No. _____

In the Supreme Court of the United States

JAMES DWIGHT PAVATT, PETITIONER

v.

TOMMY SHARP, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SARAH JERNIGAN MCGOVERN
PATTI PALMER GHEZZI
Assistant Federal Public Defenders Office of the Federal Public Defender
Western District of Oklahoma
Capital Habeas Unit
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Tel. (405) 609-5975
Sarah_Jernigan@fd.org

PETER KARANJIA
Counsel of Record
MICHAEL GELLER
JEAN CAMILLE GABAT
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, D.C. 20004
Tel. (202) 799-4000
peter.karanjia@dlapiper.com

Counsel for Petitioner James Dwight Pavatt

CAPITAL CASE

QUESTIONS PRESENTED

A divided panel of the Tenth Circuit, sitting *en banc*, vacated a panel opinion that reversed a capital sentence on the ground that the sentence rested on an unconstitutionally overbroad and arbitrary application of Oklahoma's aggravating factor for "especially heinous, atrocious, or cruel" homicides. The *en banc* court refused to reach the merits of Petitioner's Eighth Amendment challenge to his capital sentence, ruling that the claim was procedurally barred—even though the State had explicitly waived any procedural objection and Petitioner had timely presented his claim to the state court.

The questions presented are:

1. Whether this Court should summarily reverse the Tenth Circuit's clearly erroneous procedural ruling.

2. If the Court grants plenary review, whether a State's application of an aggravating factor to justify the death penalty violates the Eighth and Fourteenth Amendments—and conflicts with both this Court's precedents prohibiting the arbitrary imposition of capital sentences and the decisions of other appellate courts—when it makes punishable by death any homicide where the victim does not die immediately.

RELATED PROCEEDINGS

- *Pavatt v. Carpenter*, No. 14-6117, United States Court of Appeals for the Tenth Circuit. Judgment entered June 27, 2019.

- *Pavatt v. Royal*, No. 14-6117, United States Court of Appeals for the Tenth Circuit. Judgment entered June 9, 2017.

- *Pavatt v. Trammell*, No. CIV-08-470-R, United States District Court for the Western District of Oklahoma. Judgment entered May 1, 2014.

- *Pavatt v. State*, No. PCD-2009-777, Oklahoma Court of Criminal Appeals. Judgment entered February 2, 2010.

- *Pavatt v. State*, No. PCD-2004-25, Oklahoma Court of Criminal Appeals. Judgment entered April 11, 2008.

- *Pavatt v. State*, No. D-2003-1186, Oklahoma Court of Criminal Appeals. Judgment entered May 8, 2007.

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PETITION FOR A WRIT OF CERTIORARI

James Pavatt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1a–69a) is reported at 928 F.3d 906. The original panel opinion of the court of appeals (App. 70a–155a) is reported at 859 F.3d 920. The opinion of the district court denying Pavatt's petition for habeas corpus (App. 160a–303a) is unreported. The opinions of the Oklahoma Court of Criminal Appeals denying post-conviction relief (App. 304a–312a) are unreported. The opinion of the Oklahoma Court of Criminal Appeals on Pavatt's direct appeal from his conviction and capital sentence (App. 323a–382a) is reported at 159 P.3d 272.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on June 27, 2019. On September 11, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 25, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

28 U.S.C. § 2254(b)(3) provides in pertinent part:

> "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

STATEMENT

This capital case, which involves a fatal shooting in which the victim died seconds or minutes after he was shot, presents an important and recurring question of Eighth Amendment law: whether a State's application of its aggravating factor to justify the death penalty for "especially heinous, atrocious, or cruel" homicides violates the Eighth and Fourteenth Amendments when it authorizes capital punishment for all cases where the victim's death was *non-instantaneous*. The issue divided a panel of the Tenth Circuit, which initially granted Petitioner James Pavatt habeas relief and overturned his capital sentence on Eighth Amendment grounds. Sitting *en banc*, however, the Tenth Circuit reversed, with three judges dissenting. The *en banc* court's decision

conflicts with this Court's precedents—including *Maynard v. Cartwright*, 486 U.S. 356 (1988), which found Oklahoma's same "especially heinous, atrocious, or cruel" aggravator unconstitutional absent a proper limiting construction by state courts—as well as the decisions of multiple courts of appeals.

