists could agree with the OCCA that Johnson's trial and appellate counsels acted reasonably. *See id.* AEDPA allows us to go no further.

A. Exclusion of Evidence

Johnson first contends that his appellate counsel failed to appeal the district court's error in excluding certain mitigating evidence. The trial court excluded on various grounds (1) two of five photographs of Johnson with his family, (2) all but a thirty-second excerpt of Johnson singing Christian music in a prison quintet while previously incarcerated, and (3) a video of Johnson preaching to a prison congregation.

To succeed on his claim of ineffective assistance of appellate counsel under the Sixth Amendment, Johnson must establish "both constitutionally deficient performance and prejudice as required by *Strickland*." *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999). This means that a court cannot find ineffective assistance of appellate counsel unless there is "a reasonable probability the omitted claim would have resulted in relief" on direct appeal, *Neill v. Gibson*, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001), because there can be neither deficient performance nor prejudice "[i]f the underlying issue was not valid," *English v. Cody*, 241 F.3d 1279, 1283 (10th Cir. 2001).

[2] On this issue the OCCA addressed only the second prong of *Strickland*, holding that Johnson failed to affirmatively show prejudice resulting from his appellate counsel's omission. The district court agreed. It held that in light of the aggravating evidence, Johnson could not show a

reasonable probability that the jury would have reached a different result. After reviewing the record on these issues, we agree that even if the trial court erred in excluding the mitigating evidence, the OCCA reasonably held that Johnson cannot affirmatively prove prejudice. We therefore affirm the district court's holding.

Johnson sought to admit five photographs of him with his family. The trial court allowed three. The court admitted a photograph of Johnson's son and one of Johnson with his mother and sisters. But the court excluded another photo of him with his mother and sisters for cumulativeness and instructed Johnson to pick between two pictures of him as a child with his step-father and sisters. The jury consequently saw evidence that Johnson had a son and viewed at least one photograph of Johnson with every member of his family. We can say with confidence, therefore, that the OCCA reasonably concluded that two largely cumulative photographs would not have altered Johnson's sentence and appellate counsel could not have been ineffective for omitting this claim on direct appeal.

So too with the claim that the jury should have heard more of Johnson's proffered audio recording. Johnson sought to admit a recording featuring him singing in a gospel quintet while incarcerated for manslaughter. The trial court instructed counsel to play for the jury "a portion [of a song] that you think is appropriate." R., Vol. Tr. X at 1967. Defense counsel elected to play a thirty-second excerpt of the quintet singing *Now Behold the Lamb*. Johnson now argues that the jury ought to have heard the whole CD (or at least the entire song). He fails to adequately explain, however, how listening to more than thirty seconds would have changed the jury's decision. He argues only that "[w]hat may resonate varies from juror to juror," so presumably, in Johnson's view, some juror could have been moved by a longer excerpt. Aplt. Br. at 19.

This reasoning would be on stronger footing if the court had excluded the recording entirely. But the thirty-second excerpt would have confirmed witness testimony that Johnson had an appealing voice, and any juror who might have been moved by Johnson's singing was able to hear his voice. The OCCA was well within the realm of reasonableness to find no "reasonable probability that at least one juror would have struck a different balance." *Hooks*, 689 F.3d at 1202. Thus, appellate counsel could not have been ineffective for failing to flag the issue on direct appeal.

The exclusion of the video of Johnson preaching in prison is more complex, but we ultimately agree that the OCCA's lack-of-prejudice finding is reasonable. Defense counsel sought to admit a video of Johnson preaching a Christian sermon while serving his prior prison sentence. In this video Johnson passionately urges the audience to do to Satan what a prison inmate would do to a cockroach (i.e., crush him), remarking that "[t]he only power that Satan has is what you give him." Aplt. Br. at 20. Johnson argues here that the video would have helped jurors visualize his dynamic style of preaching and recognize the good he could do for other prison inmates, thus rebutting the continuing threat aggravator.

Unlike the photographs and CD recording, Johnson's video was not cumulative of other evidence. Granted, the jury would not have heard any relevant, new information from the video since witnesses testified that Johnson was a preacher. But a video would likely have had a somewhat different effect on the jurors than mere witness testimony—as even the OCCA has recognized. *See Coddington v. State*, 142

P.3d 437, 460 (Okla. Crim. App. 2006) (explaining that fact finders might "gain greater insight" from audio-visual devices).

This does not automatically mean, however, that Johnson's appellate counsel was ineffective for failing to argue it on appeal. Johnson still has to prove prejudice resulting from his counsel's omission. And after reviewing the video and the rest of the record we conclude the OCCA reasonably determined Johnson failed to prove prejudice.

Johnson cannot prove prejudice because almost the entirety of Johnson's mitigation defense centered on his potential for doing good in prison, especially his potential for assisting other inmates to find religion. This included witnesses who testified that he preached sermons while in prison. Specifically, the jury heard significant testimony about Johnson's involvement in the church and his activities to help others. The jury heard from one of Johnson's friends from prison that Johnson was a "light" to his fellow inmates. R., Vol. X at 2020. A prison minister testified that Johnson "had a very awesome impact" on her ministry efforts, encouraging inmates to attend services. R., Vol. X at 2035–36. The jury also heard from another prisoner that Johnson participated in a group designed to mentor troubled high school students, and that he actively participated in the church and encouraged others to do so. Another witness, Reverend Vernon Burris, noted that Johnson ministered effectively because he motivated people with his example.

These accounts of Johnson's participation in prison ministries do not render the video cumulative. But the information the jury *did* hear certainly reduces the prejudice Johnson suffered. The jury, in other words, heard significant testimony that outlined Johnson's religious activities in prison and detailed his efforts to assist others to find religious conviction. And yet the jury still found that this mitigating evidence did not outweigh the aggravating circumstances.

Johnson contends in response that the video would have rebutted the prosecution's suggestion that his heart was not in his preaching. The jury needed to see the video, in Johnson's view, to confirm Johnson's sincerity. But Johnson's own religious conviction and sincerity was not the basis for showing the video. The recording fit into trial counsel's larger defense by demonstrating Johnson's talent for preaching and accordingly his ability to positively influence other inmates. And to the extent that evidence of Johnson's religious sincerity would have moved certain jurors, the video would have been rather weak evidence since the recording occurred well before the murders— while he was in prison for his first murder—calling into question Johnson's later religious sincerity. The subsequent murders also stand in stark contrast to his prison exhortations.

The OCCA reasonably concluded, therefore, that Johnson's direct-appeal counsel was not ineffective for omitting the issue because viewing the video would not have changed the jury's determination.

B. Failure to Investigate, Develop, and Present Mitigating Evidence

Johnson next contends that his trial counsel failed to investigate, develop, and present additional mitigating evidence in the form of witnesses who could testify about his life and background. And because appellate counsel did not raise this issue on direct appeal, Johnson adds an ineffective assistance of appellate counsel claim. Johnson must establish both deficient performance and prejudice for each of these claims. *Moore*, 195 F.3d at 1180. We look to trial counsel's conduct for both claims, for Johnson cannot fault appellate

counsel for failing to raise nonmeritorious claims on direct appeal. *See English*, 241 F.3d at 1283.

The OCCA addressed Johnson's arguments and concluded that he could show neither deficient performance nor prejudice. The court concluded Johnson had not shown that trial counsel did not know the information Johnson now asserts counsel should have investigated further. And the court reasoned that Johnson's trial attorney's strategy was reasonable. The court noted that trial counsel's failure to call a few of Johnson's potential witnesses "precluded the jury from hearing first-hand some positive accounts of Johnson's life, it also precluded the jury from hearing some negative testimony about Johnson such as testimony about his earlier contacts with police and his possible gang affiliation as a teenager." *Johnson*, No. PCD-2009-1025, slip op. at 10.

The federal district court denied relief on this claim, and we affirm. Trial counsel had reasonable strategic reasons for presenting only the nine witnesses who testified during the mitigation stage, and the record contradicts Johnson's assertion that trial counsel failed to investigate other possible defense strategies. We therefore cannot conclude the OCCA unreasonably applied *Strickland* when it denied Johnson's claim.

1. Ineffective Assistance of Trial Counsel

Johnson offers two shades of the same claim that his trial counsel failed to investigate, develop, and present mitigating evidence for his second-stage trial. He first contends that trial counsel failed to present to the jury "the whole Raymond." Aplt. Br. at 68–69. His attorney selected witnesses who testified solely about Johnson's good qualities and his potential to contribute to prison society. This would have struck the jury, in Johnson's view, as inconsistent and unreliable because only a monster could commit such a heinous crime after a strong, religious upbringing.

Johnson insists that his counsel should have investigated and presented the good and the bad. Specifically, Johnson contends the jury should have known his family history—that, among other facts, when Johnson's parents were dating, his father was arrested and later convicted of first-degree rape and first-degree robbery; his father had previously been convicted of second-degree murder; and Johnson's mother cut all ties with Johnson's father, who was arrested yet again for other crimes but was found incompetent to stand trial, spending years in the state psychiatric hospital.

Johnson also contends that trial counsel failed to investigate Johnson's own childhood and present witnesses who could help the jury understand Johnson's difficult life. He maintains that counsel failed to investigate and develop the following negative but explanatory evidence: Johnson was well-adjusted only until around the seventh grade, when he began to commit crimes like burglary. Around the same time, Johnson and his cousin joined a gang. When Johnson's mother and step-father (whom he had always considered to be his father) divorced, Johnson was caught in the cross-fire. During this time he attended four different high schools until dropping out his junior year. After Johnson and Whitaker broke up, he ended up in a homeless shelter. When a friend visited him there (shortly before the murders), she found that "Raymond was in a bad way. He was a different person. He was just kind of lost. He had a bad cut on his arm. It became apparent that it was a suicide attempt and he was still suicidal." Aplt. Br. at 65–67. Johnson asserts here that this explanatory evidence would have

allowed the jury to consider the whole Raymond before debating his sentence.

Johnson's second argument is that trial counsel did not call many of the witnesses who were prepared to testify. He alleges that in the face of motions from the prosecutor and pressure from the trial court, counsel cut his list of witnesses more than once during the mitigation stage. Only nine witnesses testified for Johnson in the second stage as a result—down from counsel's original list of twenty-one. Trial counsel did not call, for instance, Johnson's mother, his step-father, or Jennifer Walton. This did not allow the jury, in Johnson's view, to pass judgment "equipped with the fullest information possible concerning defendant's life and characteristics." Aplt. Br. at 27.

[3] Johnson's argument that his trial attorney failed to adequately investigate his background and childhood evaporates under scrutiny, however. Trial counsel interviewed each of the twenty-one potential witnesses, and the descriptions of these witnesses' testimony makes clear that counsel knew most (if not all) of Johnson's background and criminal history. Johnson's mother, for instance, was to speak about "the circumstances of Defendant's childhood; his relationship with his family; that Defendant never knew his biological father; the criminal history of the Defendant's family members, including his father, maternal grandfather and maternal uncles; [and] the Defendant's criminal history as known to her." R., Vol. III at 390. No fewer than six other witnesses were slated to testify on similar topics, including Johnson's childhood, teenage years, and criminal history.

Johnson is left with his contention that his trial counsel was ineffective for not calling these witnesses to testify. Yet this argument runs headlong into the Supreme Court's decision in *Strickland*, 466 U.S. at 676–90, 104 S.Ct. 2052. In that case the defendant claimed counsel had failed "to investigate and present character witnesses." *Id.* at 676, 104 S.Ct. 2052. The Court set out a high bar for proving deficient performance on this type of claim because counsel's decisions are often strategic.

The Court stressed that "[j]udicial scrutiny of counsel's performance must be highly deferential," noting the temptation to conclude that counsel's "particular act or omission was unreasonable" because the assistance resulted in a conviction or an adverse sentence. *Id.* at 689, 104 S.Ct. 2052. Thus, the Supreme Court counseled, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" because "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* Moreover, the Court set an even higher bar when defense counsel's actions could be deemed strategic. Under *Strickland* "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690, 104 S.Ct. 2052.

This is the situation presented here. The trial court record shows that Johnson's counsel submitted a list of twenty-one witnesses, some of whom were to testify about Johnson's good character and some of whom were to testify about Johnson's good character *and* his difficult childhood and criminal history. Then counsel proceeded to call only those witnesses in the former category, largely those who planned to testify about Johnson's religious work in prison and his potential to contribute to prison society.

Johnson argues that his counsel's choice was not strategic but was compelled by the prosecution's relentless determination to

exclude witnesses and end the trial quickly. He points to the prosecution's repeated attempts to exclude witnesses on cumulativeness and insists his trial counsel cut the witness list only on account of the prosecutor's bullying.

But the trial court record does not support this position. Defense counsel originally planned to call twenty-one witnesses, but then the prosecution filed an objection based on the cumulative nature of much of the proposed testimony. The court held a hearing on the objection, and defense counsel told the court he planned to call only twelve of the witnesses. The court did not give any indication that it would have sustained the objection if counsel had not cut the list. Indeed, the court stated its broad view of the mitigation stage, stating, "I believe the case law is very clear that it—pretty much—it should be pretty liberal in what [evidence] is allowed. Of course, I can't have like 25 people coming up to say the exact same thing." R., Vol. Tr. IX at 1889. So trial counsel seems to have made the initial cut voluntarily and was not simply bowing to pressure from the prosecutor.

The OCCA's conclusion that trial counsel's actions were strategic is also supported by easily identifiable reasons not to call each eliminated witness. Of the eleven witnesses not called, the testimony of seven would have been largely cumulative. These seven were expected to testify about Johnson's participation in prison ministries and Johnson's abilities to sing and preach. This testimony would have mirrored the statements of many witnesses jurors heard testify.

The five other witnesses—several acquaintances, Jennifer Walton, and Johnson's mother—were reasonably excluded for another reason. These witnesses (with the exception of Walton) planned to speak about Johnson's childhood and criminal history. And Walton would have testified about her relationship with Johnson and the birth of their child after the murders. Given the double-edged nature of this testimony, counsel could reasonably have decided to forgo presenting this evidence to the jury.

As the OCCA noted, counsel's decision to call only the witnesses he did surely prevented the jury from hearing about some positive aspects of Johnson's character. But "it also precluded the jury from hearing some negative testimony about Johnson." *Johnson*, No. PCD-2009-1025, slip op. at 10. The decision not to persuade Johnson's mother to testify, for instance, "kept the jury from hearing her opinion that 'It was like Raymond has two (2) personalities. He would be the best of the best and then be the worst of the worst.' " *Id.*

In retrospect Johnson's trial counsel might have chosen a different strategy, such as to present "the whole Raymond," as Johnson now suggests. But our test under *Strickland* is much more demanding. And our review under AEDPA is much more deferential. Johnson must bear the "heavy burden" of overcoming the presumption that his trial attorney's "actions were sound trial strategy." *Fox v. Ward*, 200 F.3d 1286, 1295 (10th Cir. 2000).

This he has not done. The OCCA reasonably held that trial counsel made a strategic decision to present nine witnesses who focused predominately on Johnson's future for good in the prison system—rather than dwelling on the past and explaining why Johnson committed these murders. Again, perhaps counsel could have done both, but choosing to highlight the positive while excluding the negative was reasonable (and perhaps the best strategy given the difficult facts of this case). We therefore cannot conclude that Johnson's trial counsel's "performance

was completely unreasonable, not simply wrong." *Id.* at 1295.

2. Ineffective Assistance of Appellate Counsel

[4] Johnson also brings a claim of ineffective assistance of appellate counsel for failing to challenge trial counsel's performance discussed above. But because we conclude that trial counsel was not deficient for calling only the nine character witnesses, Johnson's auxiliary claim cannot succeed. Appellate counsel cannot be ineffective for omitting an unsuccessful issue on appeal, as we will only issue the writ if there is "a reasonable probability the omitted claim would have resulted in relief" on direct appeal, *Neill*, 278 F.3d at 1057 n.5; *Moore*, 195 F.3d at 1180 (holding that our "review of counsel's decision to omit an issue on appeal is highly deferential").

C. Prosecutorial Misconduct

Johnson next contends that his appellate counsel failed to appeal the prosecutor's misstatements at trial regarding the definition of "mitigating evidence." To succeed on this ineffective assistance claim under the Sixth Amendment, Johnson must establish both deficient performance and prejudice. *See Moore*, 195 F.3d at 1180. Again a court cannot find ineffective assistance of appellate counsel unless there is "a reasonable probability" appellate counsel's failure to raise an issue on direct appeal "would have resulted in relief," *Neill*, 278 F.3d at 1057 n.5, which in the context of a claim of prosecutorial misconduct, may occur only when a prosecutor's remarks prevented the jury from considering the defense's mitigating evidence, *see Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Brecheen v. Reynolds*, 41 F.3d 1343, 1361 n.13 (10th Cir. 1994) (summarizing *Lockett* and observing that its holdings apply in "situations where the sentencer was, for a variety of reasons, prevented or precluded from considering relevant mitigating evidence").

[5] The OCCA rejected Johnson's claim. It concluded Johnson had not shown a reasonable possibility that his sentence would have been different but for appellate counsel's failure. We interpret this analysis as concluding that these claims would not have succeeded on direct appeal, which in the context of a claim of ineffective assistance of appellate counsel means Johnson demonstrated neither deficient performance nor prejudice. We agree. The prosecutor certainly misstated the law regarding mitigating evidence at least once. But the OCCA's rejection of Johnson's claim is reasonable based on the clear jury instructions and the prosecutor's many curative comments.

The Oklahoma jury instruction defines mitigating evidence as "(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." OUJI-CR 4-78. The instruction continues that "[t]he determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case." *Id.* Johnson argues that the prosecutor repeatedly told the jury to consider only circumstances that reduced Johnson's moral culpability—prong one of the definition—thereby undermining his defense at the mitigation stage.

The prosecutor unquestionably made statements conflating the two prongs of the jury instruction. He told jurors at least four times during the mitigation stage that "[m]itigating circumstances are those which in fairness, sympathy and mercy may extenuate or reduce the degree of

moral capability or blame." R., Vol. Tr. III at 386–87; IV at 698. And during two of those instances the prosecutor purported to read from the jury instruction itself. He also remarked during closing argument that "[t]he inquiry that you are to make as jurors, the Judge will tell you in the instructions, is one of moral culpability," R., Vol. Tr. X at 2092, and that "the Judge tells you the inquiry is about moral inquiry," *id.* at 2094.

Johnson also argues that the trial judge reinforced the prosecutor's misstatements by overruling defense counsel's objections. Twice during closing arguments defense counsel objected to the prosecution's purported definition of mitigating circumstances. The judge overruled both objections, noting that closing arguments are for persuasion purposes only.

Immediately following one of these objections, the prosecution made its most obvious misstatement, asserting that "[t]he instruction says this: Your consideration must be *limited* to a moral inquiry as to the culpability of the defendant. That's what the law says." *Id.* at 2095 (emphasis added). Johnson contends that this statement in particular, especially combined with the other statements, instructed the jurors to ignore nearly all Johnson's mitigating evidence.

We are unpersuaded that the prosecutor's remarks amount to constitutional error. Granted, the prosecutor's statement regarding the "limited" nature of the jury's inquiry was a clear misstatement of the law. But as we recently held in *Grant v. Royal*, 886 F.3d 874, 937–38 (10th Cir. 2018), "[t]he test of constitutional error under *Lockett* is not (as relevant here) whether the prosecution's arguments were improper, but rather whether there is a reasonable likelihood that they had the effect of precluding the jury from considering mitigating evidence." Johnson has not shown a reasonable likelihood here—the jurors received clear jury instructions, and the prosecutor made many statements throughout the mitigation stage that cured his misstatements.

The prosecutor's comments did not mislead the jury primarily because the jury instructions clearly defined mitigating circumstances and explained the jury's responsibility. This lessens the impact of the prosecutor's statements because "improper comments of the prosecution 'are not to be judged as having the same force as an instruction from the court.' " *Grant*, 886 F.3d at 932–33 (quoting *Boyde v. California*, 494 U.S. 370, 384–85, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). This is largely because statements from prosecutors "are usually billed in advance to the jury as matters of argument" whereas jury instructions "are viewed as definitive and binding statements of the law." *Boyde*, 494 U.S. at 384, 110 S.Ct. 1190.

That is exactly what occurred in this case. When Johnson's counsel objected to one of the prosecutor's misstatements, the trial judge overruled the objection and told the jury, "Again, ladies and gentlemen, closing argument is for persuasion purposes only." R., Vol. Tr. X at 2094. So the jury would not have considered the prosecutor's statements as restricting their ability to consider Johnson's proffered mitigating evidence. This is why clear jury instructions, which "are viewed as definitive and binding statements of the law" can cure some improper prosecutorial misstatements. *Boyde*, 494 U.S. at 384, 110 S.Ct. 1190.

And the jury instruction is a crystal clear explanation of the law. The jury would have read during deliberations that "[m]itigating 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 ... to decide against imposing the death penalty." OUJI-CR 4-78. If the jury followed the instruction—which it is presumed to do—it fully considered the entirety of Johnson's mitigating defense. *See Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (courts hold an "almost invariable assumption of the law that jurors follow their instructions").

This is not to suggest that "prosecutorial misrepresentations may *never* have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384–85, 110 S.Ct. 1190 (emphasis added). We merely conclude that given the facts of this case, the OCCA did not unreasonably apply federal law in determining that Johnson's underlying prosecutorial misconduct claim would have failed on direct appeal. Indeed, Johnson presents a weaker underlying claim of prosecutorial misconduct than this court rejected in *Grant*, 886 F.3d at 932, and *Underwood v. Royal*, 894 F.3d 1154 (10th Cir. 2018).

In both cases we found curative Oklahoma's earlier jury instruction, an instruction that is far less clear than was Johnson's. In those cases the instruction did not separate out the two relevant considerations, merely stating that "[m]itigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." *Grant*, 886 F.3d at 931; *Underwood*, 894 F.3d at 1170. And we rejected claims that the jury instruction failed to cure prosecutorial misstatements—such as "the law says ... that before something can be mitigating it must reduce the moral culpability or blame of the defendant." *Grant*, 886 F.3d at 937. It also bears noting that the instruction this court found curative in *Grant* and *Underwood* track almost verbatim four of the prosecutor's statements to the jury that Johnson now challenges.

Moreover, the definition of mitigating circumstances was not the only instruction the jury received on the matter. The court gave another instruction listing all seven of the mitigating circumstances Johnson presented. These included (1) "Raymond Johnson was an effective leader and minister during his prior incarceration" and (2) "Raymond Johnson offers a valuable contribution, through his ministry, to prison society and consequently to society as a whole." R., Vol. VI at 1077. This list of mitigating circumstances was immediately followed by the admonition that, "[i]n addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well." *Id.*; *see* OUJI-CR 4-79. The jury, consequently, could have had no doubt that it could consider each and every piece of mitigating evidence Johnson presented.

Additionally, the prosecutor made comments throughout the second stage making clear to jurors that they could (and should) consider all mitigating evidence. The prosecutor told the jury during closing argument, for instance, "You heard a lot of stuff this morning about the defendant and ... that is entirely appropriate for you to consider." R., Vol. Tr. X at 2081. The prosecutor also walked the jury through the jury instruction, reading both prongs of the mitigating-circumstances definition and informing the jury that the question of whether there are "circumstances, which in fairness, sympathy, or mercy" caution against imposing the death penalty is "for you to decide." *Id.* at 2096.

In reviewing the totality of the second stage proceedings, Johnson has not shown a reasonable likelihood that the jury misunderstood its role and the evidence it could consider. The OCCA reasonably

held, therefore, that the prosecutor's comments did not prevent the jury from considering Johnson's mitigating evidence and his appellate counsel was not ineffective in failing to challenge on direct appeal the prosecutor's statements.

D. Cumulative Error

Finally, Johnson brings a cumulative error claim, contending that regardless of whether trial and appellate counsels' errors prejudiced his second-stage defense individually, the cumulation of errors certainly did. We have previously recognized this type of claim, noting that *Strickland* "claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice." *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003). We therefore look to whether the state court would have reversed on cumulative-error grounds on direct appeal if Johnson's appellate counsel had brought each of the claims we "denied for insufficient prejudice." *Id.*

Johnson cannot succeed on cumulative error, however, because the only errors, assumed in our *Strickland* analysis, were the exclusion of the photographs, audio recording, and video. And even combining the prejudice resulting from these three presumed errors, we are confident that Johnson's sentence would have remained the same. Johnson suffered no material prejudice from the exclusion of the photographs or additional audio recording, so including the harm from those assumed errors does not add much (if at all) to the prejudice determination regarding the video. Johnson cannot therefore demonstrate his "substantial rights were affected" by "aggregat[ing] all the errors that individually have been found to be harmless." *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc).

We accordingly affirm the district court's denial of this claim.

III. Conclusion

We affirm the district court's denial of habeas relief to Raymond Johnson. Johnson has not shown that his state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Based on this analysis, we also deny Johnson's motion for an evidentiary hearing on these issues.

CANADIAN SOLAR, INC., Changzhou Trina Solar Energy Co., Ltd., Hefei JA Solar Technology Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Plaintiffs-Appellants

Shanghai BYD Co., Ltd., BYD (Shangluo) Industrial Co., Ltd., China Sunergy (Nanjing) Co., Ltd., Chint Solar (Zhejiang) Co., Ltd., ET Solar Industry Ltd., Jinko Solar Co., Ltd., LDK Solar Hi-Tech (Nanchang) Co., Ltd., Perlight Solar Co., Ltd., Renesola Jiangsu Ltd., Shenzhen Sacred Industry Co., Ltd., Shenzhen Sungold Solar Co., Ltd., SUMEC Hardware & Tools Co., Ltd., Sunny Apex Development Ltd., Wuhan FYY Technology Co., Ltd., Wuxi Suntech Power Co., Ltd., Zhongli Talesunsolar Co., Ltd., Znshine PV-Tech Co., Ltd., SunPower Corporation, Plaintiffs

FILED
United States Court of Appeals
Tenth Circuit

April 29, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAYMOND EUGENE JOHNSON,

Petitioner - Appellant,

v.

MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,

Respondent - Appellee.

No. 16-5165

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, **MATHESON**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAYMOND EUGENE JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 13-CV-0016-CVE-FHM**
	)	
TERRY ROYAL, Warden,[1]	)	
Oklahoma State Penitentiary,	)	
	)	
Respondent.	)	

OPINION AND ORDER

This is a 28 U.S.C. § 2254 habeas corpus proceeding. Petitioner Raymond Eugene Johnson is an Oklahoma death row prisoner, currently incarcerated at the Oklahoma State Penitentiary in McAlester, Oklahoma. In his petition (Dkt. # 22), Johnson, who appears through counsel, alleges that he was convicted of two counts of murder and "sentenced to death and his death sentence was affirmed in proceedings that were unfair and unconstitutional in several different ways." Id. at 1. Respondent filed a response (Dkt. # 43) to the petition, Johnson filed a reply (Dkt. # 55) to the response, Respondent filed a surreply (Dkt. # 58), and Johnson filed a reply to the surreply (Dkt. # 59). The state court record has been produced and supplemented.[2] The Court considered all of these materials in reaching its decision. For the reasons discussed below, the petition shall be denied.

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[1] As of July 27, 2016, Terry Royal is Warden of the Oklahoma State Penitentiary. Pursuant to Fed. R. Civ. P. 25(d), Terry Royal, Warden, is hereby substituted as party respondent in place of Anita Trammell, Warden. The Clerk of Court shall note the substitution on the record.

[2] References to the transcript of the trial shall be referred to as "Tr. Vol. __ at __." The original state court record for Tulsa County District Court, Case No. CF-2007-3514, shall be identified as "O.R. Vol. ___ at ___." Motion hearings shall be identified as "M. Tr. (date) at ___."

BACKGROUND

I. Factual Background

Pursuant to 28 U.S.C. § 2254(e)(1), the historical facts found by the state court are presumed correct. Following review of the record, including the trial transcripts and evidence, this Court finds that the factual summary provided by the Oklahoma Court of Criminal Appeals (OCCA) in its order resolving Johnson's direct appeal is adequate and, unless otherwise noted, accurate. Therefore, the Court adopts the following factual summary as its own:

> Brooke Whitaker lived in a house on East Newton Street in Tulsa with her four children, the youngest of which, [K.W.], was fathered by Appellant.[3] Around February of 2007, Appellant moved in with Brooke and her children. By April of that year, Brooke and Appellant were having problems. Brooke told her mother that Appellant had threatened to kill her. Because she was frightened, Brooke and her children moved in with her mother for two weeks. During this two week period, Appellant called Brooke's mother and told her that he was going to kill Brooke. Around the first of May, Brooke and Appellant got back together and Appellant moved back in with Brooke.
>
> While Appellant was living with Brooke he was also involved in a relationship with Jennifer Walton who became pregnant by him. Around the first or second week of June 2007, Appellant wanted to move out of Brooke's house and Jennifer arranged for him to stay with a friend of hers, Laura Hendrix. On June 22, 2007, Appellant called Jennifer and asked her to give him a ride. She picked him up from Laura's house at around 10:30 that evening. They drove past the place where Brooke worked to make sure she was at work and they drove past her house to make sure that nobody was there. Jennifer dropped Appellant off on a side street near Brooke's house so that Appellant could walk to the house and retrieve some of his clothes. She left him and drove back to her mother's house. Appellant was going to call another friend to give him a ride to Jennifer's mother's house when he was finished getting his clothes.
>
> At about 1:00 a.m. on June 23, 2007, Appellant called Jennifer and told her that he was at Denny's eating while waiting for Brooke to get home. He called again

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[3] Although Johnson told police during his interview that he thought K.W. was his daughter, see State's Exhibit 120, he now states that he was not K.W.'s biological father, see Dkt. # 22 at 9 n.2.

around 5:00 a.m. to let her know that a friend would bring him home shortly. Appellant called Jennifer two more times around 10:00 a.m. that morning. During these calls he told her that Brooke was dead and that a friend had shot her. Appellant wanted Jennifer to pick him up at a school near Brooke's house. The next time he called he told her that the friend who had killed Brooke was thinking about burning down the house. While Jennifer was waiting for Appellant at the school, Appellant called her again and asked her to pick him up on the street behind the street where Brooke lived. When she arrived at this location, Appellant walked to her car from the driveway of a vacant house. He was carrying two garbage bags which he put in the trunk. When Appellant got into the front passenger seat of Jennifer's car, she noticed that he smelled like gasoline and had blood on his clothes. As she drove away, Jennifer saw flames pouring out the front window of Brooke's house.

Appellant instructed Jennifer to drive to Laura's house where he retrieved the garbage bags from the trunk of the car before they went inside. Appellant placed the bags on the living room floor and started taking things out of them, including money that had blood on it. He washed the blood off of the money and took a shower. When Jennifer asked more questions about what had happened, Appellant told her that his friend had hit Brooke with a hammer. After Appellant got out of the shower he said that he needed to go back to Brooke's house to look for her cell phone because he had used the phone to call Jennifer and he was concerned that his fingerprints would be on it. When they arrived, the street where Brooke's house was located was blocked off and ambulance, fire trucks and police cars were present. Appellant drove to the street behind Brooke's house and looked to see if he had dropped the phone on the driveway of the vacant house he had walked by earlier. He did not find the phone. Appellant next drove to Warehouse Market so that he could put some money on a prepaid credit card. Then they went to the parking lot across the street where Appellant threw his clothes in the dumpster. After stopping at McDonalds and Quiktrip, they went back to Laura's house where Jennifer stayed with Appellant a while before she left him there and went to her mother's house.

Firefighters were called to Brooke's house on east Newton Street at 11:11 a.m. on June 23, 2007. When they arrived and made entry into the house, the inside was pitch black with smoke. After they ventilated the house and cleared some of the smoke they found [K.W.]'s burned body inside the front door on the living room floor behind the couch. The infant was dead. In a room off the living room, firefighters found Brooke Whitaker on the floor partially underneath a bunk bed. She had extensive burns on her body, was unconscious without a pulse and was not breathing. Paramedics initiated resuscitation efforts and a pulse was reestablished. On the way to the hospital paramedics noticed a lot of blood pooling around her head. When they looked closer, they observed large depressions, indentations and fractures on her head. Brooke was pronounced dead shortly after she arrived at the hospital and was later determined to have died from blunt trauma to the head and

> smoke inhalation. Seven month old [K.W.] was determined to have died from thermal injury, the effect of heat and flames.
>
> Investigation of the crime scene revealed numerous items of evidence. A burned gasoline can was recovered from the front yard of the residence and samples of charred debris were collected from the house. The debris was tested and some of it was confirmed to contain gasoline. Additionally, investigators noted blood smears and blood soaked items in numerous places throughout the house. Brooke's cell phone was found on the living room floor and investigators discovered that two calls had been made from this phone to Jennifer Walton shortly before the fire was reported.
>
> Walton was located and interviewed by the police later that same day. She told police about Appellant's involvement in the homicide and she told them that she had taken Appellant to a trash dumpster when he returned from Brooke's house after the fire. When the police went to the dumpster they recovered a white trash bag that contained boots, bloody clothing, Brooke Whitaker's wallet with her driver's license inside and a claw hammer. They also found blood on the passenger side door handle inside Walton's car.
>
> Pursuant to information given to them by Walton, the police went to Laura Hendrix's house in Catoosa to look for Appellant. They set up surveillance and observed him exit the house and walk down the street at around 6:00 p.m. on June 23, 2007. He was arrested at that time on outstanding warrants and was taken to the Tulsa Police Station where he waived his Miranda rights and gave a statement to the police.
>
> Appellant told the police that Jennifer Walton had taken him to Brooke's house to get his stuff the evening of June 22, 2007. When Brook[e] came home in the early morning hours of June 23, 2007, they talked and started arguing with each other. During the argument, Brooke pushed him, called him names and got a knife to stab him. He grabbed a hammer and hit her on the head. Brooke fell to the floor and asked Appellant to call 911. Appellant hit her about five more times on the head with the hammer. Despite her injuries, Brooke was conscious and talking. She said that her head hurt and felt like it was going to fall off. Brooke begged Appellant to get help and told him that she wouldn't tell the police what had happened but he wouldn't do it because he didn't want to go to jail. Instead, Appellant went to the shed and got a gasoline can. He doused Brooke and the house, including the room where the baby was, with gasoline. He set Brooke on fire and went out the back door. Appellant admitted that he was trying to kill Brooke.

Johnson v. State, 272 P.3d 720, 724-26 (Okla. Crim. App. 2012). Additional facts necessary for a determination of Johnson's claims will be set forth in detail throughout this opinion.

II. Procedural History

In an Amended Felony Information, filed in Tulsa County District Court, Case No. CF-2007-3514, Johnson was charged with two counts of First Degree Murder, in violation of Okla. Stat. tit. 21 , § 701.7 (Counts 1 and 2), and one count of First Degree Arson, After Former Conviction of Two or More Felonies, in violation of Okla. Stat. tit. 21, § 1401 (2001) (Count 3). See O.R. Vol. I at 54-62. The State filed a Bill of Particulars alleging four aggravating circumstances for each of the two murder offenses: (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 of the victims was especially heinous, atrocious, or cruel; and (4) there exists a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Id. at 82 (citing Okla. Stat. tit. 21, § 701.12(1), (2), (4), (7)).

Johnson's trial commenced on June 15, 2009, before the Honorable Dana Kuehn, District Judge. Attorneys Pete Silva and Gregg Graves of the Tulsa County Public Defender's Office represented Johnson at trial. On June 25, 2009, at the conclusion of the first stage, the jury found Johnson guilty of both counts of First Degree Murder (Counts 1 and 2) and of First Degree Arson (Count 3). Tr. Vol. IX at 1871-72; O.R. Vol. VI at 1003, 1006, 1009. On June 26, 2009, at the conclusion of the second stage, the jury assessed punishment at death on both of the First Degree Murder convictions, after finding the existence of all four aggravating circumstances. Tr. Vol. X at 2111; O.R. Vol. VI at 1004-05, 1007-08. At the conclusion of the third stage, the jury found Johnson guilty of First Degree Arson, after five (5) previous convictions, and fixed Petitioner's punishment at life. Tr. Vol. X at 2120; O.R. Vol. VI at 1010. On July 28, 2009, Judge Kuehn

formally sentenced Johnson in accordance with the jury's verdicts and ordered the sentences to be served consecutively. Tr. Sent. at 7-8; O.R. Vol. VI at 1094-1102.

Johnson perfected a direct appeal to Oklahoma Court of Criminal Appeals (OCCA), Case No. D-2009-702. Represented by attorney Curtis M. Allen of the Tulsa County Public Defender's Office, Johnson raised the following nine (9) propositions of error:

Proposition I:	Use of traffic warrants to arrest Raymond Johnson was a pretext to effect a warrantless arrest of Raymond Johnson where the Tulsa Police had no jurisdiction; Raymond Johnson's subsequent statement must be suppressed.
Proposition II:	Raymond Johnson's statement to police was not voluntarily made; it must be suppressed.
Proposition III:	Appellant's rights under both Oklahoma law and the United States Constitution were violated by the district court's failure to instruct the jury that the death penalty could not be imposed unless the jury first found that aggravation outweighed mitigation beyond a reasonable doubt.
Proposition IV:	It was reversible error and a violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as corresponding provisions of the Oklahoma Constitution, for the district court to fail to define "Life Without Possibility of Parole" for the jury.
Proposition V:	It was reversible error to deny sequestered, individualized *voir dire* in the instant case, violating Appellant's rights pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as corresponding provisions of Oklahoma law.
Proposition VI:	The jury selection process employed by the district court violated Appellant's rights pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as corresponding provisions of the Oklahoma Constitution.
Proposition VII:	Capital punishment is unconstitutional as applied. Appellant's death sentence must be reversed.

Proposition VIII: Appellant received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Proposition IX: The accumulation of error in this case deprived Appellant of due process of law and a reliable sentencing proceeding, therefore necessitating reversal pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article II, §§ 7 and 9 of the Oklahoma Constitution.

See Brief of Appellant, OCCA Case No. D-2009-702. On March 2, 2012, the OCCA rejected all of Johnson's claims and affirmed his convictions and sentences. Johnson, 272 P.3d at 733. On October 1, 2012, the United States Supreme Court denied Johnson's petition for writ of certiorari. Johnson v. Oklahoma, 133 S. Ct. 191 (2012).

Johnson commenced original post-conviction proceedings on November 13, 2009, in OCCA Case No. PCD-2009-1025. Represented by Oklahoma Indigent Defense System (OIDS) attorney Wayna Tyner, Johnson filed his original application on July 25, 2011, and presented the following grounds for relief:

Proposition 1: Mr. Johnson received ineffective assistance of appellate counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.

A. Appellate counsel was ineffective for failing to raise the following issues:

1. Trial counsel were ineffective for acquiescing to the trial court's proposed procedure of conducting the sentencing proceeding on the non-capital arson in the third stage AFTER the capital sentencing proceeding.
2. State induced ineffective assistance of counsel.
3. The trial court committed reversible error in the capital sentencing stage when it refused to admit Mr. Johnson's relevant mitigating evidence; thereby resulting in an unreliable capital sentencing proceeding.
   a. (2) Childhood family photographs,
   b. Mr. Johnson's video and audio recorded sermon (Def's Exh 5),

c. (1) audio recorded song sung by Mr. Johnson (Def's Exh 4).

4. Ineffective assistance of trial counsel for failure to adequately investigate, develop and present mitigating evidence.
5. Trial court committed reversible error when it modified the text of Mr. Johnson's requested instruction on mitigating evidence.
6. Prosecutorial Misconduct.

Proposition 2: The cumulative impact of errors identified on direct appeal and post-conviction proceedings rendered the proceeding resulting in the death sentence arbitrary, capricious, and unreliable. The death sentence in this case constitutes cruel and unusual punishment and a denial of due process of law and must be reversed or modified to life imprisonment or life without parole.

See Original Application for Post-Conviction Relief, Case No. PCD-2009-1025. Johnson filed a separate motion for evidentiary hearing and discovery on post-conviction claims. In an unpublished opinion, the OCCA denied all requested relief, including Johnson's request for an evidentiary hearing. See Opinion Denying Application for Post-Conviction Relief and Motion for Evidentiary Hearing, entered Dec. 14, 2012, in Case No. PCD-2009-1025.

Johnson filed his second application for post-conviction relief on February 7, 2014. Represented by attorney Beverly Atteberry, Johnson raised the following propositions of error:

Proposition 1: Mr. Johnson's trial/collateral/appellate counsel failed to adequately investigate, develop, and present critical mitigating evidence regarding Raymond Johnson's social history and important and traumatic events of his life.

Proposition 2: The accumulation of errors violated Mr. Johnson's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

See Second Application for Post-Conviction Relief, Case No. PCD-2014-123 (internal quotation marks and footnote omitted). Johnson also filed an application for an evidentiary hearing and a motion to seal documents and portions of related pleadings. In an unpublished opinion, the OCCA denied all of Johnson's requested relief. See Opinion Denying Second Application for Post-

Conviction Relief, Request for an Evidentiary Hearing and Motion to Seal Documents and Portions of Related Hearings, entered May 21, 2014, in Case No. PCD-2014-123.

On January 7, 2013, represented by Assistant Federal Public Defenders Thomas Hird and Sarah Jernigan and attorney Beverly Atteberry, Johnson initiated this federal habeas action by filing an application to proceed in forma pauperis (Dkt. # 2) and a request for appointment of counsel (Dkt. # 1). In his petition, filed December 13, 2013, Johnson identifies the following six (6) grounds for relief:

Ground 1: Appellate counsel was ineffective for failing to raise prosecutorial misconduct claims regarding misstating the law and misleading the jury in second stage proceedings.

Ground 2: Mr. Johnson's rights to effective trial and appellate counsel were violated in regard to the outright exclusion, and reduction, of compelling mitigation evidence.

Ground 3: The jury selection process employed by the trial court violated Mr. Johnson's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ground 4: Trial and "appellate" counsel failed to adequately investigate, develop, and present critical mitigating evidence.

Ground 5: The lack of adequate instructions to guide the Jury's sentencing decision violated Mr. Johnson's Sixth Amendment right to a fair trial, his Eighth Amendment right to a reliable capital sentencing, and his Fourteenth Amendment right to due process.

Ground 6: The accumulation of errors violated Mr. Johnson's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

(Dkt. # 22).

GENERAL CONSIDERATIONS

I. Exhaustion

Generally, federal habeas corpus relief is not available to a state prisoner unless all state court remedies have been exhausted prior to the filing of the petition. 28 U.S.C. § 2254(b)(1)(A); Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994); see also Wainwright v. Sykes, 433 U.S. 72, 80-81 (1977) (reviewing history of exhaustion requirement). In every habeas case, the Court must first consider exhaustion. Harris, 15 F.3d at 1554. "States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." Coleman v. Thompson, 501 U.S. 722, 731 (1991) (explaining that the exhaustion requirement is "grounded in principles of comity"). In most cases, a habeas petition containing both exhausted and unexhausted claims is deemed a mixed petition requiring dismissal. Where it is clear, however, that a procedural bar would be applied by the state courts if the claim were now presented, the reviewing habeas court can examine the claim under a procedural bar analysis instead of requiring exhaustion. Id. at 735 n.1. Also, the Court may exercise its discretion to deny an unexhausted claim that lacks merit. Fairchild v. Workman, 579 F.3d 1134, 1156 (10th Cir. 2009); 28 U.S.C. § 2254(b)(2).

II. Procedural Bar

The Supreme Court has considered the effect of state procedural default on federal habeas review, giving strong deference to the important interests served by state procedural rules. See, e.g., Francis v. Henderson, 425 U.S. 536 (1976). Habeas relief may be denied if a state disposed of an issue on an adequate and independent state procedural ground. Coleman, 501 U.S. at 750; Medlock v. Ward, 200 F.3d 1314, 1323 (10th Cir. 2000). A state court's finding of procedural default is deemed "independent" if it is separate and distinct from federal law. Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995) (citing Ake v. Oklahoma, 470 U.S. 68, 75 (1985)); Duvall v. Reynolds, 139 F.3d 768, 796-97 (10th Cir. 1998). If the state court finding is "strictly or regularly followed" and

applied "evenhandedly to all similar claims," it will be considered "adequate." Maes, 46 F.3d at 986 (citation omitted). In other words, a state procedural bar "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991).

To overcome a procedural default, a habeas petitioner must demonstrate either: (1) good cause for failure to follow the rule of procedure and actual resulting prejudice; or (2) that a fundamental miscarriage of justice would occur if the merits of the claims were not addressed in the federal habeas proceeding. Coleman, 501 U.S. at 749-50; Sykes, 433 U.S. at 91. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, or interference by state officials. Id. The petitioner must also show "'actual prejudice' resulting from the errors of which he complains." U.S. v. Frady, 456 U.S. 152, 168 (1982). Alternatively, the "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 495 (1991). He must make "a colorable showing of factual innocence" to utilize this exception. Beavers v. Saffle, 216 F.3d 918, 923 (10th Cir. 2000). It is intended for those rare situations "where the State has convicted the wrong person of the crime. . . . [Or where] it is evident that the law has made a mistake." Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995).

III. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires that a habeas court apply a "highly deferential standard" under 28 U.S.C. § 2254, one that "demands that

state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal quotation marks omitted). When a state court has adjudicated a claim on the merits, a federal court cannot grant relief on that claim under § 2254 unless the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). The Supreme Court has emphasized that "review under § 2254(d)(1) focuses on what a state court knew and did"; thus, "[s]tate-court decisions are measured against [Supreme Court] precedents as of the time the state court renders its decision." Pinholster, 563 U.S. at 182 (internal quotation marks omitted). "[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, 529 U.S. 362, 412 (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, 1016-17 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, 1016-17.

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 "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." Williams, 529 U.S. at 405-06. It is not necessary that the state court cite, or even be aware of, applicable Supreme Court decisions, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early

v. Packer, 537 U.S. 3, 8 (2002) (per curiam). A state court decision is an "unreasonable application" of Supreme Court precedent 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. A court assesses "objective[ ] unreasonable[ness]," id. at 409, in light of the specificity of the rule: "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Williams, 529 U.S. at 410. "[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." Id. at 411.

Review of substantive rulings under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." Pinholster, 563 U.S. at 181; see Black v. Workman, 682 F.3d 880, 895 (10th Cir. 2012) (discussing § 2254 review of state-court merits decisions after Pinholster); Fairchild v. Trammell, 784 F.3d 702, 711 (10th Cir. 2015). And a federal court must accept a fact found by the state court unless the defendant rebuts the finding "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The Supreme Court has emphasized in the strongest terms the obstacles to relief, observing that § 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." Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (internal quotation marks omitted). To obtain relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for

fairminded disagreement." Id. at 102. Thus, "even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable." Id. at 88.