The *en banc* court refused to reach the merits of Pavatt's Eighth Amendment claim, maintaining that it was procedurally barred. But, as the original panel opinion (and *en banc* dissent) pointed out, the State explicitly waived any procedural objection. App. 101a, 62a–68a. In any event, Pavatt's claim was timely and fairly presented to the Oklahoma court and was well within the scope of the Tenth Circuit's Certificate of Appealability. As a result, this Court should summarily reverse the Tenth Circuit's clearly erroneous procedural ruling. In the alternative, the Court should grant plenary review to restore uniformity to the law on the life-and-death constitutional question presented by this case.

As to that core constitutional question, this Court's precedents have long established that capital-sentencing schemes must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (opinion of Stewart, J., joined by Blackmun, Powell, and Stevens, JJ.) (citation omitted). Thus, a State's use of an aggravating circumstance—such as Oklahoma's "especially heinous, atrocious, or cruel" factor here—"must provide a *principled basis*" for "distinguish[ing] those who deserve capital

punishment from those who do not." *Arave v. Creech*, 507 U.S. 463, 474 (1993) (citing, *inter alia*, *Godfrey*, 446 U.S. at 433) (emphasis added).

In conflict with this precedent and decisions of various appellate courts, the Tenth Circuit's *en banc* ruling rejects an Eighth Amendment challenge to Pavatt's capital sentence and allows an Oklahoma Court of Criminal Appeals decision to stand based on the theory that any *non-instantaneous* death—in this instance, the victim was conscious for anywhere between a few seconds and up to five minutes before his death—satisfies the State's aggravating factor for "especially heinous, atrocious, or cruel" conduct necessary to justify the death penalty. As the Oklahoma court reasoned, "[e]vidence that the victim was conscious and aware of the attack [in the moments before death] supports a finding of torture." App. 372a. That is particularly troubling because this Court has previously held that, absent a proper limiting construction, Oklahoma's "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague and overbroad because it failed to give a capital sentencer sufficient guidance: "[A]n ordinary person could honestly believe that *every* unjustified, intentional taking of human life is 'especially heinous.'" *Maynard*, 486 U.S. at 364 (emphasis added).

In the wake of *Maynard*, Oklahoma purported to limit its aggravator to cases involving torture or serious physical abuse, but decisions of the Oklahoma Court of Criminal Appeals have increasingly "begun to blur the common understanding of the requisite torture and conscious serious physical suffering, more

and more often finding the existence of these elements in almost every murder." *Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001). And despite increasing concerns expressed by individual members of the Tenth Circuit about the Oklahoma court's overbroad application of its aggravator in capital cases, that circuit continues to follow the Oklahoma court's flawed approach.

The present case exacerbates that trend, requiring this Court's intervention. As the dissenting judges below point out, under the State's logic, "the very act of committing the murder makes one eligible for the death penalty unless the victim was rendered unconscious immediately upon receiving the fatal blow." App. 61a. In conflict with *Maynard* and *Godfrey*, a rule that makes the death penalty turn on the mere happenstance of whether the victim dies instantly fails to "distinguish[] in a *principled* manner those deserving the death penalty from the many first-degree murderers who do not." *Id.*

The Tenth Circuit's decision rests on a clearly erroneous procedural ruling and leaves the door open to a "sharpshooter bonus" (App. 62a) that allows the death penalty to apply to any murder in which the victim does not die instantly. This application of the State's aggravator for "especially heinous, atrocious, or cruel" homicides transforms the death sentence from an extraordinary punishment to a default rule—indeed, one that would govern the vast majority of murders. In doing so, the Tenth Circuit not only contravenes the Eighth and Fourteenth Amendments, but also runs afoul of this Court's precedent and the decisions of multiple appellate

courts on a vital constitutional issue. This Court should summarily reverse or grant the petition and conduct plenary review to bring national uniformity to the law.

A. Victim's Non-Instantaneous Death And Pavatt's Conviction.

In 2001, the State of Oklahoma charged Pavatt, a decorated U.S. Air Force veteran who was honorably discharged in 1992, with the murder of his girlfriend's husband. App. 10a; Attachment 14 to Pet. for Writ of Habeas Corpus at 23. The State later added a charge of conspiracy to commit murder. App. 10a.

As the Oklahoma Court of Criminal Appeals ("OCCA") recounted, the victim, who was shot twice, did not die "instantaneous[ly]." App. 373a. Rather, he "remained conscious" for anything from seconds to up to five minutes after being shot. App. 139a (citing medical examiner's testimony that it was possible the victim died more or less than one minute after being shot and likely was unconscious within five minutes). On that basis, following a trial in 2003, the jury found that the State had established that the murder was "especially heinous, atrocious, or cruel"—one of Oklahoma's aggravating factors for capital-eligible offenses—and therefore, together with another aggravating circumstance, justified the death penalty. App. 10a.