Although federal court deference to the state court's decision is appropriate only on claims "adjudicated on the merits," 28 U.S.C. § 2254(d), the petitioner has the burden of showing that the claim was not so adjudicated. "When 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." Richter, 562 U.S. at 99; accord Johnson v. Williams, 133 S. Ct. 1088, 1094 (2013) (finding that, where a federal claim is presented to a state court and relief is denied without discussion of the claim, the presumption of a merits adjudication is rebuttable). "Where there is no indication suggesting that the state court did not reach the merits of a claim, we have held that a state court reaches a decision on the merits even when it fails either to mention the federal basis for the claim or cite any state or federal law in support of its conclusion." Dodd v. Trammell, 753 F.3d 971, 983 (10th Cir. 2013) (ellipsis and internal quotation marks omitted); see Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) ("we owe deference to the state court's result, even if its reasoning is not expressly stated"). Under AEDPA, "a habeas court must determine what arguments or theories supported or . . . could have 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." Richter, 562 U.S. at 102.

CLAIMS FOR RELIEF

I. Ineffective assistance of appellate counsel (Ground 1)

As his first proposition of error, Johnson claims that appellate counsel provided ineffective assistance of counsel in failing to allege that the prosecutor improperly misstated the law with regard to consideration of mitigation evidence and mislead the jury during second stage proceedings. (Dkt. # 22 at 10). Johnson alleges that "[b]ecause of prosecutorial misconduct in this case, the jury in Raymond Johnson's case was unable to give effect to the second-stage mitigation evidence presented." Id. at 11. Johnson's argument focuses on the impression left with the jury, by both the trial judge and the prosecutor, that inquiry into mitigating circumstances is limited to an inquiry of the defendant's moral culpability. Id. at 12. Johnson alleges that prosecutor William Musseman repeatedly misstated the law with regard to mitigation evidence and characterizes the misstatements as "pervasive" and "egregious." Id. at 14, 16. In response, Respondent asserts that Johnson is not entitled to habeas corpus relief on his claim of ineffective assistance of appellate counsel under 28 U.S.C. § 2254(d). See Dkt. # 43 at 26. Respondent also notes that parts of Johnson's argument are unexhausted[4] and that, because the Court's review of this claim is limited to the record that was before the OCCA when the claim was adjudicated on the merits, the Court is precluded from considering the affidavit of appellate counsel, see Dkt. # 22-2, executed on December 10, 2013,

[4] Respondent alleges that, to the extent Johnson claims that appellate counsel provided ineffective assistance in omitting claims that the trial judge incorrectly instructed the jury, the prosecutor misstated the law during voir dire, and the definition of mitigating circumstances given to the jury is vague, the claims are unexhausted. See Dkt. # 43 at 27 n.7. This Court agrees and finds the claims are now procedurally barred as a result of Johnson's failure to present the claims to the OCCA as part of his application for post-conviction relief. Even if not procedurally barred, the unexhausted claims underlying the allegation of ineffective assistance of appellate counsel are meritless.

almost one year after the OCCA denied Johnson's original application for post-conviction relief.[5] See Dkt. # 43 at 27 n.7.

Johnson first raised a claim of ineffective assistance of appellate counsel for failing to present claims of second stage prosecutorial misconduct in his original application for post-conviction relief. See Original Application for Post-Conviction Relief, Case No. PCD-2009-1025, at 33-39. The OCCA denied relief, finding that "Johnson has not shown a reasonable probability that but for appellate counsel's alleged deficient performance in failing to raise [this issue] on direct appeal the result of the trial and sentencing proceedings would have been different. Johnson's argument fails under the Strickland test." See Opinion Denying Application for Post-Conviction Relief and Motion for Evidentiary Hearing, Case No. PCD-2009-1025, at 11-12.

When a habeas petitioner alleges that his appellate counsel rendered ineffective assistance by failing to raise an issue on direct appeal, the Court first examines the merits of the omitted issue. Hawkins v. Hannigan, 185 F.3d 1146, 1152 (10th Cir. 1999). If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance under the two-pronged standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003). To succeed on a claim of ineffective assistance of appellate

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[5] The Court notes that when Johnson presented his Ground 1 claim to the OCCA in his original application for post-conviction relief, Johnson provided an affidavit from his appellate counsel, Curtis Allen. See Original Application for Post-Conviction Relief, Case No. PCD-2009-1025, Attachment 4. However, in that affidavit, executed July 5, 2011, appellate counsel states that he focused on record issues only and conducted no first or second stage extra-record investigation. Id. That affidavit is not before the Court in this habeas action. Instead, Johnson provides the more detailed Affidavit of Curtis Allen (Dkt. # 22-2) as presented to the OCCA in support of the second application for post-conviction relief. See Second Application for Post-Conviction Relief, Case No. PCD-2014-123, Attachment 3. Thus, the affidavit provided in this habeas action was not considered by the OCCA in resolving Johnson's Ground 1 claim of ineffective assistance of appellate counsel.

counsel for failing to raise prosecutorial misconduct, a petitioner must show that the underlying prosecutorial-misconduct claim is meritorious. Neill v. Gibson, 278 F.3d 1044, 1058, 1062 (10th Cir. 2001); see also Werts v. Vaughn, 228 F.3d 178, 205 (3d Cir. 2000) (concluding that trial counsel's performance cannot be ineffective for failing to object to the prosecutor's proper remarks).

Petitioner first complains that the prosecutor mislead the jury, "from voir dire to the end of the sentencing stage," by misstating the law with regard to consideration of mitigating evidence. See Dkt. # 22 at 12. Petitioner further alleges that the trial judge compounded the problem by leaving the jury with the impression that consideration of mitigating evidence was limited to that evidence extenuating or reducing the degree of moral culpability or blame. Id. at 11-12.

Generally, there are two ways in which prosecutorial misconduct can result in constitutional error. See DeRosa v. Workman, 679 F.3d 1196, 1222 (10th Cir. 2012). "First, [it] can prejudice a specific right . . . as to amount to a denial of that right." Id. (quoting Matthews v. Workman, 577 F.3d 1175, 1186 (10th Cir. 2009)) (internal quotation marks omitted).[6] Additionally, absent infringement of a specific constitutional right, a prosecutor's misconduct may in some instances render a habeas petitioner's trial "so fundamentally unfair as to deny him due process." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); see Wilson v. Sirmons, 536 F.3d 1064, 1117 (10th Cir. 2008) ("Unless prosecutorial misconduct implicates a specific constitutional right, a prosecutor's improper remarks require reversal of a state conviction only if the remarks so infected the trial with

[6] "The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner." Boyde v. California, 494 U.S. 370, 377-78 (1990).

unfairness as to make the resulting conviction a denial of due process." (quoting Le v. Mullin, 311 F.3d 1002, 1013 (10th Cir. 2002) (per curiam)) (internal quotation marks omitted)); see also Parker v. Matthews, 132 S. Ct. 2148, 2153-54 (2012); Romano v. Oklahoma, 512 U.S. 1, 12-13 (1994). In determining whether a trial is rendered "fundamentally unfair" in light of the conduct of a prosecutor, a court must:

> . . . examine the entire proceeding, "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 as well as any cautionary steps – such as instructions to the jury – offered by the court to counteract improper remarks."

Wilson, 536 F.3d at 1117 (quoting Bland v. Sirmons, 459 F.3d 999, 1024 (10th Cir. 2006)). "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury . . . will [necessarily] draw that meaning." Donnelly, 416 U.S. at 647; see Banks v. Workman, 692 F.3d 1133, 1148 (10th Cir. 2012) (noting that the fundamental-fairness standard for allegedly improper prosecution statements constitutes "a high hurdle"). "[N]ot every improper or unfair remark made by a prosecutor will amount to a federal constitutional deprivation." Tillman v. Cook, 215 F.3d 1116, 1129 (10th Cir. 2000).

In this case, Johnson argues that, because the OCCA resolved the ineffective assistance of appellate counsel claim by addressing only the prejudice prong of the Strickland standard, this Court's review of the deficient performance prong is de novo. However, the Court need not address the question because Johnson cannot prevail even if the Court analyzes the deficient performance prong de novo. Webber v. Scott, 390 F.3d 1169, 1175 (10th Cir. 2004) ("The question of whether the OCCA reached the merits need not be decided, however, because Webber's claim fails with or without according the state court's decision AEDPA deference.").

The Court finds that Johnson's underlying prosecutorial misconduct claim lacks merit. As a result, appellate counsel did not perform deficiently in failing to raise the claim. First, the prosecutor never stated that the jury should not consider Johnson's second stage mitigation evidence. In fact, during their closing arguments, the prosecutors repeatedly stated that the jurors should consider whatever mitigating circumstances they found to have been demonstrated (Tr. Vol. X at 2084, 2091-92, 2096, 2105). Johnson correctly cites to multiple instances during closing argument when the prosecutor stated that mitigating evidence is concerned with the reduction of moral culpability. Tr. Vol. X at 2092-93, 2094, 2095, 2096. However, the prosecutor also stated the following:

> Mitigating circumstances. They're defined in your instructions. They are, number one, circumstances that may extenuate or reduce, as we have talked about, the degree of moral culpability or blame.
>
> I know that there are people that care for him. Is anything you have heard from them a circumstance that extenuates or reduces his degree of moral culpability or blame in these killings? I submit to you they are not.
>
> Two, they could be circumstances, which in fairness, sympathy, or mercy maybe you, as jurors, individually or collectively, can decide against imposing the death penalty. That's for you to decide.

Id. at 2096. Based on that record, the Court rejects Johnson's contention that there exists a reasonable likelihood that jurors understood the prosecutor's statements to limit consideration of Johnson's mitigating evidence only to the extent it extenuated or reduced moral culpability. See Dkt. # 22 at 14.

Furthermore, the second stage jury instructions defined the scope of the mitigation evidence to be considered and served to cure any possible confusion attributable to the prosecutor's statements. Instruction No. 11 directed the jury, in pertinent part, that:

> 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 imposting the death penalty. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

See O.R. Vol. VI at 1076. This instruction served to correct any alleged limitation and to broaden the jury's consideration beyond evidence involving moral culpability. The jury was further instructed in Instruction No. 12 that evidence had been introduced of seven enumerated mitigating circumstances and that "[i]n addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well." Id. at 1077. Finally, the jury was instructed in Instruction No. 13 that they could not impose the death penalty unless they unanimously found that the aggravating circumstance or circumstances outweighed the mitigating circumstances, and that "[e]ven if you find that the aggravating circumstances outweigh the mitigating circumstances, you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole." Id. at 1078. Juries are presumed to follow the court's instructions, Richardson v. Marsh, 481 U.S. 200, 211 (1987), and there is no indication that the jury in Johnson's case did not.

Having considered the challenged comments by the prosecutor in context and in context of the instructions provided to the jury, this Court finds there is not a reasonable likelihood that the jury improperly limited its consideration of the mitigating evidence in violation of the Eighth Amendment based on the prosecutor's comments during second stage. In addition, Johnson's trial was not rendered fundamentally unfair by the prosecutor's comments. As a result, Johnson's claim of prosecutorial misconduct lacks merit and appellate counsel did not provide ineffective assistance in failing to raise a meritless claim. Habeas corpus relief is denied on Ground 1.

II. Ineffective assistance of trial and appellate counsel (Grounds 2 and 4)

In Ground 2, Johnson alleges that trial counsel provided ineffective assistance in excluding and reducing available mitigation evidence, and that appellate counsel provided ineffective assistance in failing to raise this claim of ineffective assistance of trial counsel on direct appeal. (Dkt. # 22 at 27). Johnson characterizes the excluded evidence as "compelling." Id. In response, Respondent argues that Johnson is not entitled to habeas relief under 28 U.S.C. § 2254(d). (Dkt. # 43 at 37).

In Ground 4, Johnson claims that trial and "appellate"[7] counsel failed to adequately investigate, develop, and present critical mitigating evidence. (Dkt. # 22 at 54). In response, Respondent argues that, as to claims of ineffective assistance of counsel raised in the original application for post-conviction relief, Johnson is not entitled to habeas relief under 28 U.S.C. § 2254(d). (Dkt. # 43 at 61). As to claims raised in the second application for post-conviction relief, Respondent argues that the claims are procedurally barred and should be denied on that basis. (Dkt. # 58).

A. Standards governing ineffective assistance of counsel claims

As stated above, when a habeas petitioner alleges that his appellate counsel rendered ineffective assistance by failing to raise an issue on direct appeal, the Court first examines the merits of the omitted issue. Hawkins, 185 F.3d at 1152. If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance. Cargle, 317 F.3d at 1201. In Grounds 2 and 4, Johnson claims that appellate counsel provided ineffective assistance in failing to raise claims of ineffective assistance of trial counsel.

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[7] Johnson emphatically claims that "appellate" counsel includes both direct appeal counsel Curtis Allen and post-conviction counsel Wayna Tyner.

To be entitled to habeas corpus relief on a claim of ineffective assistance of trial counsel, Johnson must demonstrate that the OCCA's adjudication of his claims involved an unreasonable application of the two-pronged test set forth in Strickland, 466 U.S. at 687. Under Strickland, a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Id.; Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). These two prongs may be addressed in any order, and failure to satisfy either is "dispositive." Byrd v. Workman, 645 F.3d 1159, 1168 (10th Cir. 2011). A federal habeas court may intercede only if the petitioner can overcome the "doubly deferential" hurdle resulting from application of the standards imposed by § 2254(d) and Strickland. Pinholster, 563 U.S. at 190.

"Review of counsel's performance under Strickland's first prong is highly deferential." Hooks v. Workman, 606 F.3d 715, 723 (10th Cir. 2010). "Every effort must be made to evaluate the conduct from counsel's perspective at the time." U.S. v. Challoner, 583 F.3d 745, 749 (10th Cir. 2009) (quoting Dever v. Kan. State Penitentiary, 36 F.3d 1531, 1537 (10th Cir. 1994)) (internal quotation marks omitted). Furthermore, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Byrd, 645 F.3d at 1168 (alteration omitted) (quoting Dever, 36 F.3d at 1537) (internal quotation marks omitted); accord Fairchild v. Workman, 579 F.3d 1134, 1140 (10th Cir. 2009) ("We approach these issues with 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and that 'the challenged action might be considered sound trial strategy.'" (quoting Strickland, 466 U.S. at 689)).

However, while a reviewing court entertains "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," Matthews, 577 F.3d at 1190

(quoting Strickland, 466 U.S. at 689) (internal quotation marks omitted), the court nevertheless applies "closer scrutiny when reviewing attorney performance during the sentencing phase of a capital case." Cooks v. Ward, 165 F.3d 1283, 1294 (10th Cir. 1998); see also Osborn v. Shillinger, 861 F.2d 612, 626 n.12 (10th Cir. 1988) ("[T]he minimized state interest in finality when resentencing alone is the remedy, combined with the acute interest of a defendant facing death, justify a court's closer scrutiny of attorney performance at the sentencing phase."); cf. Wellons v. Hall, 558 U.S. 220, 220 (2010) (per curiam) ("From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect.").

If counsel's performance at sentencing was deficient, a court must then assess whether the petitioner was prejudiced as a result. See Strickland, 466 U.S. at 694. Prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "To assess prejudice arising out of counsel's errors at a capital-sentencing proceeding, we must 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" Hooks v. Workman, 689 F.3d 1148, 1202 (10th Cir. 2012) (quoting Young v. Sirmons, 551 F.3d 942, 960 (10th Cir. 2008)). "If there is a reasonable probability that at least one juror would have struck a different balance, . . . prejudice is shown." Id. (internal quotation marks and citations omitted).

In the case of mitigating evidence, the Sixth Amendment imposes a duty on counsel "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Even under AEDPA's deferential standard, "we are . . . conscious of the overwhelming importance of the role mitigation evidence plays in the just

imposition of the death penalty." Mayes v. Gibson, 210 F.3d 1284, 1288 (10th Cir. 2000). Because of the enormous stakes confronted in a capital case, a reviewing court must ensure that "the sentencing jury makes an individualized decision while equipped with the 'fullest information possible concerning the defendant's life and characteristics,' and must scrutinize carefully any decision by counsel which deprives a capital defendant of all mitigation evidence." Id. (quoting Lockett v. Ohio, 438 U.S. 586, 603 (1978)).

B. Management of available mitigating evidence (Ground 2)

In Ground 2, Johnson claims that the trial judge, in an effort to insure that the trial lasted no more than its allotted two weeks, excluded second-stage defense evidence and pressured trial counsel to rush the second-stage defense. See Dkt. # 22 at 28. Johnson argues that, in addition to the nine (9) witnesses who testified for the defense in the second stage, the defense had subpoenaed eleven (11) other witnesses who were not called to testify due to "increasing pressure" from the prosecutor and the trial judge to finish the trial in two weeks. Id. Johnson alleges that the prosecutor argued that the anticipated testimony of many of Johnson's mitigation witnesses was cumulative. Id. at 30. Johnson also complains that the prosecutor succeeded in reducing both the playing of a CD, containing eleven tracks performed by Johnson's "Lexington Praise Team," from the entire CD to only 30 seconds of one song, and also the playing of an entire videotaped church service, led by Johnson, to a two minute clip. Id. at 31-32. The trial judge then completely excluded the videotape. Id. at 32 (citing Tr. Vol. X at 2044). Lastly, Johnson complains that the trial judge refused to allow two of five proffered family photographs to be admitted as mitigating evidence. Id. at 33 (citing Tr. Vol. X at 1958).

According to Johnson, trial counsel "certainly should have acquiesced less, and fought more, against the substantial diminution and denigration of his mitigation presentation," and that appellate counsel should have challenged "the actions of the 1) prosecutor, 2) trial court, and 3) trial counsel regarding these matters." Id. at 36. Johnson emphasizes that "[t]he videotape evidence is the centerpiece of this ground for relief and would have been the compelling centerpiece of a mitigation presentation that had one theme: Raymond Johnson's 'life, based upon his conduct when he was previously in prison, is capable of redemption and a life of value.'" Id. at 43. In response to the issues raised in Ground 2, Respondent argues that Johnson is not entitled to habeas corpus relief under 28 U.S.C. § 2254(d). See Dkt. # 43 at 37-56.

Johnson raised these claims of ineffective assistance of counsel in his original application for post-conviction relief. As a preliminary matter, although Johnson did not present separate claims of ineffective assistance of trial counsel, he nonetheless expressed concern that the OCCA would impose a procedural bar on the claims of ineffective assistance of trial counsel because they were not raised on direct appeal. For that reason, Johnson argued that appellate counsel was working under a conflict of interest. Specifically, Johnson alleged that:

> [a]t the time of his direct appeal, Mr. Johnson's appellate counsel, Curtis M. Allen, was an Assistant Public Defender with the Tulsa County Public Defender's Office. Mr. Allen's supervisor, at the time, was Mr. Johnson's lead trial counsel, Pete Silva, who was and currently is the Chief Public Defender for the Tulsa County Public Defender's Office.

See Original Application for Post-Conviction Relief – Death Penalty Case, Case No. PCD-2009-1025, at 3. Johnson argued that, because trial and appellate counsel were not "separate," it would be improper for the OCCA to impose a procedural bar on the claims of ineffective assistance of trial

counsel. Id. at 4. In resolving Johnson's post-conviction claims on the merits, the OCCA explained that:

> this Court is required to consider the merits of each claim of ineffective assistance of appellate counsel. When the claim is that appellate counsel was ineffective for failing to raise issues of ineffective assistance of trial counsel, the merits of the claims involving the alleged failings of trial counsel will necessarily be considered.

(Opinion Denying Application for Post-Conviction Relief and Motion for Evidentiary Hearing, in Case No. PCD-2009-1025, at 3). Based on that reasoning, the OCCA determined that it "need not address the issue of whether appellate counsel failed to raise issues of ineffective assistance of trial counsel because of a conflict of interest."[8] Id. at n.2.

In his original application for post-conviction relief, Johnson characterized this claim as "state-induced ineffective assistance of counsel." See Original Application for Post-Conviction Relief – Death Penalty Case, Case No. PCD-2009-1025, at 6. He argued that his trial counsel "were bullied by the prosecution, and shackled by the trial court into severely limiting its mitigation case." Id. at 11. Johnson also argued that the trial court committed reversible error when it refused to admit two of five proposed family photographs, limited the admission of a recorded song sung by

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[8] In the "Introduction" to his habeas petition, Johnson alleges that appellate counsel failed to raise claims of ineffective assistance of trial counsel because of a conflict of interest. See Dkt. 22 at 1-6. To the extent Johnson intends the claim presented in the "Introduction" to be considered and resolved as a separate ground of error, the Court finds that given the procedural history of the "conflict of interest" allegations presented in the state proceedings, the claim is procedurally barred. As in this habeas case, Johnson did not present his conflict of interest claim to the OCCA as a separate ground of error. Furthermore, even if this Court were to consider the conflict of interest claim on the merits, no relief is warranted because Johnson cannot satisfy the prejudice prong of Strickland. The OCCA did not impose a procedural bar on Johnson's ineffective assistance of trial counsel claim because they were not raised on direct appeal. Instead, the OCCA denied Johnson's claims of ineffective assistance of appellate counsel claims on the merits based on its determination this the underlying ineffective assistance of trial counsel claims lacked merit.

Johnson, and excluded a videotaped recording of Johnson preaching while in prison. Id. at 11-20.

The OCCA denied relief on Johnson's claim of ineffective assistance of appellate counsel, finding as follows:

> Prior to the beginning of the second stage of trial the State objected to many of the defendant's listed witnesses on the grounds that their testimony was cumulative. Defense counsel advised the court that he had already submitted a shortened witness list. While the prosecutor still objected on the basis that the testimony of some of the remaining witnesses would be similar if not identical, defense counsel responded that each witness was important and he or she was going to describe his or her own unique relationship and experiences with the defendant. Defense counsel stated his intent to streamline the testimony and avoid cumulative effect as much as possible. The trial court overruled the State's objection to the cumulative nature of the defendant's intended mitigation witnesses. Defense counsel did, in fact, limit the testimony of some of the mitigation witnesses and did not call other listed witnesses to testify.
>
> Johnson alleges on post-conviction that from the time the State filed its written objection to the defendant's mitigation witnesses, defense counsel was bullied by both the prosecutor and the trial judge into presenting a very limited case in mitigation. As a result, he argues, trial counsel was constitutionally ineffective and appellate counsel was, in turn, ineffective for failing to raise this issue on direct appeal. Although Johnson argues on post-conviction that defense counsel was prevented from assisting him during a critical stage of trial causing fundamental constitutional error, this argument is not supported and is not well taken. Johnson has not shown that trial counsel's performance was deficient or a reasonable probability that but for the alleged failings of trial counsel the outcome of this capital sentencing proceeding would have been different. Thus, we cannot find appellate counsel constitutionally ineffective for failing to argue the same on direct appeal. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.
>
> Next, Johnson argues that the trial court committed reversible error in the capital sentencing stage when it refused to admit some of the defense's proffered relevant mitigating evidence and he asserts that appellate counsel was constitutionally ineffective for not raising the issue on direct appeal. Johnson specifically complains that the trial court improperly admitted only three of the five childhood family photographs that the defense intended to present, declined to admit a two to three minute videotape of him preaching a sermon while he was incarcerated, and limited the introduction of an audio recording of him singing to only a thirty second portion of a song. Although Johnson argues strenuously that the trial court erred in excluding relevant mitigating evidence at trial and that appellate counsel was ineffective for failing to raise the issue on direct appeal, he has failed

> to affirmatively prove prejudice resulting from appellate counsel's alleged omission. Accordingly, this argument must fail. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

(Opinion Denying Application for Post-Conviction Relief and Motion for Evidentiary Hearing, in Case No. PCD-2009-1025, at 7-8).

The OCCA resolved the ineffective assistance of appellate counsel claims by analyzing the merits of the underlying claims of ineffective assistance of trial counsel. Upon application of the Strickland standard, the OCCA concluded that trial counsel had not provided ineffective assistance and that appellate counsel had not provided ineffective assistance in failing to raise a non-meritorious claim. Because the OCCA adjudicated the Ground 2 claims on the merits, Johnson must overcome the "doubly deferential" hurdle resulting from application of the standards imposed by § 2254(d) and Strickland. Pinholster, 563 U.S. at 190.

1. Trial counsel's failure to call additional subpoenaed mitigation witnesses

As to Johnson's claim that appellate counsel provided ineffective assistance in omitting a claim challenging trial counsel's failure to call additional mitigation witnesses, the record demonstrates that, prior to the commencement of the second stage, the trial judge heard argument from counsel concerning admission of second stage testimony and exhibits. See Tr. IX at 1874-98. The prosecutor argued that much of the anticipated mitigation testimony was cumulative. Id. at 1875. The trial judge overruled the objection, stating that "I believe in mitigation the case law is very clear that it – pretty much – it should be pretty liberal in what is allowed. Of course, I can't have like 25 people coming up to say the exact same thing . . . [A]t this time, I am going to overrule it, but take it under advisement." Id. at 1889.

After the State rested during the second stage of trial, trial counsel presented his opening statement and told the jury that "it's our intent and our hope that we can introduce to you an entirely new Raymond and an entirely different Raymond whose life, based upon his conduct when he was previously in prison, is capable of redemption and a life of value." Tr. X at 1976. In support of that mitigation theme, Johnson called nine (9) witnesses. First, Johnson's younger half-sister, Artina, testified that she and her family, including her older sister, her mother, and Johnson's step-father, still love Johnson. Tr. Vol. X at 1982-86. She identified two family photographs, both taken on trips when she and Johnson were children. Id. at 1988-89. She described Johnson's relationships with other family members and stated that Johnson has one child, the son of state's witness Jennifer Walton. Id. at 1981. She described Johnson's religious upbringing and his involvement in prison ministries. Id. 1989-94. She identified a CD, recorded at Lexington Correctional Center, containing songs performed by Johnson and other prisoners. Id. at 1995-96. A thirty (30) second except of the song "Behold the Lamb," sung by Johnson, was played for the jury. Id. at 1996.

Next, Cory Gibson, a long-time friend of Johnson, testified that he sang in a choir with Johnson when they were teenagers. Id. at 2007. His friendship with Johnson became closer when he began working with Johnson's prison ministry, "Seekers of Refuge." Id. at 2009. Gibson testified that their friendship served to "keep each other on a straight and narrow path," and that they had remained in contact with each other over the years. Id. at 2011.

Two fellow inmates, Charles Waymond Shaw and Marty Christopher Williams, both testified concerning Johnson's positive impact on their lives and the lives of other inmates through their involvement in prison ministry programs. Id. at 2020, 2039, 2041.

Defense counsel also presented five (5) witnesses, Chaplain Larry Adams, Pastor Cynthia Petties, Reverend Vernon Burris, Linda Reed, and Pastor James Edward Reed, who testified about Johnson's involvement in prison ministries and his talents in singing and persuasive preaching. Id. at 2024-25, 2035, 2048-51, 2058, 2072-73.

In his habeas petition, Johnson lists seven (7) subpoenaed witnesses who were not called to testify and summarizes their anticipated testimony. See Dkt. # 22 at 37-38. Those witnesses are Linda Bell Johnson, Petitioner's mother; Bishop A. D. Johnson, Sr., Petitioner's stepfather; Jennifer Walton, Petitioner's ex-girlfriend and mother of his child; Joy Howard, a long-time friend of Petitioner; Chaplain Duane Baker, chaplain for Davis Correctional Center (DCC); Terrance Cook, family friend and Petitioner's fellow inmate at DCC; and Helen Pipkin, a prison minister familiar with Petitioner's involvement with prison ministries during his prior incarceration. Id. Johnson argues the omitted witnesses were "crucial witnesses that could have made a real difference." Id. at 38-39.

The Court disagrees. Johnson's description of the anticipated testimony from those additional seven (7) witnesses confirms that their testimony, concerning his relationships with friends and family and his prison ministries, would have been cumulative of the testimony presented by the nine (9) testifying witnesses. See id.; see also O.R. Vol. III at 390-97. Johnson fails to demonstrate that trial counsel's decision not to present the additional witnesses was not sound strategy. Strickland, 466 U.S. at 690-91.

Furthermore, even if trial counsel had presented all of the subpoenaed second stage witnesses, there was no substantial probability, let alone a conceivable one, that one juror (or more) would have voted against the death penalty. See Richter, 562 U.S. at 112 (defining reasonable

probability as the likelihood of a different result being "substantial, not just conceivable"); Williams v. Trammell, 782 F.3d 1184, 1215 (10th Cir. 2015); Lockett v. Trammel, 711 F.3d 1218, 1233 (10th Cir. 2013). The State presented overwhelming evidence supporting all four (4) aggravating circumstances found by the jury. To support the aggravating circumstance that Johnson had previously been convicted of a violent felony, the State presented a certified copy of a Judgment and Sentence, entered in Cleveland County District Court, Case No. CF-1995-1412, demonstrating Johnson's prior conviction of First Degree Manslaughter and sentence of twenty (20) years imprisonment. See Tr. IX at 1902. In that case, Johnson's conviction resulted from the shooting death of Clarence Oliver on September 11, 1995. Id. at 1904. In addition to the Judgment and Sentence, the State presented four (4) witnesses who testified with regard to the facts of that case. Id. at 1904-39. Johnson's jury learned that Oliver died as the result of being shot four (4) times while seated in his car, id. at 1916, 1921, that Johnson was developed as the suspect in the shooting, id. at 1936, and was ultimately convicted of First Degree Manslaughter, id. at 1937.

The State also incorporated the first stage evidence to support the other three (3) aggravating circumstances. Id. at 1903. Overwhelming evidence presented during the first stage demonstrated that Johnson knowingly created a great risk of death to more than one person when both Brooke Whitaker and her seven-month-old baby, K.W., died as a result of Johnson's actions. Overwhelming evidence, including, but not limited to, photographs of the victims' injuries (State's Exhibits 28, 38, 85, 88, 89); testimony of the firefighters and paramedic describing the condition of the victims' bodies as they were recovered after the fire (Tr. Vol. VI at 1236-37, 1261, 1271-72, 1275-77, 1283); testimony of the medical examiner describing the victims' injuries and causes of death (Tr. Vol. VIII at 1709-31, 1736, 1748, 1749-51, 1752-53, 1756, 1760); and Johnson's videotaped admissions to

Detective Regalado (State's Exhibit 120), demonstrated that the murders were especially heinous, atrocious, or cruel. See Le v. State, 947 P.2d 535, 550 (Okla. Crim. App. 1997) ("[H]einous, atrocious, or cruel . . . aggravating circumstance requires proof of conscious serious physical abuse or torture prior to death; evidence a victim was conscious and aware of the attack supports a finding of torture."). Lastly, overwhelming evidence demonstrated that there exists a probability that Johnson would commit criminal acts of violence that would constitute a continuing threat to society. That evidence included the testimony of Brooke Whitaker's mother that Johnson had told her "I'm going to kill your daughter" (Tr. Vol. VI at 1211), and that her daughter feared Johnson was going to kill her (id. at 1208); the testimony of Brooke Whitaker's neighbor that Brooke "was terrified" of Johnson and that Johnson had been threatening to kill Brooke (Tr. Vol. VII at 1526-27); and the videotape of Johnson's confession (State's Exhibit 120), demonstrating his calm demeanor and complete lack of remorse while describing how he repeatedly hit Brooke in the head with a hammer; that he refused her requests to call 911 for medical help because he knew that if he did, he would have to return to prison; that he told Brooke she "deserve[d] to die"; that he walked out to a shed, got a gasoline can, and returned to the house; that he doused the kitchen, the front room, Brooke's room, and the room where the baby was at the time with gasoline; that when he lit Brooke on fire, she immediately got up so he knew she was still alive; and that he knew the baby was in the room that he had doused with gasoline. See Gilson v. State, 8 P.3d 883, 925 (Okla. Crim. App. 2000) (stating that the continuing threat aggravating circumstance can be supported by "evidence of the callousness of the murder for which the defendant was convicted . . . as well as prior criminal history and the facts of the murder for which the defendant was convicted").

Therefore, under the facts of this case and upon review of the state court record, the Court agrees with the OCCA's conclusion that Johnson fails to demonstrate that but for the alleged failings of trial counsel the outcome of this capital sentencing proceeding would have been different. Because the underlying claim of ineffective assistance of trial counsel lacks merit, appellate counsel did not perform deficiently in failing to raise the claim. Johnson cannot satisfy either prong of Strickland and has failed to demonstrate entitlement to habeas corpus relief under 28 U.S.C. § 2254(d). Habeas corpus relief shall be denied on this claim of ineffective assistance of appellate counsel.

2. Failure to challenge trial judge's rulings excluding exhibits

Johnson also alleges that appellate counsel provided ineffective assistance in omitting claims challenging the trial judge's rulings with regard to mitigation exhibits. Johnson focuses his argument on the trial judge's rulings excluding or limiting the following: photographs of Johnson and his family, the CD containing recordings of his singing in a prison band, and the DVD recording of a sermon he preached while in custody serving his sentence for a prior manslaughter conviction. As discussed above, the trial judge excluded two (2) family photographs as cumulative (Tr. Vol. X at 1957-58), but allowed Johnson to present three (3) photographs: one of his son as well as two photographs of himself as a child on family vacations. The trial judge also allowed a thirty (30) second excerpt of one song on the CD, "Behold the Lamb," to be played for the jury. See id. at 1966-67. However, the trial judge denied Johnson's request to play even a two-minute excerpt of the DVD, finding that, in light of the testimony of five witnesses concerning Johnson's involvement in prison ministries, the DVD was cumulative. Id. at 2044. The trial judge also stated that she did

not think the DVD "goes to mitigation" and that, unless Johnson testified, the DVD was hearsay. Id. at 2044-45.

As set forth above, the OCCA cited Strickland, 466 U.S. at 687, and ruled that Johnson had "failed to affirmatively prove prejudice resulting from appellate counsel's alleged omission." See Opinion Denying Application for Post-Conviction Relief and Motion for Evidentiary Hearing, Case No. PCD-2009-1025, at 8. In this habeas case, Johnson has failed to overcome the "doubly deferential" hurdle resulting from application of the standards imposed by § 2254(d) and Strickland. Pinholster, 563 U.S. at 190. In light of the strong evidence supporting the aggravating circumstances, as discussed above, neither the admission of two more family photographs nor the playing of additional recordings of Johnson singing would have altered the outcome of the second stage sentencing proceeding. In addition, even if the trial judge erred in excluding the videotape of Johnson preaching, the jury heard multiple witnesses testify with regard to Johnson's involvement in the church and various prison ministries and that he was very effective. As a result, Johnson fails to show that, even if appellate counsel performed deficiently in failing to challenge the trial court's rulings, "there is 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. For that reason, Johnson is not entitled to habeas corpus relief under 28 U.S.C. § 2254(d) on this part of Ground 2.

C. Failure to investigate and develop mitigating evidence (Ground 4)

In Ground 4, Petitioner alleges that his attorneys failed to investigate and develop the "social history" of his life. See Dkt. # 22 at 54-55. In support of this claim, Johnson details the evidence developed by post-conviction counsel. Id. at 63-68. Johnson also cites to the report of Victoria Reynolds, Ph.D., for details of Johnson's traumatic life history and its impact on his development

and subsequent behavior. Id. at 76 (citing Dkt. # 22-11). In addition, habeas counsel identifies numerous other witnesses whose testimony supports Dr. Reynolds' findings. Id. at 81-85.

1. Claims raised in original application for post-conviction relief

In his original application for post-conviction relief, Johnson argued that trial counsel failed to present mitigation witnesses who could "present a different side of him than that which they had seen in first stage – one that would allow the jury to consider the potential value of his life as a whole." See Opinion Denying Application for Post-Conviction Relief and Motion for Evidentiary Hearing, Case No. PCD-2009-1025, at 9. The OCCA ruled as follows:

> Johnson claims that several important potential mitigation witnesses who could have offered compelling testimony, or who could have added to the argument that his life was worth sparing, were not called to testify in mitigation. Some of the evidence he contends these witnesses could have presented was actually introduced through the testimony of other witnesses who did testify. For instance, although Johnson's mother did not want to testify in mitigation and was not called to do so, Johnson's sister testified that Johnson had grown up with and still had strong family support and that her mother loved Johnson and had visited him in prison. She also testified that if Johnson were sentenced to death it would be detrimental to her mother. Although Johnson's step-father, Arthur Johnson, did not testify, Johnson's sister testified that he, too, loved and supported Johnson.
>
> While the failure to call some of these potential witnesses precluded the jury from hearing first-hand some positive accounts of Johnson's life, it also precluded the jury from hearing some negative testimony about Johnson such as testimony about his earlier contacts with the police and his possible gang affiliation as a teenager. The decision not to persuade Johnson's mother to testify kept the jury from hearing her opinion that "It is like Raymond has two (2) personalities. He would be the best of the best and then be the worst of the worst."
>
> Johnson has not shown that trial counsel did not know of both the good and the bad that the potential witnesses had to offer. Nor has he shown that the decision not to call each of these witnesses constituted deficient performance of trial counsel. Finally, Johnson has failed to meet his burden of showing that the failure to call the omitted potential mitigation witnesses was prejudicial. As Johnson has not shown that trial counsel's performance regarding the investigation and development of mitigating evidence was deficient or that he was prejudiced by the alleged failings of trial counsel, we cannot find that appellate counsel was ineffective for failing to

> allege otherwise on direct appeal. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

Id. at 9-10 (footnote omitted).

Thus, the OCCA resolved the ineffective assistance of counsel claims raised in the original application for post-conviction relief under both the deficient performance and the prejudice prongs of Strickland. To be entitled to habeas relief, Johnson must overcome the "doubly deferential" hurdle resulting from application of the standards imposed by § 2254(d) and Strickland. Pinholster, 563 U.S. at 190. When a petitioner alleges ineffective assistance of counsel stemming from a failure to investigate mitigating evidence at a capital-sentencing proceeding, the Court must "evaluate the totality of the evidence – both that adduced at trial, and the evidence adduced in habeas proceedings." Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004) (quoting Wiggins v. Smith, 539 U.S. 510, 536 (2003)). This includes weighing "the evidence in aggravation against the totality of available mitigating evidence." Hooks, 689 F.3d at 1202. "In a system like Oklahoma's, where only a unanimous jury may impose the death penalty, the question is whether it's 'reasonably probabl[e] that at least one juror would have struck a different balance.'" Grant v. Trammell, 727 F.3d 1006, 1018-19 (10th Cir. 2013) (quoting Wiggins, 539 U.S. at 537). Counsel is presumed to have acted in an "objectively reasonable manner" and in a manner that "might have been part of a sound trial strategy." Bullock v. Carver, 297 F.3d 1036, 1046 (10th Cir. 2002). Where the facts establish that decisions made by counsel were, in fact, "strategic choices made after thorough investigation of law and facts relevant to plausible options," those decisions are "virtually unchallengeable." Strickland, 466 U.S. at 690. However, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. Once a decision is determined to be strategic, the petitioner may only

establish deficient performance if "the choice was so patently unreasonable that no competent attorney would have made it." Bullock, 297 F.3d at 1046 (citations and internal quotes omitted).

Here, the Court cannot find that the OCCA unreasonably applied Strickland. As discussed above, Johnson's mitigation witnesses testified about his childhood, his upbringing and relationships with family members, and his participation in church and prison ministries. See Tr. Vol. X at 1978-2075. The additional proposed mitigating evidence presented to the OCCA as part of his original post-conviction application included four (4) affidavits of Rodney Floyd, an investigator for the Capital Post-Conviction Division of the Oklahoma Indigent Defense System (OIDS), providing Oklahoma Department of Corrections (ODOC) records for Johnson; a summary of an interview of Artura Hamilton, Johnson's biological father; a summary of an interview of Laura Hendrix, a friend of Johnson and a first stage prosecution witness; and a summary of an interview of James Reed, Johnson's "adoptive" father and a second stage mitigation witness.[9] See Original Application for Post-Conviction Relief, Case No. PCD-2009-1025, Attachments 6, 7, 10, and 11. In addition, Johnson provided affidavits of Curtis M. Allen, direct appeal counsel; Linda Johnson, his mother; Arthur Johnson, his stepfather; and Tina Osborn, an employee of Tulsa Community Corrections Center. Id., Attachments 4, 5, 8, and 9.

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[9] This Court will not consider the affidavits of investigator Rodney Floyd setting forth what he was told by Artura Hamilton, Laura Hendrix, and James Reed, as they are hearsay. See Neill v. Gibson, 278 F.3d 1044, 1056 (10th Cir. 2001) (holding district court did not abuse its discretion in disregarding inadmissible hearsay investigator affidavits presented to support habeas petition); see also Herrera v. Collins, 506 U.S. 390, 417 (1993) (noting that affidavits submitted in habeas action were "particularly suspect" because they were based on hearsay).

Nothing provided by Johnson in support of his original application for post-conviction relief suggests that trial counsel did not know the information contained in the additional mitigation evidence compiled by post-conviction counsel. The documentary evidence provided by investigator Rodney Floyd, including Johnson's ODOC records and Artura Hamilton's prison and mental health records, came from trial counsels' files. See id., Attachments 6, 7. Thus, it appears trial counsel made a strategic decision not to use those records or information contained therein. James Reed did in fact testify during the second stage of trial and much of the information contained in the post-conviction record was presented during his testimony. Furthermore, Linda Johnson states in her affidavit that defense counsel told her that she did not have to testify if she did not want to and because she "really did not want to testify," she did not. Id., Attachment 5 at ¶ 3. Also, Linda Johnson, Arthur Johnson, and Laura Hendrix, were all listed as defense witnesses, see O.R. Vol. III at 390-400, and, therefore, had presumably been interviewed by trial counsel. Much of the information found in their post-conviction affidavits was presented at trial during the second stage. Specifically, the family and childhood information came in through the testimony of Johnson's sister, Artina. Also, as noted by the OCCA, had trial counsel presented the information identified by Johnson in his original application for post-conviction relief, his jury may have heard not only positive aspects of Johnson's life but also negative aspects, including testimony concerning his additional criminal history and his involvement in gang activity. Again, it appears trial counsel made a strategic decision not to call those witnesses during mitigation. Instead, trial counsel elicited testimony from mitigation witnesses supporting the mitigation strategy that Johnson's life was capable of redemption.

Johnson fails to demonstrate that trial counsel's strategic decisions with regard to mitigation were so patently unreasonable that no competent attorney would have made them. Furthermore, even if trial counsel had presented all of the witnesses and documents proposed in the claim raised in the original post-conviction application, there was no substantial probability, let alone a conceivable one, that one juror (or more) would have voted against the death penalty. See Williams, 782 F.3d at 1215; Lockett, 711 F.3d at 1233; see also Richter, 562 U.S. at 112 (defining reasonable probability as the likelihood of a different result being "substantial, not just conceivable"). Therefore, Johnson cannot satisfy Strickland and has failed to demonstrate entitlement to habeas corpus relief under 28 U.S.C. § 2254(d). Habeas corpus relief shall be denied on this claim of ineffective assistance of counsel.

2. Claims raised in the second application for post-conviction relief

On February 7, 2014, or almost two months after filing his federal habeas petition and more than one year after the OCCA denied his original application for post-conviction relief, Johnson filed his second application for post-conviction relief, raising additional claims of ineffective assistance of trial, appellate, and post-conviction counsel. Specifically, Johnson claimed that "trial/collateral/ appellate counsel failed to adequately investigate, develop, and present critical mitigating evidence regarding Raymond Johnson's social history and important and traumatic events of his life." See Second Application for Post-Conviction Relief, Case No. PCD-2014-123, at 7 (internal quotation marks and footnote omitted). The OCCA denied post-conviction relief on these claims, finding them to be procedurally barred. See Opinion Denying Second Application for Post-Conviction Relief, Case No. PCD-2014-123. Respondent filed a surreply (Dkt. # 58) and urges the Court to recognize the procedural bars imposed by the OCCA.

a. The OCCA's ruling

Citing Johnson's failure to comply with Oklahoma's procedures, the OCCA found all claims of ineffective assistance of counsel raised in the second application for post-conviction relief to be procedurally barred. As to Johnson's claim of ineffective assistance of trial counsel, the OCCA cited Coddington v. State, 259 P.3d 833, 835 (Okla. Crim. App. 2011), and Okla. Stat. tit. 22, § 1089(D)(4)(b), (D)(8) (Supp. 2006), and ruled that "[i]t is apparent from Johnson's argument that the basis for each element of this claim was available to defense counsel at the time of trial. It was, accordingly, available well before Johnson's direct appeal and original application for post-conviction relief, and is therefore waived." See Opinion Denying Second Application for Post-Conviction Relief, Case No. PCD-2014-123, at 6. As to Johnson's claim of ineffective assistance of appellate counsel, the OCCA cited Hatch v. State, 924 P.2d 284, 294 (Okla. Crim. App. 1996), and Okla. Stat. tit. 22, § 1089(D)(4)(b), (D)(8) (Supp. 2006), and ruled that "[t]he issue of ineffective assistance of appellate counsel, like any other claim, must be raised at the first opportunity. Johnson could have raised the issue in his original 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." See Opinion Denying Second Application for Post-Conviction Relief, Case No. PCD-2014-123, at 7 (internal quotation marks and citation omitted). As to Johnson's claim of ineffective assistance of post-conviction counsel, the OCCA cited Hale v. State, 934 P.2d 1100, 1102 (Okla. Crim. App. 1997), Okla. Stat. tit. 22, § 1089(D)(8) and (9) (Supp. 2006), and Rule 9.7(G), Rules of the Oklahoma Court of Criminal Appeals, and ruled that "Johnson's second application for post-conviction relief was filed . . . over a year 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." See Opinion Denying Second Application for Post-Conviction Relief, Case No. PCD-2014-123, at 8.

b. Procedural bars are independent and adequate

The Court finds that, upon application of the standards discussed in General Considerations, Part II, above, the procedural bars imposed by the OCCA are independent and adequate to preclude federal habeas corpus review. Clearly, the OCCA based its procedural bars on Johnson's failure to comply with state law. In his reply to the response to the petition, Johnson relies on Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (stating that, even when a prisoner has failed to comply with procedural requirements, the OCCA has the "power to grant relief when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right"), and argues that the OCCA's procedural rulings are neither adequate to preclude federal habeas review nor independent of federal law. See Dkt. # 55 at 20. In addition, Johnson discusses "the effect of Martinez v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S. Ct. 1911 (2013) on Petitioner's Ground Four claims." Id. at 21, 23-28. In the surreply (Dkt. # 58), Respondent addresses Johnson's claims concerning the adequacy and independence of the OCCA's procedural bar imposed on the claims raised in the second application for post-conviction relief.

The Court rejects Johnson's arguments. First, the OCCA acknowledged the holding in Valdez, 46 P.3d at 710-11, but declined to apply the holding to Johnson's claims, stating as follows:

> 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. However, Johnson's situation does not present the unique and compelling difficulties found in Valdez. Johnson'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. Johnson can present no such substantive issue. Johnson 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.

See Opinion Denying Second Application for Post-Conviction Relief, Case No. PCD-2014-123, at 5 (citations omitted). Thus, in the absence of "unique and compelling difficulties," such as the lack of consulate involvement as in Valdez, the OCCA declined to review the merits of Johnson's claims. As a result, Respondent contends that the OCCA's application of a procedural bar is independent of federal law and adequate to preclude habeas review. See Dkt. # 58 at 2-3.

The Court agrees with Respondent and finds that Respondent has satisfied the required burden of proof as whether the OCCA's procedural bar is independent and adequate to preclude habeas corpus review. See Bonney v. Wilson, 817 F.3d 703, 708 (10th Cir. 2016) (citing Hooks v. Ward, 184 F.3d 1206, 1216-17 (10th Cir. 1999)). Therefore, the Court rejects Johnson's argument based on Valdez. See Walker v. Martin, 562 U.S. 307, 316 (2011) (finding that "a discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review" (quoting Beard v. Kindler, 558 U.S. 53, 60 (2009))); Fairchild, 784 F.3d at 719 (explicitly finding that, even where the OCCA reports that defendant invoked Valdez, the procedural bars resulting from application of Okla. Stat. tit. 22, § 1089, and Rule 9.7(G)(3) were independent of federal law); Banks v. Workman, 692 F.3d 1133, 1145 (10th Cir. 2012) (concluding that Oklahoma's procedural bar is independent of federal law, notwithstanding the OCCA's power to excuse default in "extreme cases").

Furthermore, while the Court recognizes the need to be particularly vigilant in analyzing the adequacy of Oklahoma's procedural bar as applied to claims of ineffective trial assistance not raised

on direct appeal, see generally English v. Cody, 146 F.3d 1257, 1263-65 & nn. 5, 6 (10th Cir. 1998), the claim of ineffective assistance of trial counsel at issue was first presented to the OCCA in Johnson's second application for post-conviction relief. Johnson's claims of ineffective assistance of both trial and appellate counsel could have been, but were not, raised in the original application for post-conviction relief. The Tenth Circuit has affirmed the adequacy of the Oklahoma procedural bar as applied to claims that could have been, but were not, raised in an initial state application for post-conviction review. Cannon v. Gibson, 259 F.3d 1253, 1266 (10th Cir. 2001) (citing Thomas v. Gibson, 218 F.3d 1213, 1221-22 (10th Cir. 2000); Medlock, 200 F.3d at 1323; Smallwood v. Gibson, 191 F.3d 1257, 1267-69 (10th Cir. 1999); Moore v. Reynolds, 153 F.3d 1086, 1097 (10th Cir. 1998)).

Johnson also claims that his court-appointed post-conviction counsel provided ineffective assistance in failing to raise the defaulted claims of ineffective assistance of trial and appellate counsel. However, as discussed above, the OCCA declined to review the merits of the claim of ineffective assistance of post-conviction counsel, and imposed a procedural bar based on Johnson's failure to comply with state procedural rules, including Okla. Stat. tit. 22, § 1089(D)(8) and (9), and Rule 9.7(G), Rules of the Oklahoma Court of Criminal Appeals.[10] In his reply (Dkt. # 55 at 23-27), Johnson argues that his claim of ineffective assistance of post-conviction counsel should not be subject to a procedural bar under the exceptions announced by the Supreme Court in Martinez, 132

[10] Respondent does not address the adequacy of Rule 9.7(G)(3) (providing that "[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered"), and instead specifically states that "the OCCA's sixty-day rule is immaterial" to the procedural bar imposed on the claim of ineffective assistance of post-conviction counsel. See Dkt. # 58 at 7.

S. Ct. 1309 (2012) (holding that when state law prohibits a defendant from presenting a claim of ineffective assistance of trial counsel on direct appeal, post-conviction counsel's deficient performance in failing to assert the claim on collateral review can serve as cause for the default) and Trevino, 133 S. Ct. 1911 (2013) (holding that the rule in Martinez applied even when the state provided a theoretical opportunity to raise on direct appeal a claim of ineffective assistance of trial counsel, but the design and operation of the state's procedural requirements for doing so often made that theoretical possibility a practical impossibility).[11] However, the Tenth Circuit Court of Appeals has specifically addressed the issue of "whether Trevino applies to Oklahoma's procedures" for raising a claim of ineffective assistance of trial counsel on direct appeal. Fairchild , 784 F.3d at 721-23. In Fairchild, the Tenth Circuit reviewed Oklahoma's procedural rules and found that "Oklahoma provides a reasonable time to investigate a claim of ineffective assistance before raising it on direct appeal." Id. Based on Oklahoma's procedural rules and citing a multitude of cases in which the OCCA had reviewed the merits of ineffective assistance of counsel claims in direct appeals, the Tenth Circuit held that the "'design and operation' of Oklahoma's procedural framework" does not "'make[ ] it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.'" Id. at 723 (quoting Trevino,

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[11] Petitioner argues that, because he was represented both at trial and on direct appeal by attorneys from the Tulsa County Public Defender's Office, a conflict of interest precluded appellate counsel from raising trial ineffectiveness claims on direct appeal and he was effectively unable to raise those claims until he filed his original application for post-conviction relief. For that reason, Johnson argues that this case falls within the Trevino exception. This argument is unpersuasive. First, appellate counsel did in fact raise a claim of ineffective assistance of trial counsel on direct appeal. See Johnson, 272 P.3d at 732. Furthermore, the Supreme Court's focus in Trevino was state court procedures. Here, Johnson attempts to use a claim of appellate counsel ineffectiveness to justify application of the Trevino exception. That argument fails because it exceeds the scope of Trevino.

133 S. Ct. at 1921). Therefore, in this case, the Supreme Court's ruling in Trevino does not serve to provide an exception to the doctrine of procedural bar for Johnson's claims of ineffective assistance of post-conviction counsel for failing to raise claims of ineffective assistance of trial and appellate counsel in his original application for post-conviction relief.

For the foregoing reasons, the Court finds that the OCCA's procedural bars are both independent and adequate to preclude federal habeas corpus review. Accordingly, Johnson's claims of ineffective assistance of counsel first raised in his second application for post-conviction relief are procedurally barred and federal habeas review is precluded unless Johnson establishes cause and prejudice or a fundamental miscarriage of justice. Coleman, 501 U.S. at 749-50.

c. Ineffective post-conviction counsel claims barred under § 2254(i)

This Court also rejects Petitioner's claim of ineffective assistance of post-conviction counsel under 28 U.S.C. § 2254(i). That subsection explicitly states that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." Petitioner raises a specific claim that his state post-conviction counsel provided ineffective assistance. This case is proceeding under 28 U.S.C. § 2254. The AEDPA bars this Court from granting relief on Petitioner's claim of ineffective assistance of post-conviction counsel.

d. Johnson fails to overcome the procedural bars

As "cause" to overcome the procedural bars, Coleman, 501 U.S. at 749-50, Johnson attributes his failure to raise the Ground 4 claims of ineffective assistance of trial and appellate counsel in the original application for post-conviction relief to ineffective assistance of post-conviction counsel. However, ineffective assistance of post-conviction counsel cannot serve as

cause to explain Johnson's failure to raise these claims in the original application for post-conviction relief. 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" (internal quotation marks and citation omitted)); Spears v. Mullin, 343 F.3d 1215, 1255 (10th Cir. 2003) (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, 218 F.3d at 1222 (relying on "well-established Supreme Court precedent" to reject an allegation of cause based upon post-conviction counsel's representation). As discussed above, this remains unchanged by the Supreme Court's decisions in Trevino, 133 S. Ct. 1911 (2013), and Martinez, 132 S. Ct. 1309 (2012). Therefore, ineffective assistance of post-conviction counsel cannot serve as cause to overcome the procedural bar applicable to Johnson's claims of ineffective assistance of trial and appellate counsel first raised in the second application for post-conviction relief. Furthermore, Johnson does not argue that a fundamental miscarriage of justice will occur if his claims are not considered.

Therefore, the Ground 4 claims of ineffective assistance of counsel first presented to the OCCA in the second application for post-conviction relief are denied as procedurally barred.

III. Jury selection process (Ground 3)

As his third proposition of error, Johnson alleges that the jury selection process employed by the trial court violated his rights under the Sixth, Eighth, and Fourteenth Amendments. (Dkt. # 22 at 44). Johnson alleges that a prospective juror, "Juror R," was removed for cause "despite an insufficient record to justify that decision." Id. at 44-45. Johnson also complains that defense counsel was not afforded the opportunity to rehabilitate prospective Juror R before she was excused

for cause. Id. at 49-51 (citing Miller v. State, 313 P.3d 934, 960-63 (Okla. Crim. App. 2013) (finding that same trial court judge abused her discretion in refusing to allow defense counsel to rehabilitate three prospective jurors prior to removal for cause)). Johnson claims that "[w]ithout defense counsel being afforded the opportunity for rehabilitation of Juror [R], there can be no confidence in the court's decision to remove her. The trial court abused its discretion and the OCCA's failure to grant relief for same was unreasonable." Id. at 54. In response, Respondent argues that Johnson is not entitled to habeas relief under 28 U.S.C. § 2254(d). (Dkt. # 43 at 56).

On direct appeal, Johnson argued that the trial court's excusing three prospective jurors for cause "left him with a group of potential jurors composed of death penalty advocates." See Johnson, 272 P.3d at 730. The OCCA denied relief, finding as follows:

> The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Williams v. State, 2001 OK CR 9, ¶ 10, 22 P.3d 702, 709, quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985). "Due process of law requires that a prospective juror be willing to consider all the penalties provided by law and not be irrevocably committed to a particular punishment before the trial begins." Sanchez v. State, 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997. Deference must be paid to the trial judge who sees and hears the jurors because the trial judge is in a position to personally observe the panelists, and take into account a number of non-verbal factors that cannot be observed from a transcript. Harmon, 2011 OK CR 6, ¶ 18, 248 P.3d at 929-30; Grant v. State, 2009 OK CR 11, ¶ 17, 205 P.3d 1, 11. Further, where, as in the present case, the trial court used the questions set forth in Oklahoma Uniform Jury Instruction (OUJI-CR 2d) 1-5, and the last-recorded answers of these prospective jurors indicated that they were not able to consider the death penalty, this Court held that the trial court did not abuse its discretion in striking the prospective jurors for cause without allowing defense counsel an opportunity to further question them. Jones v. State, 2009 OK CR 1, ¶ 17, 201 P.3d 869, 877.
>
> Although Appellant makes a broad claim of error regarding the trial court's excusal of prospective jurors for cause without allowing defense counsel an opportunity to rehabilitate the jurors, he only complains specifically about the dismissal of one prospective juror. The record reflects that Juror R. initially told the

> trial court that she could consider all three punishment options and that she could impose the death penalty in the "proper case." However, she later expounded upon this clarifying that the only circumstance under which she could consider imposing the death penalty would be if the case involved someone she knew or her children. When the prosecution moved to have Juror R. removed for cause, defense counsel objected arguing that her inability to consider the death penalty as an option was not clear and he requested the opportunity to question her further. The trial court noted that Juror R.'s response was quite unequivocal about her inability to consider the death penalty in cases in which her children had not been murdered. The court denied defense counsel's request and excused Juror R. for cause. We find on this record that the trial court did not abuse its discretion in declining defense counsel's request to further voir dire this prospective juror and in excusing her for cause after she had been asked the appropriate clarifying questions regarding her willingness to consider the death penalty, and her last recorded response indicated that she was not able to follow the law and consider the death penalty.
>
> We also note that the record clearly does not support Appellant's broad assertion that the trial court excused all prospective jurors who were conscientiously opposed to the death penalty leaving him only with a group of potential jurors composed of death penalty advocates. As the State points out, the trial court denied the prosecution's motion to dismiss for cause one prospective juror who initially indicated that she could never return a verdict which assessed the death penalty but later stated that she could consider the death penalty under certain circumstances, but that she did not support it generally as she considered it to be a "violation of our basic human rights." This prospective juror, although personally opposed to the death penalty, stated that she could consider it as an option and was not removed from the panel for cause. The trial court did not improperly dismiss potential jurors leaving Appellant with a group of potential jurors composed of death penalty advocates. The jurors who served on this case indicated they could consider all three penalties provided by law. There was no abuse of discretion in the manner and extent of the trial court's voir dire. This proposition is denied.

Johnson, 272 P.3d at 730-31.

There is no question that "[c]apital defendants have the right to be sentenced by an impartial jury." Uttecht v. Brown, 551 U.S. 1, 22 (2007). "[D]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." Morgan v. Illinois, 504 U.S. 719, 727 (1992). An impartial juror in the capital setting is one who,

despite his or her views on capital punishment, can follow the trial court's instructions. Thus, "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (internal quotations marks omitted).

"[B]ecause determinations of juror bias cannot be reduced to question-and-answer sessions[,]" the printed record cannot fully capture the qualification assessment. Id. at 424-26, 434-35. Reviewing courts must therefore defer to the trial court's determination of whether a particular juror is qualified to serve. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." Uttecht, 551 U.S. at 9. Adding to this deference is even more deference – the deference embodied in the AEDPA standard for relief. In Eizember v. Trammell, 803 F.3d 1129 (10th Cir. 2015), the Tenth Circuit recently discussed the interplay of these deferential standards:

> How do these established standards play out when we're called on to review not a federal trial court on direct appeal but the reasonableness of a state's application of federal law on collateral review? In [Uttecht] the Court explained that a federal court owes what we might fairly describe as double deference: one layer of deference because only the trial court is in a position to assess a prospective juror's demeanor, and an "additional" layer of deference because of AEDPA's "independent, high standard" for habeas review. See id. at 9-10, 127 S. Ct. 2218. Indeed, the Court stressed that where, as here, the record reveals a "lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire, the trial court has broad discretion" on the issue of exclusion. Id. at 20, 127 S. Ct. 2218.

Id. at 1135-36. See also White v. Wheeler, 136 S. Ct. 456, 460, 462 (2015) (discussing the "doubly deferential" standard and stating that "simple disagreement does not overcome the two layers of deference owed by a federal habeas court in this context" (internal quotation marks omitted)).

Here, the OCCA's ruling is supported by the record demonstrating that the trial judge supervised a diligent and thoughtful voir dire. Juror R stated that she could not consider imposing the death penalty unless the case involved somebody that she knew or her children. Tr. Vol IV at 842-43. Based on Juror R's statements, it is clear that her views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath. Consequently, Petitioner has not shown that the OCCA unreasonably denied relief with respect to Juror R. Because the trial court is invested with broad discretion to conduct voir dire and the OCCA addressed Petitioner's juror related claims in full and with reasoning supported by the record, Supreme Court authority and AEDPA deference mandate the denial of habeas corpus relief on Ground 3.

IV. Second stage jury instructions (Ground 5)

In Ground 5, Johnson claims that the second stage jury instructions were inadequate. (Dkt. # 22 at 103). Specifically, Petitioner alleges that the jury instructions failed to provide "guidance" on the meaning of the three possible sentences: life, life without parole, and death. Id. at 104. Johnson claims that "[m]any jurors believe any sentence other than death will allow for the possible discharge of a defendant onto the streets – a risk they are unwilling to take." Id. at 103-04. According to Johnson, "[t]he lack of adequate instructions to guide the jury's sentencing decision in this case violated Mr. Johnson's Sixth Amendment right to a fair trial, his Eighth Amendment right to a reliable capital sentencing, and his Fourteenth Amendment right to Due Process." Id. at

104. In support of his claim, Johnson cites Simmons v. South Carolina, 512 U.S. 154 (1994). Johnson acknowledges that the Tenth Circuit Court of Appeals has repeatedly rejected this claim, finding that Oklahoma's three-sentence choice serves to clarify the meaning of the sentencing options. See Dkt. # 22 at 108 (citing Mayes v. Gibson, 210 F.3d 1284 (10th Cir. 2000)). However, Johnson contends that the Tenth Circuit's "reasoning simply 'cannot be reconciled with [the Supreme Court's] well-established precedents interpreting the Due Process Clause.'" Id. at 109 (quoting Simmons, 512 U.S. at 164)). In response, Respondent argues that Johnson is not entitled to habeas relief under 28 U.S.C. § 2254(d). (Dkt. # 43 at 77).

On direct appeal, Petitioner claimed that the trial court erroneously denied defense counsel's request for an instruction defining "life without the possibility of parole," finding that the meaning of the phrase was "self-evident." See Johnson, 272 P.3d at 729. The OCCA reviewed the trial judge's ruling for an abuse of discretion and found as follows:

> This Court has long held that the meaning of life without parole is self-explanatory and an instruction on its meaning is not required. Warner v. State, 2006 OK CR 40, ¶ 158, 144 P.3d 838, 885. See also Murphy v. State, 2002 OK CR 24, ¶ 52, 47 P.3d 876, 886; Young v. State, 2000 OK CR 17, ¶ 102, 12 P.3d 20, 46. However, Appellant argues that this line of cases is outdated. In support of his argument Appellant cites to several cases where the jury asked questions about the punishment of life without parole although in the present case, the jury asked no questions indicating confusion about the punishment of life without the possibility of parole. Appellant also cites to Simmons v. South Carolina, 512 U.S. 154, 156, 114 S.Ct. 2187, 2190, 129 L.Ed.2d 133 (1994), wherein the Supreme Court held that "where the [capital] defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." However, where the jury is instructed on the three punishment options of life, life without the possibility of parole and death, this Court has held that the three-way choice fulfills the Simmons requirement that a jury be notified if the defendant is parole ineligible. Wood v. State, 2007 OK CR 17, ¶ 18, 158 P.3d 467, 475 ("[I]nstructing a capital sentencing jury on the three statutory punishment options, with their obvious distinctions, is sufficient to satisfy the due process concerns addressed in Simmons.").

> Appellant's argument regarding the necessity of an instruction defining the punishment option of life without the possibility of parole falls short. If there is a case which calls for the reconsideration of this issue, it is not the case before us. We find Appellant was not denied due process or a fundamentally fair trial when the trial judge declined to provide the jury more information on this issue than is currently required.

Id.

Johnson fails to demonstrate that the OCCA's adjudication of this claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. In Welch v. Workman, 639 F.3d 980 (10th Cir. 2011) (unpublished), the Tenth Circuit Court of Appeals rejected the habeas petitioner's claim that his constitutional rights were violated by the trial judge's refusal to instruct the jury on the definition of life without the possibility of parole, distinguishing Simmons and finding as follows:

> In Simmons, the Supreme Court held when the defendant's future dangerousness is at issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process requires that the sentencing jury be told the defendant is parole ineligible. Id. at 156, 114 S. Ct. 2187. The Court reasoned that consideration of a defendant's future dangerousness is affected by the possibility the defendant may be allowed to return to society. Id. at 168-69, 114 S. Ct. 2187. Similarly, in Shafer v. South Carolina, the Court held, because the jury was only given two sentencing options – life imprisonment or death – without being told the meaning of life imprisonment, the sentence must be reversed. 532 U.S. 36, 121 S. Ct. 1263, 149 L. Ed. 2d 178 (2001).
>
> In applying Simmons, we have concluded that if the trial court simply directs the jury to review the instructions again, the defendant's due process rights are not violated. See McCracken v. Gibson, 268 F.3d 970, 980-81 (10th Cir. 2001); McGregor v. Gibson, 219 F.3d 1245, 1256 (10th Cir. 2000), *overruled en banc on other grounds by* 248 F.3d 946 (10th Cir. 2001). Conversely, in cases in which the trial court informs the jury that it is not to consider the issue of whether the defendant is parole ineligible, we have found a due process violation. See Mollett v. Mullin, 348 F.3d 902, 915 (10th Cir. 2003) (determining trial court violated defendant's due process rights by stating, "matters of parole are beyond the purvue [sic] of the jury or the court to consider") (quotation marks omitted); Johnson v. Gibson, 254 F.3d 1155, 1164, 1166 (10th Cir. 2001) (holding trial court's response, "[i]t is inappropriate for you to consider the question asked," "did more than give a

> non-responsive answer" but, contrary to Supreme Court precedent, "told the jury that parole eligibility could not be considered . . . .") (quotation marks omitted).

Welch, 639 F.3d at 1005.

As noted by the OCCA, the jury in this case did not ask for clarification of the meaning of life without parole. Johnson, 272 P.3d at 729. Nothing in the record suggests Johnson's jury suffered from confusion with regard to the sentencing options. This Court may not depart from controlling legal authority clearly set forth in a published decision of the Tenth Circuit Court of Appeals. See U.S. v. Spedalieri, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("[a] district court must follow the precedent of this circuit") (citations omitted). The Tenth Circuit has repeatedly rejected attempts to apply Simmons/Shafer to Oklahoma's three-option sentencing scheme, absent highly unusual circumstances not present in this case. Welch, 639 F.3d at 1005. The false choice at issue in Simmons simply does not come into play when the jury is told, as it was here, that it has three distinct sentencing options and those options distinguish (on their face) between life imprisonment with and without the possibility of parole. Id. Because Johnson's reliance on Simmons has been squarely foreclosed by the Tenth Circuit, Johnson is not entitled to habeas corpus relief on Ground 5.

V. Cumulative error (Ground 6)

As his final proposition of error, Johnson alleges that the accumulation of errors violated his rights under the Sixth, Eighth, and Fourteenth Amendments. See Dkt. # 22 at 110. Johnson raised cumulative error claims on direct appeal and in both applications for post-conviction relief. As to the cumulative error claim raised on direct appeal, the OCCA found as follows:

> [u]pon 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.

Johnson, 272 P.3d at 733. The OCCA also denied relief on Johnson's cumulative error claim raised on post-conviction, finding that "[h]aving determined on direct appeal that there was no accumulation of error sufficient to warrant reversal of his conviction or modification of his sentence, and having found no merit to any of the claims raised here, there is no basis for granting post-conviction relief on this cumulative error claim." See Dkt. # 22-1 at 12 (Opinion Denying Application for Post-Conviction Relief and Motion for Evidentiary Hearing, Case No. PCD-2009-1025). Lastly, the OCCA denied relief on the cumulative error claim raised in the second application for post-conviction relief, finding that "[h]aving determined that all of Johnson's claims are waived, we find no basis for granting post-conviction relief on this claim of cumulative error." See Opinion Denying Second Application for Post-Conviction Relief, Case No. PCD-2014-123, at 8 (citations omitted).

In analyzing a cumulative error claim, the proper inquiry "aggregates all the errors that individually might be harmless [and therefore insufficient to require reversal], 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." U.S. v. Wood, 207 F.3d 1222, 1237 (10th Cir. 2000) (quotation omitted). The Tenth Circuit has held that a cumulative error analysis is applicable only where there are two or more actual errors. Workman v. Mullin, 342 F.3d 1100, 1116 (10th Cir. 2003). Additionally, only federal constitutional errors can be aggregated to permit relief on habeas review. Matthews v. Workman, 577 F.3d 1175, 1195 (10th Cir. 2009). Cumulative impact of non-errors is not part of the analysis. Le, 311 F.3d at 1023 (citing U.S. v. Rivera, 900 F.2d 1462, 1470-71 (10th Cir. 1990)). "[T]he task 'merely' consists of 'aggregat[ing] all the errors that have

been found to be harmless' and 'analyz[ing] whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.'" Grant, 727 F.3d at 1025 (quoting Rivera, 900 F.2d at 1470).

Having rejected each of Petitioner's claims of constitutional error, the Court finds he has shown no cumulative error warranting habeas relief. The OCCA's denials of Johnson's cumulative error claims were not contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Habeas corpus relief is denied on Ground 6.

VI. Requests for an evidentiary hearing and for discovery

In his petition, Johnson requests that he be allowed to engage in discovery (Dkt. # 22 at 126-30) and that the Court hold an evidentiary hearing on Grounds 1, 2, and 4 (id. at 122-26), and on "any other issue, substantive or procedural, which involves facts not apparent form the existing record and on any issue that involves facts disputed by Respondent" (id. at 126). Both requests shall be denied.

In his request for discovery, Johnson states that he "is concerned prosecutors may not have disclosed exculpatory evidence in this case." (Dkt. # 22 at 129). Specifically, Petitioner states that "exculpatory/mitigating evidence may exist in relation to the victim Brooke Whitaker and her family, particularly her brother and biological father." Id. Significantly, however, Johnson never presented a claim to the OCCA alleging that the prosecutors failed to disclose exculpatory or mitigating evidence. As a result, those claims are unexhausted and procedurally barred. Furthermore, Johnson's guilt has never been contested and any argument to the contrary is not credible. Johnson's request for discovery is denied.

Also, it is clear that an evidentiary hearing is unwarranted in this case. As to that part of Ground 4 found to be procedurally barred, 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 raised in Grounds 1, 2, and 4 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 28 U.S.C. § 2254 is warranted. As a result, 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"). The Court further finds that there are no disputed factual questions remaining that could possibly entitle Johnson to habeas corpus relief. He has failed to demonstrate the need for an evidentiary hearing under either 28 U.S.C. § 2254(e)(2), or any other governing principle of law. Williams, 529 U.S. 420.

Accordingly, Johnson's requests for an evidentiary hearing and for discovery are denied.

CERTIFICATE OF APPEALABILITY

Rule 11, Rules Governing Section 2254 Cases in the United States District Courts, instructs that "[t]he district court must issue or deny a certificate of appealability when it enters a final order

adverse to the applicant." The Court recognizes that "review of a death sentence is among the most serious examinations any court of law ever undertakes." Brecheen v. Reynolds, 41 F.3d 1343, 1370 (10th Cir. 1994). To be granted a certificate of appealability, however, Johnson must demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner can satisfy that standard by demonstrating that the issues raised are debatable among jurists of reason or that the questions deserve further proceedings. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). "[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citations omitted).

The Court reviewed each of Johnson' propositions of error, and found none of the claims merited or warranted habeas relief. However, the Court has carefully considered each issue and finds that the following enumerated issues could be debated among jurists or could be resolved differently by another court:

Ground 1: Ineffective assistance of appellate counsel.

Ground 2: Ineffective assistance of counsel.

Ground 4: Ineffective assistance of counsel.

Additionally, this Court finds that these issues deserve encouragement to proceed further. See Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citing Barefoot, 463 U.S. at 893).

CONCLUSION

After careful review of the record in this case, the Court concludes that Johnson has not established that he is in custody in violation of the Constitution or laws of the United States. His petition for writ of habeas corpus shall be denied.

ACCORDINGLY IT IS HEREBY ORDERED that:

1. The Clerk of Court shall note the substitution of Terry Royal, Warden, as party respondent in place of Anita Trammell, Warden.

2. The petition for writ of habeas corpus (Dkt. # 22) is **denied**.

3. Johnson's motions for an evidentiary hearing and for discovery (Dkt. # 22) are **denied**.

4. A certificate of appealability is **granted** as to the claims of ineffective assistance of counsel raised in Grounds 1, 2, and 4.

5. A separate judgment shall be entered in this matter.

DATED this 11th day of October, 2016.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

¶ 15 While an attorney failing to fulfill her obligation as counsel and missing court dates is not to be taken lightly, it is clear that the Ms. Cowley did not willfully defraud or intentionally harm her clients in any way. Indeed, if the original charges against the her had proceeded through disciplinary proceedings, it is doubtful the punishment would have risen to the level of disbarment. *State ex rel. Oklahoma Bar Association v. Whitebook*, 2010 OK 72, 242 P.3d 517 and *State ex rel. Oklahoma Bar Association v. Beasley*, 2006 OK 49, 142 P.3d 410.

¶ 16 The evidence proves that Ms. Cowley used sound judgment in her activities following resignation. She exercised caution in avoiding situations that could have been perceived as the unauthorized practice of law. She has also worked to remain current in her knowledge of the law, earning 62.5 CLE credits since 2005. Ms. Cowley's youth and lack of experience in balancing a law practice appear to have contributed greatly to the factors leading to her resignation. Her work in the areas of legal research and writing illustrate Ms. Cowley's present legal competence.

CONCLUSION

¶ 17 Ms. Cowley has met her burden of proof, showing by clear and convincing evidence that she has fully complied with the requirements of Rule 11, RGDP. Petition for reinstatement is granted. The Bar has filed an application for the costs of this proceeding as allowed by Rule 11.1(c), RGDP, in the amount of $1,160.31. The Petitioner is ordered to pay these costs within ninety days of the date of this opinion.

PETITION FOR REINSTATEMENT GRANTED; COSTS ASSESSED.

CONCUR: COLBERT, V.C.J., KAUGER, WATT, WINCHESTER, EDMONDSON, REIF, GURICH, JJ.

DISSENT: TAYLOR, C.J., COMBS, J.

2012 OK CR 5

Raymond Eugene JOHNSON, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. D–2009–702.

Court of Criminal Appeals of Oklahoma.

March 2, 2012.

Background: Defendant was convicted by jury in the District Court, Tulsa County, Dana L. Kuehn, J., of two counts of first degree murder, first degree arson, after former conviction of two or more felonies. Defendant appealed.

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

(1) city police officers had jurisdiction to arrest defendant in neighboring city;

(2) defendant's confession was voluntary;

(3) defendant was not denied due process by trial court's refusal to give his proffered instruction defining "life without the possibility of parole;"

(4) trial court did not abuse its discretion in denying defendant's request for individual, sequestered voir dire;

(5) trial court did not abuse its discretion in declining defense counsel's request to further voir dire prospective juror or in excusing juror for cause; and

(6) counsel's comments during opening statement did not constitute ineffective assistance.

Affirmed.

Lumpkin, J., concurred in result.

1. Criminal Law ⇦1153.6

When reviewing the denial of a motion to suppress evidence, the appellate court reviews the trial court's ruling for an abuse of discretion.

2. Criminal Law ⇐1139

Appellate court, on review of denial of motion to suppress evidence, reviews de novo the trial court's legal conclusion that the facts fail to establish a constitutional violation.

3. Automobiles ⇐349(13)

Any pretext on part of officers who arrested capital murder defendant on outstanding traffic warrants was irrelevant and did render arrest unlawful, though officers suspected he was involved in murder and arson, as officers arrested defendant on the warrants, which were valid and issued before the murders occurred. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐57.1

If police have a valid right to arrest an individual for one crime, it does not matter if their subjective intent is in reality to collect information concerning another crime. U.S.C.A. Const.Amend. 4.

5. Arrest ⇐63.4(2)

Whether a Fourth Amendment violation has occurred with respect to an arrest turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken. U.S.C.A. Const.Amend. 4.

6. Arrest ⇐57.1

If the alleged pretextual arrest could have taken place absent police suspicion of defendant's involvement in another crime, then the arrest is lawful. U.S.C.A. Const. Amend. 4.

7. Automobiles ⇐349(13)

City police officers had jurisdiction to arrest capital murder defendant in neighboring city on any of four outstanding traffic warrants against him, two of which were issued by district court for failure to appear for state traffic warrants and two were issued by the municipal court for failure to appear for tickets for violations of municipal ordinances, as officers had authority to arrest defendant under statutes providing that warrants, except those issued for violation of city ordinances, may be served by any peace officer to whom they may be directed or delivered, and that a law enforcement officer of the municipality or a county sheriff may serve an arrest warrant issued by the municipality any place within the state. 11 Okl.St. Ann. § 28–121; 22 Okl.St.Ann. § 175.

8. Criminal Law ⇐410.77

A suspect's statement to police is voluntary, and thus admissible in evidence, only when it is the product of an essentially free and unconstrained choice by its maker.

9. Criminal Law ⇐410.77

Whether a suspect's statements to police are voluntary in the legal sense, as necessary to be admissible in evidence, depends on an evaluation of all the surrounding circumstances, including the characteristics of the accused and the details of the interrogation.

10. Criminal Law ⇐413.43

When the admissibility of a confession is challenged at trial, the state must establish the voluntariness of the confession by a preponderance of the evidence.

11. Criminal Law ⇐1158.13

On appeal of trial court's ruling that a confession was voluntary, and, thus, admissible in evidence, the appellate court, considers whether the district court's ruling is supported by competent evidence of the voluntary nature of the statement.

12. Criminal Law ⇐410.80, 410.89, 411.96

Capital murder defendant's confession was voluntary; police officer who interviewed defendant at police station read defendant his rights and asked defendant if he understood them, defendant indicated that he understood his rights and he agreed to talk with officer defendant did not request an attorney, he did not appear to be under the influence of any type of intoxicants, and despite defendant's claim that officers who transported him to police station had hit him, interviewing officer testified that did not appear to have any injuries indicating that he had been assaulted, and videotape of interview corroborated interviewing officer's testimony.

13. Criminal Law ⚿1152.21(1)

Trial court's decision to give or refuse a requested jury instruction is reviewed on appeal for an abuse of discretion.

14. Sentencing and Punishment ⚿1780(3)

A capital murder defendant is not entitled to an instruction during the penalty phase requiring jury to find that the aggravating circumstances outweigh the mitigating circumstances; state law requires only that jurors unanimously find any aggravating circumstance beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

15. Constitutional Law ⚿4745

Sentencing and Punishment ⚿1780(3)

Capital murder defendant was not denied due process by trial court's refusal to give his proffered instruction defining "life without the possibility of parole," though defendant's future dangerousness was at issue as an aggravating circumstance, where jury was instructed on the three punishment options of life imprisonment, life imprisonment without the possibility of parole, and death, by which jury was informed that defendant was parole ineligible. U.S.C.A. Const. Amend. 14.

16. Criminal Law ⚿1152.2(2)

Appellate court reviews the manner and extent of a trial court's voir dire under an abuse of discretion standard.

17. Jury ⚿131(13)

Capital murder defendant has no automatic right to individual voir dire.

18. Jury ⚿131(1, 3)

Purpose of voir dire is to determine whether there are grounds to challenge prospective jurors for either actual or implied bias and to facilitate the intelligent exercise of peremptory challenges.

19. Jury ⚿131(13)

The crux of the issue of whether capital murder defendant is entitled to sequestered, individualized voir dire is whether he can receive a fair trial with fair and impartial jurors.

20. Jury ⚿131(13)

Trial court did not abuse its discretion in denying capital murder defendant's request for individual, sequestered voir dire, as defendant did not allege that his case received extensive pre-trial media coverage or that jurors were not candid in their responses about the death penalty or provided responses tailored to avoid jury service, while trial court did not grant defense counsel's request, it did use jury questionnaires, it advised attorneys that the request could be reurged and reconsidered if required and trial court did allow some potential jurors to be questioned individually and outside the presence of the prospective jury panel when such was deemed necessary.

21. Jury ⚿108

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

22. Constitutional Law ⚿4754

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

23. Criminal Law ⚿1158.17

On appellate review of trial judge's decision as to whether to excuse a prospective juror for cause, deference must be paid to the trial judge who sees and hears the jurors, because the trial judge is in a position to personally observe the panelists, and take into account a number of non-verbal factors that cannot be observed from a transcript.

24. Jury ⚿108

Trial court did not abuse its discretion in declining defense counsel's request to further voir dire prospective juror or in excusing juror for cause, as while juror initially told trial court that she could consider all three punishment options and that she could impose the death penalty in the "proper case," she later expounded upon this clarifying that

the only circumstance under which she could consider imposing the death penalty would be if the case involved someone she knew or her children, such that her last recorded response indicated that she was not able to follow the law and consider the death penalty.

25. Sentencing and Punishment ⚿1648

Relief from death penalty was not warranted for capital murder defendant on the basis of race, where defendant could not prove that jurors in his particular case acted with a discriminatory purpose.

26. Criminal Law ⚿1881

Defendant asserting ineffective assistance of counsel is required to show: (1) that counsel's performance was constitutionally deficient, and (2) that counsel's performance prejudiced the defense, depriving him of a fair trial with a reliable result. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⚿1883

For purposes of the prejudice prong of a claim of ineffective assistance of counsel, it is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding; rather, defendant must show that there is a "reasonable probability," i.e., a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional error, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

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

28. Criminal Law ⚿1942

Defense counsel's comments during his opening statement that might have suggested that capital murder defendant set his girlfriend on fire was a reasonable trial strategy, and, thus, was not ineffective assistance, in light of defendant's confession to intentionally murdering girlfriend and his denial of intentionally harming his infant daughter; counsel, in order to diffuse the impact of this evidence indicating that defendant intentionally set his daughter on fire, offered to jury alternative explanation that evidence indicated that when girlfriend was set on fire, she ran to get infant, who was her daughter, and when she did this, she transferred gasoline to infant before dropping infant to the floor in her failed attempt to save them both. U.S.C.A. Const.Amend. 6.

29. Sentencing and Punishment ⚿1647

Defendant's death sentences on his convictions for murdering his girlfriend and infant daughter were not imposed under the influence of passion, prejudice, or any other arbitrary factor. 21 Okl.St.Ann. § 701.13.

30. Sentencing and Punishment ⚿1679, 1684, 1705, 1720

Evidence supported jury's findings in support of its assessment of death sentences on defendant for murdering his girlfriend and infant daughter of aggravating circumstances that defendant 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, that the murders were especially heinous, atrocious, or cruel, and that there existed a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. 21 Okl.St.Ann. § 701.13.

An Appeal from the District Court of Tulsa County; the Honorable Dana L. Kuehn, District Judge.

Doug Drummond, First Asst. District Attorney, Julie Doss, William Musseman, Assistant District Attorneys, Tulsa, OK, attorneys for the State at trial.

Pete Silva, Chief Public Defender, Gregg Graves, Assistant Public Defender, Tulsa, OK, attorneys for the defendant at trial.

Curtis M. Allen, Assistant Public Defender, Tulsa, OK, attorney for appellant on appeal.

E. Scott Pruitt, Attorney General of Oklahoma, Jennifer L. Strickland, Assistant Attorney General, Oklahoma City, OK, attorneys for State on appeal.

OPINION

C. JOHNSON, Judge.

¶ 1 Appellant, Raymond Eugene Johnson, was tried by a jury and convicted of First Degree Murder (Counts I and II) and First Degree Arson, After Former Conviction of Two or More Felonies (Count III) in the District Court of Tulsa County, Case No. CF 2007–3514. 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.[1] 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 and at life imprisonment on Count III. The trial court sentenced Appellant accordingly ordering the sentences to be served consecutively. From this Judgment and Sentence Appellant has appealed.[2]

I. FACTS

¶ 2 Brooke Whitaker lived in a house on East Newton Street in Tulsa with her four children, the youngest of which, Kya, was fathered by Appellant. Around February of 2007, Appellant moved in with Brooke and her children. By April of that year, Brooke and Appellant were having problems. Brooke told her mother that Appellant had threatened to kill her. Because she was frightened, Brooke and her children moved in with her mother for two weeks. During this two week period, Appellant called Brooke's mother and told her that he was going to kill Brooke. Around the first of May, Brooke and Appellant got back together and Appellant moved back in with Brooke.

¶ 3 While Appellant was living with Brooke he was also involved in a relationship with Jennifer Walton who became pregnant by him. Around the first or second week of June 2007, Appellant wanted to move out of Brooke's house and Jennifer arranged for him to stay with a friend of hers, Laura Hendrix. On June 22, 2007, Appellant called Jennifer and asked her to give him a ride. She picked him up from Laura's house at around 10:30 that evening. They drove past the place where Brooke worked to make sure she was at work and they drove past her house to make sure that nobody was there. Jennifer dropped Appellant off on a side street near Brooke's house so that Appellant could walk to the house and retrieve some of his clothes. She left him and drove back to her mother's house. Appellant was going to call another friend to give him a ride to Jennifer's mother's house when he was finished getting his clothes.

¶ 4 At about 1:00 a.m. on June 23, 2007, Appellant called Jennifer and told her that he was at Denny's eating while waiting for Brooke to get home. He called again around 5:00 a.m. to let her know that a friend would bring him home shortly. Appellant called Jennifer two more times around 10:00 a.m. that morning. During these calls he told her that Brooke was dead and that a friend had shot her. Appellant wanted Jennifer to pick him up at a school near Brooke's house. The next time he called he told her that the friend who had killed Brooke was thinking about burning down the house. While Jennifer was waiting for Appellant at the school, Appellant called her again and asked her to pick him up on the street behind the street where Brooke lived. When she arrived at this location, Appellant walked to her car from the driveway of a vacant house. He was carrying two garbage bags which he put in the trunk. When Appellant got into the front passenger seat of Jennifer's car, she noticed that he smelled like gasoline and had blood on his clothes. As she drove away, Jennifer saw flames pouring out the front window of Brooke's house.

1. 21 O.S.2001, § 701.12(1)(2)(4)(7).

2. Appellant's Petition in Error was filed December 18, 2009. Appellant's Brief in Chief was filed October 18, 2010. Appellee's Brief was filed February 15, 2011. This matter was submitted to this Court on February 23, 2011. Oral Argument was held on October 25, 2011.

APPENDIX D

¶ 5 Appellant instructed Jennifer to drive to Laura's house where he retrieved the garbage bags from the trunk of the car before they went inside. Appellant placed the bags on the living room floor and started taking things out of them, including money that had blood on it. He washed the blood off of the money and took a shower. When Jennifer asked more questions about what had happened, Appellant told her that his friend had hit Brooke with a hammer. After Appellant got out of the shower he said that he needed to go back to Brooke's house to look for her cell phone because he had used the phone to call Jennifer and he was concerned that his fingerprints would be on it. When they arrived, the street where Brooke's house was located was blocked off and ambulance, fire trucks and police cars were present. Appellant drove to the street behind Brooke's house and looked to see if he had dropped the phone on the driveway of the vacant house he had walked by earlier. He did not find the phone. Appellant next drove to Warehouse Market so that he could put some money on a prepaid credit card. Then they went to the parking lot across the street where Appellant threw his clothes in the dumpster. After stopping at McDonalds and Quiktrip, they went back to Laura's house where Jennifer stayed with Appellant a while before she left him there and went to her mother's house.

¶ 6 Firefighters were called to Brooke's house on east Newton Street at 11:11 a.m. on June 23, 2007. When they arrived and made entry into the house, the inside was pitch black with smoke. After they ventilated the house and cleared some of the smoke they found Kya's burned body inside the front door on the living room floor behind the couch. The infant was dead. In a room off the living room, firefighters found Brooke Whitaker on the floor partially underneath a bunk bed. She had extensive burns on her body, was unconscious without a pulse and was not breathing. Paramedics initiated resuscitation efforts and a pulse was reestablished. On the way to the hospital paramedics noticed a lot of blood pooling around her head. When they looked closer, they observed large depressions, indentations and fractures on her head. Brooke was pronounced dead shortly after she arrived at the hospital and was later determined to have died from blunt trauma to the head and smoke inhalation. Seven month old Kya was determined to have died from thermal injury, the effect of heat and flames.

¶ 7 Investigation of the crime scene revealed numerous items of evidence. A burned gasoline can was recovered from the front yard of the residence and samples of charred debris were collected from the house. The debris was tested and some of it was confirmed to contain gasoline. Additionally, investigators noted blood smears and blood soaked items in numerous places throughout the house. Brooke's cell phone was found on the living room floor and investigators discovered that two calls had been made from this phone to Jennifer Walton shortly before the fire was reported.

¶ 8 Walton was located and interviewed by the police later that same day. She told police about Appellant's involvement in the homicide and she told them that she had taken Appellant to a trash dumpster when he returned from Brooke's house after the fire. When the police went to the dumpster they recovered a white trash bag that contained boots, bloody clothing, Brooke Whitaker's wallet with her driver's license inside and a claw hammer. They also found blood on the passenger side door handle inside Walton's car.

¶ 9 Pursuant to information given to them by Walton, the police went to Laura Hendrix's house in Catoosa to look for Appellant. They set up surveillance and observed him exit the house and walk down the street at around 6:00 p.m. on June 23, 2007. He was arrested at that time on outstanding warrants and was taken to the Tulsa Police Station where he waived his Miranda rights and gave a statement to the police.

¶ 10 Appellant told the police that Jennifer Walton had taken him to Brooke's house to get his stuff the evening of June 22, 2007. When Brook came home in the early morning hours of June 23, 2007, they talked and started arguing with each other. During the argument, Brooke pushed him, called him names and got a knife to stab him. He

grabbed a hammer and hit her on the head. Brooke fell to the floor and asked Appellant to call 911. Appellant hit her about five more times on the head with the hammer. Despite her injuries, Brooke was conscious and talking. She said that her head hurt and felt like it was going to fall off. Brooke begged Appellant to get help and told him that she wouldn't tell the police what had happened but he wouldn't do it because he didn't want to go to jail. Instead, Appellant went to the shed and got a gasoline can. He doused Brooke and the house, including the room where the baby was, with gasoline. He set Brooke on fire and went out the back door. Appellant admitted that he was trying to kill Brooke.

II. ARREST

[1, 2] ¶ 11 Appellant complains in his first proposition that the use of traffic warrants to arrest him was pretextual and the officers who arrested him were acting outside of their jurisdiction. Thus, he claims, his arrest was illegal and the statements he made to the police shortly after his arrest should have been suppressed. Prior to trial Appellant filed a motion to suppress the evidence based upon this ground. A hearing was held and Appellant's motion to suppress was subsequently overruled. Appellant argues on appeal that this ruling was in error. When reviewing the denial of a motion to suppress, we review the trial court's ruling for an abuse of discretion. *See Nilsen v. State,* 2009 OK CR 6, ¶ 5, 203 P.3d 189, 191; *Seabolt v. State,* 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237. We review *de novo* the trial court's legal conclusion that the facts fail to establish a constitutional violation. *Burton v. State,* 2009 OK CR 10, ¶ 9, 204 P.3d 772, 775.

[3–6] ¶ 12 Appellant first asserts that his arrest on outstanding warrants was illegal because it was solely a pretext to hold him for questioning about the homicides. However, if police have a valid right to arrest an individual for one crime, it does not matter if their subjective intent is in reality to collect information concerning another crime. *Bland v. State,* 2000 OK CR 11, ¶ 48, 4 P.3d 702, 718. "Whether a Fourth Amendment violation has occurred, 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, . . . and not on the officer's actual state of mind at the time the challenged action was taken.' " *Maryland v. Macon,* 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985) quoting *Scott v. United States,* 436 U.S. 128, 136–39 n. 13, 98 S.Ct. 1717, 1722, 1724 n. 13, 56 L.Ed.2d 168 (1978). *See also Whren v. United States,* 517 U.S. 806, 812–13, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89, 98 (1996) (Supreme Court reiterated its position that it was unwilling to entertain Fourth Amendment challenges based upon the actual motivations of individual officers); *Phillips v. State,* 1999 OK CR 38, ¶ 41, 989 P.2d 1017, 1031. If the police action could have been taken against an individual "even absent the 'underlying intent or motivation,' there is no *conduct* which ought to have been deterred and thus no reason to bring the Fourth Amendment exclusionary rule into play for purposes of deterrence." *See* 1 Wayne R. LaFave, *Search and Seizure* § 1.4(e) (4th ed. 2004). In other words, if the alleged pretextual arrest could have taken place absent police suspicion of Appellant's involvement in another crime, then the arrest is lawful. In the present case, Appellant was arrested on outstanding warrants which were issued before the murders occurred. The officers legally executed the valid arrest warrants and their subjective intent does not make this otherwise lawful conduct illegal or unconstitutional.

[7] ¶ 13 Appellant also complains that his arrest was unlawful because the Tulsa police officers who arrested him were acting outside of their jurisdiction when they arrested him in Catoosa. The record reflects that Appellant had four outstanding warrants at the time of his arrest—two were misdemeanor warrants issued by the Tulsa County District Court for failure to appear for state traffic warrants and two were issued by the Tulsa Municipal Court for failure to appear for tickets for violations of municipal ordinances. As the State points out, Tulsa police officers had jurisdiction under 22 O.S.2001, § 175 to arrest Appellant anywhere in the state on the warrants issued by the district court for failure to appear on state traffic warrants.

Section 175 provides, "All warrants, except those issued for violation of city ordinances, may be served by any peace officer to whom they may be directed or delivered." Further, Tulsa police officers had the authority under 11 O.S.2001, § 28–121 to arrest Appellant anywhere in the state on the warrants issued for violation of municipal ordinances by the Tulsa County Municipal Court. Section 28–121 provides that "[a] law enforcement officer of the municipality or a county sheriff may serve an arrest warrant issued by the municipality any place within this state." Thus, it is clear that the Tulsa police officers had jurisdiction to arrest Appellant in Catoosa on any of the four outstanding bench warrants. Accordingly, the trial court did not abuse its discretion in denying Appellant's motion to suppress based upon his argument that his arrest was unlawful.

III. STATEMENT

[8–10] ¶ 14 In Proposition II, Appellant argues that his statement should have been suppressed because it was not voluntarily made. A statement is voluntary, and thus admissible in evidence, only when it is "the product of an essentially free and unconstrained choice by its maker." *Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961). "Whether a suspect's statements to police are voluntary in the legal sense depends on an evaluation of all the surrounding circumstances, including the characteristics of the accused and the details of the interrogation." *Underwood v. State,* 2011 OK CR 12, ¶ 33, 252 P.3d 221, 238, *citing Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). When the admissibility of a confession is challenged at trial, the State must establish voluntariness by a preponderance of the evidence. *Young v. State,* 2008 OK CR 25, ¶ 19, 191 P.3d 601, 607.

[11] ¶ 15 In the present case, the district court heard evidence regarding the voluntariness of Appellant's statement at an *in camera* hearing pursuant to *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and ruled the statement was admissible. On appeal, we consider whether the district court's ruling "is supported by competent evidence of the voluntary nature of the statement." *Davis v. State,* 2004 OK CR 36, ¶ 34, 103 P.3d 70, 80. Again, we review the trial court's ruling on a motion to suppress for an abuse of discretion. *See Nilsen,* 2009 OK CR 6, ¶ 5, 203 P.3d at 191.

[12] ¶ 16 Appellant testified at the *Jackson v. Denno* hearing that after his arrest, he was placed in the front passenger seat of a police car. When the officer got into the driver's seat, he said to Appellant, "Well, let me get this out of the way. I don't want the fine citizens of Tulsa to see the police kicking your ass." The officer started to drive and asked Appellant if he knew why he was under arrest. Appellant responded that he did not. The officer who was driving then hit Appellant on the left side of his face. The officer asked if they needed to "refresh" Appellant's memory and he asked the officer in the backseat of the car to pass him a telephone book. The officer in the backseat passed the telephone book to the officer who was driving and then used leg irons to choke Appellant from behind. During the drive, the officer in the front seat hit Appellant in the face a couple of times with the telephone book. The officers showed Appellant a picture of his daughter, Kya, and asked him if it refreshed his memory. Appellant started crying and the officers told him to work with them and tell them what happened. Appellant told the officers that he wanted an attorney and they told him that there would be no lawyers and that he would not waste their time. Appellant said that he made statements to the officers in the car during the transport because he was "kind of scared" and knew that they would continue to harm him.

¶ 17 Appellant testified at the *Jackson v. Denno* hearing that at the police station, he was placed in a room where he waited alone for about five minutes before he was joined by Detective Regalado who read him his rights. When Appellant said that he wanted a lawyer, Regalado stopped the tape recorder and left the room. When Regalado returned, he was accompanied by the two officers who had transported Appellant to the police station. They started hitting Appellant and giving him body blows. They beat

him and told him that there would be no lawyers. They coerced him into cooperating with them by threatening to charge Jennifer Walton with accessory to murder. When they were finished, they put him back into his chair and left the room again. A few minutes later Regalado began the interview again and Appellant cooperated and gave his video recorded statement. When the interview was finished, Appellant was escorted by the police to a car in which he was transported to the David L. Moss correctional facility. As he was walking to that car, news reporters took photographs of him. He claimed in the hearing that these photos showed injuries and swelling on his face from the beatings he had endured prior to giving his statement.[3]

¶ 18 Tulsa Police detective Victor Regalado also testified at the *Jackson v. Denno* hearing. He testified that before the interview began, he directed another officer to remove Appellant's handcuffs from behind him and move them to the front. Regalado introduced himself, and asked Appellant preliminary questions about the spelling of his name and his education. Then Regalado read Appellant his rights and asked Appellant if he understood them. Appellant indicated that he understood his rights and he agreed to talk with the officer. Appellant did not request an attorney. Regalado testified that Appellant did not appear to be under the influence of any type of intoxicants. Appellant appeared to understand what Regalado was saying to him and he gave coherent answers, articulating well and appearing to be focused. Regalado denied making any threats or promises to Appellant or seeing others make threats or promises to him. Regalado denied kicking, hitting or punching Appellant and testified that he did not see anyone do these things to Appellant. Regalado testified that Appellant did not appear to have any injuries indicating that he had been assaulted by the victim or anyone else. When asked, Appellant referred only to one slight injury he had received about two weeks earlier during an argument with Brooke Whitaker. Appellant did not ask to stop questioning or request an attorney during the interview.[4]

¶ 19 Tulsa Police Officer Philip Forbrich testified for the State in rebuttal. He was one of the officers who transported Appellant from Catoosa to the police station in Tulsa. Forbrich testified that Detective Sokoloski drove and Appellant was placed in the front passenger seat of the car while he sat in the back seat. The ride to the police station took about thirty minutes during which there was very little conversation. Forbrich testified Appellant was not hit or threatened during the transport.

¶ 20 Despite Appellant's testimony at the suppression hearing, the record strongly supports the conclusion that his statement and waiver of his rights was the product of a free and deliberate choice rather than intimidation or coercion. We find from the totality of the circumstances, there is competent evidence supporting the trial court's decision denying Appellant's motion to suppress his statements.

IV. ISSUES RELATING TO JURY INSTRUCTIONS

[13] ¶ 21 In his third proposition Appellant argues that the trial court erred in denying defense counsel's request that the jury be instructed that they had to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. The trial court's decision to give or refuse a requested jury instruction is reviewed on appeal for an abuse of discretion. *Soriano v. State*, 2011 OK CR 9, ¶ 10, 248 P.3d 381, 387.

[14] ¶ 22 Appellant acknowledges that this Court has held that the State is not required to prove beyond a reasonable doubt

3. Photos taken of Appellant as he left the police station were admitted into evidence. These were not good quality photos and do not clearly depict injuries to Appellant's face.

4. The video tape of Appellant's interview with Detective Regalado was admitted into evidence during the hearing. This recording corroborated Regalado's testimony about the content of the interview as well as Appellant's demeanor and appearance during the interview. The video recording does not depict the injuries Appellant claims were inflicted prior to the interview.

that the alleged aggravating circumstances outweigh the mitigating factors. *Harris v. State,* 2004 OK CR 1, ¶ 66, 84 P.3d 731, 754–55. However, he urges this Court to reconsider this position in light of the recently decided Supreme Court authority. We have already done so. In *Glossip v. State,* 2007 OK CR 12, ¶ 118, 157 P.3d 143, 161, we rejected the argument that failure to give this instruction resulted in a death sentence that is unconstitutional and unreliable under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Further, we have consistently rejected this claim in more recent cases. *See Cuesta–Rodriguez v. State,* 2010 OK CR 23, ¶ 103, 241 P.3d 214, 245; *Mitchell v. State,* 2010 OK CR 14, ¶ 127, 235 P.3d 640, 665; *Rojem v. State,* 2009 OK CR 15, ¶ 27, 207 P.3d 385, 396; *Torres v. State,* 2002 OK CR 35, ¶¶ 5–7, 58 P.3d 214, 216. We are not persuaded to revisit the issue here and we continue to hold that no such instruction is necessary, as Oklahoma law requires only that jurors unanimously find any aggravating circumstance beyond a reasonable doubt. *Harris,* 2004 OK CR 1, ¶ 66, 84 P.3d at 754–55. The trial court did not abuse its discretion in declining this requested instruction.

[15] ¶ 23 Defense counsel also requested an instruction defining "life without the possibility of parole." The trial court declined to give the requested instruction finding that the meaning of this phrase is self-evident. Appellant argues in his fourth proposition that this ruling was in error. Again, the trial court's decision to give or refuse a requested jury instruction is reviewed on appeal for an abuse of discretion. *Soriano,* 2011 OK CR 9, ¶ 10, 248 P.3d at 387. Appellant notes that this Court has never required a trial court to give this type of instruction but he asks us to reconsider this issue in the case at bar.

¶ 24 This Court has long held that the meaning of life without parole is self-explanatory and an instruction on its meaning is not required. *Warner v. State,* 2006 OK CR 40, ¶ 158, 144 P.3d 838, 885. *See also Murphy v. State,* 2002 OK CR 24, ¶ 52, 47 P.3d 876, 886; *Young v. State,* 2000 OK CR 17, ¶ 102, 12 P.3d 20, 46. However, Appellant argues that this line of cases is outdated. In support of his argument Appellant cites to several cases where the jury asked questions about the punishment of life without parole although in the present case, the jury asked no questions indicating confusion about the punishment of life without the possibility of parole. Appellant also cites to *Simmons v. South Carolina,* 512 U.S. 154, 156, 114 S.Ct. 2187, 2190, 129 L.Ed.2d 133 (1994), wherein the Supreme Court held that "where the [capital] defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." However, where the jury is instructed on the three punishment options of life, life without the possibility of parole and death, this Court has held that the three-way choice fulfills the *Simmons* requirement that a jury be notified if the defendant is parole ineligible. *Wood v. State,* 2007 OK CR 17, ¶ 18, 158 P.3d 467, 475 ("[I]nstructing a capital sentencing jury on the three statutory punishment options, with their obvious distinctions, is sufficient to satisfy the due process concerns addressed in *Simmons.*").

¶ 25 Appellant's argument regarding the necessity of an instruction defining the punishment option of life without the possibility of parole falls short. If there is a case which calls for the reconsideration of this issue, it is not the case before us. We find Appellant was not denied due process or a fundamentally fair trial when the trial judge declined to provide the jury more information on this issue than is currently required.

V. ISSUES RELATING TO VOIR DIRE

[16] ¶ 26 Appellant argues in his fifth proposition that he was denied his constitutional right to an adequate voir dire by the trial court's denial of his request for sequestered, individualized voir dire. This Court reviews the manner and extent of a trial court's voir dire under an abuse of discretion standard. *Williams v. State,* 2008 OK CR 19, ¶ 27, 188 P.3d 208, 217.

[17–19] ¶ 27 Appellant acknowledges that this Court has never found that individual, sequestered voir dire is required in all capital

cases. Indeed, "[w]e have left the decision for individual voir dire to the discretion of the district court and have rejected requests for a mandatory rule requiring the use of individual sequestered voir dire in capital cases." *Harmon v. State,* 2011 OK CR 6, ¶ 13, 248 P.3d 918, 929, *citing Jones v. State,* 2006 OK CR 17, ¶ 16, 134 P.3d 150, 156.[5] Although a defendant has no automatic right to individual voir dire, he has the right to request such as individual voir dire has been deemed appropriate in certain cases. *See Harmon,* 2011 OK CR 6, ¶ 13, 248 P.3d at 929 (individual voir dire appropriate in cases that have been the subject of extensive pre-trial news coverage); *Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 57, 241 P.3d at 233 ("Individual voir dire is appropriate where the record shows jurors were not candid in their responses about the death penalty, or that responses were tailored to avoid jury service."). Because the purpose of voir dire is to determine whether there are grounds to challenge prospective jurors for either actual or implied bias and to facilitate the intelligent exercise of peremptory challenges, the crux of the issue is whether the defendant can receive a fair trial with fair and impartial jurors. *Harmon,* 2011 OK CR 6, ¶ 13, 248 P.3d at 929; *Mitchell v. State,* 2010 OK CR 14, ¶ 11, 235 P.3d 640, 646.

[20] ¶ 28 Appellant does not allege that this case received extensive pre-trial media coverage or that jurors were not candid in their responses about the death penalty or provided responses tailored to avoid jury service. Rather, he argues generally that the denial of individualized, sequestered voir dire adversely affected his right to the effective assistance of counsel and due process. The record does not support his argument. As the State points out, although the trial court did not grant defense counsel's request for individualized voir dire, the court did utilize jury questionnaires. Additionally, the trial court advised the attorneys that the motion for individualized voir dire could be reurged and reconsidered if required and the trial court did, in fact, allow some potential jurors to be questioned individually and outside the presence of the prospective jury panel when such was deemed necessary. There is no evidence that full sequestered, individualized voir dire was necessary or that Appellant did not receive a fair trial with fair and impartial jurors. The district court did not abuse its discretion in denying defense counsel's request.

¶ 29 Appellant argues in his Sixth Proposition that the jury selection process violated his constitutional rights because the trial court improperly dismissed potential jurors who revealed in voir dire that they would 'automatically' exclude the death penalty as an option due to their personal beliefs, without giving defense counsel the opportunity to further question and rehabilitate them. Appellant complains that the trial court's excusal of these prospective jurors for cause left him with a group of potential jurors composed of death penalty advocates. Again, the manner and extent of a trial court's voir dire is reviewed on appeal under an abuse of discretion standard. *Williams,* 2008 OK CR 19, ¶ 27, 188 P.3d at 217.

[21–23] ¶ 30 "The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Williams v. State,* 2001 OK CR 9, ¶ 10, 22 P.3d 702, 709, *quoting Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). "Due process of law requires that a prospective juror be willing to consider all the penalties provided by law and not be irrevocably committed to a particular punishment before the trial begins." *Sanchez v. State,* 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997. Deference must be paid to the trial judge who sees and hears the jurors because the trial judge is in a position to personally observe the panelists, and take into account a number of non-verbal factors that cannot be observed from a transcript. *Harmon,* 2011 OK CR 6, ¶ 18, 248 P.3d at

5. This Court in *Jones* declined to adopt a mandatory rule requiring the use of individual sequestered voir dire in capital cases but did urge trial courts to use a juror questionnaire and conduct individual sequestered voir dire in capital cases. *Jones,* 2006 OK CR 17, ¶ 16, 134 P.3d at 156.

929–30; *Grant v. State,* 2009 OK CR 11, ¶ 17, 205 P.3d 1, 11. Further, where, as in the present case, the trial court used the questions set forth in Oklahoma Uniform Jury Instruction (OUJI–CR 2d) 1–5, and the last-recorded answers of these prospective jurors indicated that they were not able to consider the death penalty, this Court held that the trial court did not abuse its discretion in striking the prospective jurors for cause without allowing defense counsel an opportunity to further question them. *Jones v. State,* 2009 OK CR 1, ¶ 17, 201 P.3d 869, 877.

[24] ¶ 31 Although Appellant makes a broad claim of error regarding the trial court's excusal of prospective jurors for cause without allowing defense counsel an opportunity to rehabilitate the jurors, he only complains specifically about the dismissal of one prospective juror. The record reflects that Juror R. initially told the trial court that she could consider all three punishment options and that she could impose the death penalty in the "proper case." However, she later expounded upon this clarifying that the only circumstance under which she could consider imposing the death penalty would be if the case involved someone she knew or her children. When the prosecution moved to have Juror R. removed for cause, defense counsel objected arguing that her inability to consider the death penalty as an option was not clear and he requested the opportunity to question her further. The trial court noted that Juror R.'s response was quite unequivocal about her inability to consider the death penalty in cases in which her children had not been murdered. The court denied defense counsel's request and excused Juror R. for cause. We find on this record that the trial court did not abuse its discretion in declining defense counsel's request to further voir dire this prospective juror and in excusing her for cause after she had been asked the appropriate clarifying questions regarding her willingness to consider the death penalty, and her last recorded response indicated that she was not able to follow the law and consider the death penalty.

¶ 32 We also note that the record clearly does not support Appellant's broad assertion that the trial court excused all prospective jurors who were conscientiously opposed to the death penalty leaving him only with a group of potential jurors composed of death penalty advocates. As the State points out, the trial court denied the prosecution's motion to dismiss for cause one prospective juror who initially indicated that she could never return a verdict which assessed the death penalty but later stated that she could consider the death penalty under certain circumstances, but that she did not support it generally as she considered it to be a "violation of our basic human rights." This prospective juror, although personally opposed to the death penalty, stated that she could consider it as an option and was not removed from the panel for cause. The trial court did not improperly dismiss potential jurors leaving Appellant with a group of potential jurors composed of death penalty advocates. The jurors who served on this case indicated they could consider all three penalties provided by law. There was no abuse of discretion in the manner and extent of the trial court's voir dire. This proposition is denied.

VI. CONSTITUTIONALITY OF THE DEATH PENALTY

¶ 33 Appellant contends in his seventh proposition that his death sentence must be reversed because capital punishment is unconstitutional as applied. Appellant's argument, that capital punishment is unworkable and ultimately unconstitutional, is based largely upon the position of the American Law Institute that the death penalty cannot be adequately administered. This argument is not unlike earlier arguments urging this Court to adopt the resolution of the American Bar Association recommending a moratorium on the imposition of death penalty. We have consistently rejected this position. *See Martinez v. State,* 1999 OK CR 47, ¶ 27, 992 P.2d 426, 432; *Alverson v. State,* 1999 OK CR 21, ¶ 58, 983 P.2d 498, 517; *Patton v. State,* 1998 OK CR 66, ¶ 115, 973 P.2d 270, 300.

[25] ¶ 34 In the present case, Appellant notes several obstacles to providing adequate capital justice including the politicization of the capital process, racial discrimination, inadequacy of court regulation, inadequacy of

resources of capital defense services and the lack of meaningful independent federal review of capital conviction. Most of these arguments are policy arguments which are best left to the legislature. *Hogan v. State,* 2006 OK CR 19, ¶ 82, 139 P.3d 907, 934 (policy matters fall within the purview of the legislature and not the courts). Further, although issue of race as a factor in the imposition of the death penalty is not a policy argument, Appellant acknowledges that he cannot prove that his sentence of death was racially motivated. Absent such a showing, relief is not warranted on this claim. *Alverson,* 1999 OK CR 21, ¶ 58 n. 79, 983 P.2d at 517 n. 79, *citing McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)(relief will not be granted on the basis of discrimination unless the Appellant can show the jurors in his particular case acted with discriminatory purpose).

¶ 35 As in earlier cases, Appellant has failed to offer authority showing that his execution would be violative of the constitution. We decline to consider this issue further.

VII. EFFECTIVE ASSISTANCE OF COUNSEL

[26, 27] ¶ 36 In his eighth proposition, Appellant argues that he was denied his Sixth Amendment right to the effective assistance of counsel because his attorney conceded in his opening statement, without Appellant's consent, that Appellant had set Brooke Whitaker on fire. 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.*

[28] ¶ 37 In support of his position, Appellant cites to *Jackson v. State,* 2001 OK CR 37, ¶ 25, 41 P.3d 395, 400, where this Court stated, "a complete concession of guilt is a serious strategic decision that must only be made after consulting with the client and after receiving the client's consent or acquiescence." However, the record before this Court reveals that defense counsel in the present case did not expressly concede guilt. Rather, in opening argument, defense counsel stated that he anticipated the jury would hear evidence from the Fire Marshall indicating that Kya's body was found at the point of ignition. In order to diffuse the impact of this evidence indicating that Appellant intentionally set Kya on fire, defense counsel offered another explanation. He suggested to the jury that this evidence "indicat[ed] that when Brooke was set on fire," she ran to get Kya and when she did this, Brooke transferred gasoline to Kya before dropping the child to the floor in her failed attempt to save them both. While this argument may have suggested that the evidence would show that Appellant set Brooke on fire, this was not an unreasonable trial strategy in light of Appellant's confession to intentionally murdering Brooke and his denial of intentionally harming Kya. The entire argument taken in context supports the conclusion that defense counsel's argument was neither an overt nor a complete concession of guilt and thus, Appellant's consent was not required. *See Lott v. State,* 2004 OK CR 27, ¶ 51, 98 P.3d 318, 337.

¶ 38 Appellant has failed to show his counsel's representation fell below an objective standard of reasonableness or that any errors by counsel were so serious as to deprive him of a fair trial with a reliable result. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Appellant was not denied his Sixth Amendment right to the effective assistance of counsel.

VIII. CUMULATIVE ERROR

¶ 39 Finally, Appellant claims that trial errors, when considered cumulatively, deprived him of a fair sentencing determination. This Court has recognized that concession 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 v. State,* 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 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.

IX. MANDATORY SENTENCE REVIEW

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

[29] ¶ 41 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, improper 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.

[30] ¶ 42 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, that the murders were especially heinous, atrocious, or cruel 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. Appellant's jury did not consider any improper aggravating evidence in deciding punishment. Weighing the 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

¶ 43 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. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

A. JOHNSON, P.J., LEWIS, V.P.J., and SMITH, J.: concur.

LUMPKIN, J.: concur in result.

2012 OK CIV APP 19

Donald Joseph CABER, Jr., Petitioner/Appellant,

v.

Kendra L. DAHLE, Respondent/Appellee.

No. 108,421.

Released for Publication by Order of the Court of Civil Appeals of Oklahoma, Division No. 2.

Court of Civil Appeals of Oklahoma, Division No. 2.

Jan. 30, 2012.

Background: Father of out of wedlock child filed a motion that sought sole custody of child, a finding that mother was in contempt of court, and permission to relocate out of state with child. The District

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RAYMOND EUGENE JOHNSON,	)	
	)	**NOT FOR PUBLICATION**
Petitioner,	)	
v.	)	Case No. PCD 2009-1025
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

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

C. JOHNSON, JUDGE:

Petitioner, Raymond Eugene Johnson, was tried by a jury for the crimes of First Degree Murder (Counts I and II) and First Degree Arson, After Former Conviction of Two or More Felonies (Count III) in the District Court of Tulsa County, Case No. CF 2007-3514. The jury found Johnson 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 and at life imprisonment on Count III. The trial court sentenced Johnson accordingly ordering the sentences to be served consecutively. He appealed his convictions to this Court in Case No. D-2009-702. We affirmed Johnson's Judgment and Sentence in *Johnson v. State*, 2012 OK CR 5, 272 P.3d 720.

Johnson now seeks post-conviction relief in this Court, raising two propositions of error. The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. Under the Capital Post-Conviction Procedure Act, the only claims that may be raised are those that "[w]ere not

and could not have been raised in a direct appeal" and that also "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22 O.S.Supp.2006, § 1089(C)(1) & (2). "[T]his 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).

Ineffective Assistance of Appellate Counsel

Johnson specifically claims in his first proposition that he was denied his Sixth Amendment right to the effective assistance of counsel because his appellate counsel failed to raise several meritorious claims on appeal, most involving alleged failings of trial counsel. Petitioner asserts that this Court should not apply a procedural bar to consideration of the claims of ineffective assistance of trial counsel, but rather, should consider each on its merits as appellate counsel omitted these claims on direct appeal because he was

operating under an actual conflict of interest.[1] As is explained below, this Court is required to consider the merits of each claim of ineffective assistance of appellate counsel. When the claim is that appellate counsel was ineffective for failing to raise issues of ineffective assistance of trial counsel, the merits of the claims involving the alleged failings of trial counsel will necessarily be considered.[2] *See Smith v. State*, 2010 OK CR 24, ¶ 9, 245 P.3d 1233, 1237.

Claims of ineffective assistance of appellate counsel may be raised for the first time on post-conviction appeal because it is usually a petitioner's first opportunity to allege and argue the issue. All post-conviction claims of ineffective assistance of appellate counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Smith v. Robbins*, 528 U.S. 259, 289, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) ("[Petitioner] must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel."); *Coddington v. State*, 2011 OK CR 21, ¶ 3, 259 P.3d 833, 835; *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding (in this case the

[1] Johnson alleges that because his lead trial counsel was appellate counsel's supervisor, appellate counsel was operating under an actual conflict of interest at the time of his direct appeal which caused him to fail to raise several meritorious claims of ineffective assistance of trial counsel.

[2] Accordingly, we need not address the issue of whether appellate counsel failed to raise the issues of ineffective assistance of trial counsel because of a conflict of interest.

appeal) would have been different. *Strickland*, 466 U.S. at 687-689, 104 S.Ct. at 2064-2066. "A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011)(quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065).

In reviewing a claim of ineffective assistance of appellate counsel under *Strickland*, this Court must look to the merits of the issue(s) that appellate counsel failed to raise. *See Malicoat v. Mullin*, 426 F.3d 1241, 1249 (10th Cir. 2005) ("[I]n certain circumstances, appellate counsel's omission of an issue may constitute ineffective assistance under *Strickland*. In analyzing such claims, the court must consider the merits of the omitted issue")(citing *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765-766, 145 L.Ed.2d 756 (2000)); *Cargle v. Mullin*, 317 F.3d 1196, 1205 (10th Cir. 2003)("The very focus of a *Strickland* inquiry regarding performance of appellate counsel is upon the merits of omitted issues, and no test that ignores the merits of the omitted claim in conducting its ineffective assistance of appellate counsel analysis comports with federal law."). Only an examination of the merits of the omitted issue(s) will reveal whether appellate counsel's performance was deficient or whether the failure to raise the issue on appeal prejudiced the defendant, i.e., whether there is a reasonable probability that raising the omitted issue would have resulted in a different outcome in the defendant's direct appeal. As with any ineffective assistance claim, an ineffective assistance of appellate counsel

claim can sometimes be disposed of for failure to show prejudice without addressing the attorney's performance. *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); *Bland v. State*, 2000 OK CR 11, ¶ 113, 4 P.3d 702, 731("When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed.").

Johnson first alleges that appellate counsel was ineffective for failing to argue on direct appeal that trial counsel was constitutionally ineffective for acquiescing to the trial court's proposed procedure to conduct the sentencing proceeding for arson in a third stage after the capital sentencing proceeding. In *Perryman v. State*, 1999 OK CR 39, ¶ 14, 990 P.2d 900, 905, this Court set forth the procedure to be used when a defendant is charged with both capital murder and non-capital felonies for which the State does not seek to enhance punishment by proof of prior convictions. This Court noted in *Perryman* that because sentencing juries in unenhanced, non-capital crimes should not be exposed to evidence of statutory aggravating circumstances or victim impact evidence, "[w]henever a defendant is charged with multiple counts, one or more of which is capital murder and one or more of which are unenhanced non-capital offenses, trial shall be bifurcated. The non-capital crimes shall be tried to guilt or innocence and punishment in the first stage. The capital murder crimes shall be tried to guilt or innocence in the first stage and punishment in the second stage." *Id.*

We held in *Williams v. State*, 2001 OK CR 9, ¶ 42, 22 P.3d 702, 715, however, that *Perryman* is not controlling when the State seeks to enhance the defendant's non-capital felonies which are tried together with a charge of capital murder. In *Williams*, the defendant was convicted of capital murder and a non-capital felony that the State sought to enhance. We found no error where the trial court tried the case in a trifurcated proceeding; after the guilt/innocence stage, the jury considered punishment on the capital murder conviction in a second stage and then considered the non-capital felony conviction subject to enhancement in a third stage. This Court noted that the procedure used was not prohibited by statute and that appropriate limiting instructions were given which eliminated any potential prejudice. *Williams*, 2001 OK CR 9, ¶ 43, 22 P.3d at 715-16.

Like *Williams*, Johnson was convicted of capital murder and a non-capital felony subject to enhancement. The procedure suggested by the trial court and agreed to by the attorneys prevented the jury from hearing about all of Johnson's five prior felony convictions prior to considering punishment on the capital charge and, as in *Williams*, the jury was given an appropriate limiting instruction.[3] Johnson has not demonstrated prejudice from this

[3] The following limiting instruction, approved in *Williams*, 2001 OK CR 9, ¶ 43 n. 6, 22 P.3d at 715 n. 6 was given in the present case:

> In determining the appropriate sentence in Count 3, ARSON – FIRST DEGREE, you may only consider evidence incorporated from the first stage of the trial and evidence pertaining to the State's allegations of previous convictions. You cannot consider evidence of prior bad acts by the Defendant which have not resulted in conviction, evidence of the underlying facts of the alleged former convictions, aggravating evidence or circumstances, or victim impact evidence, while determining the suitable punishment for Count 3, ARSON – FIRST DEGREE.

proper and lawful procedure or shown that trial counsel's performance was deficient for acquiescing to it. Nor has he shown that appellate counsel's performance was deficient for failing to assert otherwise on appeal. This argument fails under *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

Prior to the beginning of the second stage of trial the State objected to many of the defendant's listed witnesses on the grounds that their testimony was cumulative. Defense counsel advised the court that he had already submitted a shortened witness list. While the prosecutor still objected on the basis that the testimony of some of the remaining witnesses would be similar if not identical, defense counsel responded that each witness was important and he or she was going to describe his or her own unique relationship and experiences with the defendant. Defense counsel stated his intent to streamline the testimony and avoid cumulative effect as much as possible. The trial court overruled the State's objection to the cumulative nature of the defendant's intended mitigation witnesses. Defense counsel did, in fact, limit the testimony of some of the mitigation witnesses and did not call other listed witnesses to testify.

Johnson alleges on post-conviction that from the time the State filed its written objection to the defendant's mitigation witnesses, defense counsel was bullied by both the prosecutor and the trial judge into presenting a very limited case in mitigation. As a result, he argues, trial counsel was constitutionally ineffective and appellate counsel was, in turn, ineffective for failing to raise this issue on direct appeal. Although Johnson argues on post-conviction that

defense counsel was prevented from assisting him during a critical stage of trial causing fundamental constitutional error, this argument is not supported and is not well taken. Johnson has not shown that trial counsel's performance was deficient or a reasonable probability that but for the alleged failings of trial counsel the outcome of his capital sentencing proceeding would have been different. Thus, we cannot find appellate counsel constitutionally ineffective for failing to argue the same on direct appeal. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

Next, Johnson argues that the trial court committed reversible error in the capital sentencing stage when it refused to admit some of the defense's proffered relevant mitigating evidence and he asserts that appellate counsel was constitutionally ineffective for not raising the issue on direct appeal. Johnson specifically complains that the trial court improperly admitted only three of the five childhood family photographs that the defense intended to present, declined to admit a two to three minute videotape of him preaching a sermon while he was incarcerated, and limited the introduction of an audio recording of him singing to only a thirty second portion of a song. Although Johnson argues strenuously that the trial court erred in excluding relevant mitigating evidence at trial and that appellate counsel was ineffective for failing to raise the issue on direct appeal, he has failed to affirmatively prove prejudice resulting from appellate counsel's alleged omission. Accordingly, this argument must fail. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

Johnson also asserts that trial counsel was ineffective for failing to interview and investigate potential mitigation witnesses and prepare those that did testify more thoroughly. He alleges that appellate counsel was constitutionally ineffective for not raising the issue of ineffective assistance of trial counsel for these alleged failings on direct appeal. Johnson notes that trial counsel called several witnesses to testify in mitigation including his biological sister, two inmates who knew him from when he was incarcerated at Lexington, a friend involved in a prison ministry, three other ministers who knew Johnson through their own prison ministries and a couple who considered themselves to be Johnson's "second parents." However, Johnson complains that these mitigation witnesses failed to present a different side of him than that which they had seen in first stage – one that would allow the jury to consider the potential value of his life as a whole.

Johnson claims that several important potential mitigation witnesses who could have offered compelling testimony, or who could have added to the argument that his life was worth sparing, were not called to testify in mitigation. Some of the evidence he contends these witnesses could have presented was actually introduced through the testimony of other witnesses who did testify. For instance, although Jonson's mother did not want to testify in mitigation and was not called to do so, Johnson's sister testified that Johnson had grown up with and still had strong family support and that her mother loved Johnson and had visited him in prison. She also testified that if Johnson were sentenced to death it would be detrimental to her mother.

Although Johnson's step-father, Arthur Johnson, did not testify, Johnson's sister testified that he, too, loved and supported Johnson.

While the failure to call some of these potential witnesses precluded the jury from hearing first-hand some positive accounts of Johnson's life, it also precluded the jury from hearing some negative testimony about Johnson such as testimony about his earlier contacts with the police and his possible gang affiliation as a teenager. The decision not to persuade Johnson's mother to testify kept the jury from hearing her opinion that "It is like Raymond has two (2) personalities. He would be the best of the best and then be the worst of the worst."[4]

Johnson has not shown that trial counsel did not know of both the good and the bad that the potential witnesses had to offer. Nor has he shown that the decision not to call each of these witnesses constituted deficient performance of trial counsel. Finally, Johnson has failed to meet his burden of showing that the failure to call the omitted potential mitigation witnesses was prejudicial. As Johnson has not shown that trial counsel's performance regarding the investigation and development of mitigating evidence was deficient or that he was prejudiced by the alleged failings of trial counsel, we cannot find that appellate counsel was ineffective for failing to allege otherwise on direct appeal. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

[4] Affidavit of Linda Johnson, Attachment 5 to Johnson's Application for Post-Conviction Relief.

At trial, defense counsel requested that the jury be instructed as follows:

> 4. Raymond Johnson is thirty five (35) years old and under any of the three sentencing options will be incarcerated for the majority of if not the entirety of the remainder of his life;

The prosecutor objected to this requested instruction and the trial court modified it as follows:

> 4. Raymond Johnson is thirty five (35) years old;

Johnson argues on post-conviction that the trial court committed reversible error when it modified his requested jury instruction and appellate counsel was constitutionally ineffective for failing to raise this issue on direct appeal. Johnson has not shown that the requested instruction was proper, the modification was improper, or that the jury was improperly advised about the three punishment options. Accordingly, we cannot find appellate counsel rendered deficient performance by failing to raise this issue on direct appeal. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

Finally, Johnson alleges appellate counsel was ineffective for failing to argue on appeal that several instances of prosecutorial misconduct deprived him of his fundamental right to a fair trial and Due Process. He claims that appellate counsel should have raised on direct appeal that the prosecutor improperly argued facts not in evidence, misstated the law, incited societal alarm, evoked sympathy for the victims and denigrated mitigating evidence, and engaged in unprofessional and prejudicial conduct by yelling and pointing at him. Johnson has not shown a reasonable probability that but for appellate counsel's alleged deficient performance in failing to raise these issues on direct

appeal the result of the trial and sentencing proceedings would have been different. Johnson's argument fails under the *Strickland* test. *Id.*

Accumulation of Errors

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

Motion for Evidentiary Hearing

Also pending before the Court in connection with this application is Johnson's motion for an evidentiary hearing and discovery. A post-conviction applicant is entitled to an evidentiary hearing only if "the application for hearing and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2012). Additionally, in a post-conviction proceeding, we will remand for an evidentiary hearing only if we find there are "unresolved factual issues material to the legality of the applicant's confinement." 22 O.S.Supp.2006, § 1089(D)(5). Based on the existing record and the affidavits proffered with Johnson's application for post-conviction relief, we fail to discern any disputed questions

of fact that are material to Johnson's confinement. His request for an evidentiary hearing and discovery is denied.[5]

DECISION

After reviewing Johnson'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 Johnson's confinement; (2) Johnson'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, Johnson's Application for Post-Conviction Relief and Motion for Evidentiary Hearing and Discovery are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[5] Johnson also filed a Motion Reserving the Right to Supplement Original Application for Post-Conviction Relief – Death Penalty Case, wherein he requested the right to supplement his original application thirty days after any supplemental briefs are submitted in any possible remanded evidentiary hearing in his direct appeal case. This motion is now **DISMISSED** as **MOOT**.

OPINION BY C. JOHNSON, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
SMITH, J.: CONCUR

LUMPKIN, J.: CONCUR IN RESULTS

I agree that Petitioner is not entitled to post-conviction relief. However, I cannot agree with this Court's review of the parsed claim in Proposition One.

This Court's review under the amended Post-Conviction Procedure Act is narrow in scope. *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. A claim raised on direct appeal is barred by *res judicata." Id.*; *see also 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*). As I stated in my separate writing in *Lewis v. State*, 1998 OK CR 34, 970 P.2d 1177;

> I continue to question the viability of issues in post-conviction applications when direct appeal counsel has raised those same category of issues in the direct appeal, i.e. ineffective assistance of trial counsel, absent a showing the matters raised are outside the record on appeal and were not available to direct appeal counsel through the exercise of reasonable diligence. That post-conviction counsel raises the same claims in a different posture than that raised on direct appeal is not grounds for reasserting the claims under the guise of ineffective assistance of appellate counsel. The doctrine of res judicata does not allow the subdividing of an issue as a vehicle to relitigate it at a different stage of the appellate process. Direct appeal counsel competently raised the issues of prosecutorial misconduct and ineffective assistance of trial counsel on direct appeal. Just because post-conviction counsel has the benefit of reviewing appellate counsel's brief on direct appeal, and with the benefit of hindsight, envisions a new method of presenting the arguments is not a legal basis for disregard of the procedural bar. In other words, "post-conviction review does not afford defendants the opportunity to reassert

> claims in hopes that further argument alone may change the outcome in different proceedings." *Trice v. State*, 912 P.2d 349, 353 (Okla.Cr.1996). *See also Hooks v. State*, 902 P.2d 1120, 1124 (Okl.Cr.1995); *Fowler v. State*, 896 P.2d 566, 570 (Okl.Cr.1995).
>
> In this case, the claims of prosecutorial misconduct and ineffective assistance of trial counsel, as raised on direct appeal, contained relevant legal arguments supported by pertinent facts and legal authority. This was sufficient to enable the Court to consider the issues. That appellate counsel was not successful in those challenges is not grounds for a finding of ineffectiveness. As appellate counsel's challenges to the prosecutor's misconduct and trial counsel's effectiveness were not deficient, further argument on post-conviction would not render the issue meritorious. *Id.* 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. *See Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

Id., 1998 OK CR 34, ¶ 5, 970 P.2d at 1182, (Lumpkin, J., concurring in result).

Turning to the present case, Petitioner claims that he received ineffective assistance of appellate counsel based upon the underlying claim of ineffective assistance of trial counsel. Petitioner's direct appeal counsel competently raised the issue of ineffective assistance of trial counsel on direct appeal. As Petitioner has not shown any objective factor, external to the defense, with impeded direct appeal counsel's ability to raise the issue, the Court should not entertain the merits of the present claim. Instead, the claim is barred by *res judicata*.

Further, I note that Petitioner's claim of accumulated errors on direct appeal in Proposition Two is not properly raised on post-conviction and the Court does not consider such claims. *Patton v. State*, 1999 OK CR 25, ¶ 18, 989 P.2d 983, 989.

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

RAYMOND EUGENE JOHNSON,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2014-123
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.)		

OPINION DENYING SECOND APPLICATION FOR POST-CONVICTION RELIEF, REQUEST FOR AN EVIDENTIARY HEARING AND MOTION TO SEAL DOCUMENTS AND PORTIONS OF RELATED HEARINGS

C. JOHNSON, JUDGE:

Petitioner, Raymond Eugene Johnson, was tried by a jury and convicted of First Degree Murder (Counts I and II) and First Degree Arson, After Former Conviction of Two or More Felonies (Count III) in the District Court of Tulsa County, Case No. CF 2007-3514. The jury found Johnson guilty on each count charged and assessed punishment at death on Counts I and II and at life imprisonment on Count III. The trial court sentenced Johnson accordingly ordering the sentences to be served consecutively. He appealed his convictions to this Court in Case No. D-2009-702. We affirmed Johnson's Judgment and Sentence in *Johnson v. State*, 2012 OK CR 5, 272 P.3d 720. The Supreme Court denied certiorari in *Johnson v. Oklahoma*, ___ U.S. ___, 133 S.Ct. 191, 184 L.Ed.2d 38 (2012). Johnson's original application for post-conviction relief was denied by this Court in *Johnson v. State*, Case No. PCD-2009-1025, (opinion not for publication) (December 14, 2012).

Before us is Johnson'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,* Title 22, Ch.18, App. (2014).

1.

Preliminary Statement and Notice of Conflict of Interest Claims

In his first application for post-conviction relief, Johnson alleged that because his lead trial counsel was appellate counsel's supervisor, appellate counsel was operating under an actual conflict of interest at the time of his direct appeal which caused him to fail to raise several meritorious claims of ineffective assistance of trial counsel. Because of this, Johnson urged this Court not to apply a procedural bar to consideration of the claims of ineffective assistance of trial counsel, but rather, to consider each on its merits. This Court declined to address the issue of whether appellate counsel failed to raise the issues of ineffective assistance of trial counsel because of a conflict of

interest and explained that when the claim on post-conviction is that appellate counsel was ineffective for failing to raise issues of ineffective assistance of trial counsel, the merits of the claims involving the alleged failings of trial counsel will necessarily be considered. *See Smith v. State*, 2010 OK CR 24, ¶ 9, 245 P.3d 1233, 1237. Accordingly, the allegations of error purported to have arisen from the alleged conflict of interest between trial and direct appeal counsel were addressed on their merits in Johnson's first application for post-conviction relief.

Johnson now, in his subsequent application for post-conviction relief generally states, without actually raising the issue, that the conflict of interest issue "greatly impacts" the ineffective assistance of counsel claims presented in this application, "standing on its own as a ground for relief." This assertion is not well taken. Claims raised in the initial application for post-conviction relief regarding appellate counsel's failure to assert ineffective assistance of trial counsel were addressed on the merits. Johnson has cited no good reason why claims not raised by his first post-conviction counsel regarding the alleged failings of trial and direct appeal counsel should not be subject to procedural bar. We will proceed accordingly.

2.

Request for Relief Under *Valdez v. State*

Johnson 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, Johnson's situation does not present the unique and compelling difficulties found in *Valdez*. Johnson'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. Johnson can present no such substantive issue. Johnson 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.

3.

Ineffective Assistance of Trial Counsel

Johnson claims that trial counsel was constitutionally ineffective for putting forth only a minimal effort in the sentencing stage of trial. He faults trial counsel with only giving 'lip service' to the idea that the jury would receive a fully realized mitigation presentation. Although Johnson notes that several witnesses were called to testify in mitigation, he asserts that the scope of their testimony was limited and that they were "wholly inadequate to address the

many different grounds for mitigation that existed." He also argues that trial counsel failed to properly argue the importance of the mitigating evidence in closing argument. Johnson goes on to claim that trial counsel was ineffective for failing to investigate and present all kinds of easily obtainable mitigation evidence regarding his life/social history including an evaluation by a trauma specialist/clinical psychologist and the testimony of numerous additional family and friends who could have been called as witnesses. He asserts that different aspects of his life and record, including hereditary factors, childhood abuse and neglect, his lack of a good moral education, his response to a structured environment, the growing desperation that led up to the crime, and his attempt to manage his anger should have been investigated and presented to help the jury better understand him and the murders.

"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 Johnson's argument that the basis for each element of this claim was available to defense counsel at the time of trial. It was, accordingly, available well before Johnson's direct appeal and original application for post-conviction relief, and is therefore waived. *Id.*; 22 O.S.Supp.2006, § 1089(D)(4)(b), (D)(8).

4.

Ineffective Assistance of Appellate Counsel

Johnson 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. Johnson 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 Johnson'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. (2014). Johnson's original application for post-conviction relief was decided in an unpublished opinion handed down on December 14, 2012. As the alleged failings of post-conviction counsel became apparent on or before that 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 December 14, 2012. Johnson's second application for post-conviction relief was filed on February 7, 2014, over a year 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.

Accumulation of Errors

Johnson finally claims that an accumulation of errors identified in this post-conviction application requires relief. Having determined that all of Johnson'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.

6.

Evidentiary Hearing

Johnson 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, Johnson'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.").

7.

Motion to Seal Documents and Portions of Related Pleadings

On March 20, 2014, Johnson filed a motion to seal documents and portions of related pleadings. The materials Johnson seeks to have filed under seal are "the personal, sensitive, and confidential materials ... involving adult and childhood sexual abuse; sexual dysfunction; and medical, sexual, and psychological reports and declarations."[1] Johnson's second application for post-conviction relief was filed in this Court on February 2, 2014, and post-conviction counsel acknowledges that she did not previously request these materials be filed under seal because she had been advised by more

[1] Johnson notes that these materials have already been filed under seal pursuant to a court order in a habeas corpus action before the United States District Court for the Northern District of Oklahoma Case No. CIV-13-16, styled *Raymond Eugene Johnson v. Anita Trammell.* The State avers that this court order was issued before the State was allowed to respond.

experienced counsel that such a mechanism was not available in this type of case as such is not provided for in this Court's rules. She asserts, however, that it is within this Court's broad discretion to order the sensitive materials be sealed. Counsel requests that this Court exercise that discretion and order the materials at issue be filed under seal, order additionally that any portion of respondent's response and all subsequent responses and supporting documents substantively addressing the sensitive materials be filed under seal and finally, direct the parties to prevent any further dissemination of the personal, confidential, and sensitive information, except as provided by court order.

The State has responded objecting to Johnson's motion. It notes initially that the United States Supreme Court has held that there is a presumption of openness in criminal proceedings. *Press-Enterprise Co. v. Superior Courts of California for Riverside County*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). The State also correctly asserts that under this Court's ruling in *Nichols v. Jackson*, 2001 OK CR 35, ¶ 10, 38 P.3d 228, 231, records filed in a court in connection with the public business of a criminal prosecution fall within the purview of the Oklahoma Open Records Act (Act). 21 O.S.2011, § 24A.1 et seq. In *Nichols*, this Court held:

> The Act does provide for the removal of materials from the public record by a court order. However, there is no provision in the Open Records Act which allows a court to balance an individual's interest in having records remain private and the public's interest in having access to the records. The Legislature has determined by statute the public's interest is greater, except where specific statutory exemption is given.

Nichols, 2001 OK CR 35, ¶ 11, 38 P.3d at 231-32 (internal quotations omitted). In the present case, Johnson has not shown that the records he seeks to have sealed fall within a statutorily recognized exemption. Nor has Johnson shown this Court that the removal of the specified material is necessary to forward the interests of justice as may be allowed under 51 O.S.2011, § 24A.29.

The documents Johnson seeks to have sealed include the very information he asserts his trial attorney was ineffective for failing to present during his trial. This sort of information is typically disclosed to the public in death penalty cases and Johnson has shown this Court no significant reason why it should now be sealed from the public. Johnson's motion to seal documents and portions of related pleadings is denied.

DECISION

Johnson's Second Application for Capital Post-Conviction Relief, Request for Evidentiary Hearing and Motion to Seal Documents and Portions of Related Pleadings are **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: C. JOHNSON, J.
LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

July 16, 2019

Mr. Thomas David Hird
Federal Public Defender's Office
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102

Re: Raymond Eugene Johnson
v. Mike Carpenter, Warden
Application No. 19A66

Dear Mr. Hird:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on July 16, 2019, extended the time to and including September 26, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Lisa Nesbitt
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
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NOTIFICATION LIST

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