B. Current Habeas Case.

1. On Direct Appeal, The Oklahoma Court Of Criminal Appeals Affirmed Pavatt's Capital Sentence.

Pavatt filed a direct appeal to the OCCA. Among other things, he argued that "[t]he evidence does not support the fact that the murder was 'especially' heinous, atrocious or cruel." App. 479a.

The OCCA acknowledged that this aggravating factor applies only if the victim's death was preceded by either "serious physical abuse or torture." App. 372a. The OCCA had adopted that interpretation of the aggravator to perform the narrowing function required by the Eighth Amendment. *See DeRosa v. Oklahoma*, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004). But the OCCA concluded that the aggravator was established in this case because "[e]vidence that the victim was conscious and aware of [the] attack supports a finding of torture." App. 372a (citing Oklahoma cases). In particular, the OCCA emphasized that the victim's "death was not instantaneous," and the facts "tend[ed] to show that [the victim] . . . was conscious of the fatal attack for several minutes." App. 374a.[1] In other words, because

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[1] The court cited the following to support this conclusion: (1) the medical examiner's testimony that "death was not instantaneous"; (2) evidence that the victim died while "clutching a trash bag of empty aluminum cans" (which the court construed as evidence that the victim was conscious and trying to shield himself); and (3) the victim's wife's claim in a 911 call that the victim was "still conscious and attempting to talk to her." App. 373a–374a.

the shooting did not result in the victim's *instantaneous* unconsciousness, it was deemed to be a form of especially heinous torture that makes the defendant eligible for the death penalty. The OCCA, therefore, rejected Pavatt's challenge to the application of this aggravator, as well as Pavatt's other arguments, and affirmed his conviction and capital sentence. App. 380a.[2]

2. The District Court Followed The OCCA's Reasoning, Emphasizing The Victim's Non-Instantaneous Death.

Pavatt sought habeas relief in the Western District of Oklahoma. Among other things, he argued that his capital sentence violated the Eighth Amendment because the OCCA "applied an incorrect standard of review" when applying its "especially heinous, atrocious, or cruel" aggravator. App. 458a. In particular, Pavatt argued that "[t]hough the Oklahoma court concluded that 'these facts tend to show [the victim] suffered serious physical abuse,' the court failed to identify what serious physical abuse occurred, beyond what naturally occurs in *any* shooting." App. 459a. As a result, "the Oklahoma court's approach of finding 'serious physical abuse' . . .

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[2] In 2008, this Court denied a petition seeking direct review of the OCCA's 2007 judgment based on unrelated arguments that are separate from the Eighth Amendment and procedural issues presented here. *See Pavatt v. Oklahoma*, 552 U.S. 1181 (2008); Pet. for a Writ of Certiorari, *Pavatt v. Oklahoma*, No. 07-703, 2007 WL 4207141, at *i (U.S. Nov. 23, 2007) (presenting due process and Confrontation Clause arguments based on the state court's exclusion of evidence).

simply does not comport with the narrowing process [for capital-eligible murders] that the Constitution requires." App. 467a.

Echoing the OCCA's reasoning, the district court rejected Pavatt's Eighth Amendment claim and denied the writ in its entirety. App. 278a–279a, 303a. The district court emphasized that the victim "did not die instantaneously" and "could have suffered for several minutes." App. 267a.

3. The Tenth Circuit Reversed Pavatt's Capital Sentence, Concluding This Case Is Controlled By *Godfrey*.

The Tenth Circuit granted Pavatt a Certificate of Appealability on several issues, including "[w]hether there was sufficient evidence to support the 'especially heinous, atrocious, or cruel' aggravator (raised in Ground 10 of Mr. Pavatt's habeas petition)[.]" App. 156a. That cross-referenced ground in Pavatt's habeas petition argued that the capital sentence violated the Eighth and Fourteenth Amendments. Based on the COA, Pavatt argued to the Tenth Circuit that the evidence presented against him at trial was "constitutionally insufficient" under the Eighth Amendment's narrowing restraints because it failed to show "that the homicide was any more heinous, atrocious, or cruel than any other homicide." App. 421a.

After comprehensively reviewing this Court's precedents, the Tenth Circuit concluded that "we have a case controlled by the Supreme Court's holding in *Godfrey*." App. 100a (citing *Godfrey*, 446 U.S. 420). In particular, the panel held, over Judge Briscoe's

dissent, that Pavatt had raised a "meritorious" Eighth Amendment challenge and that "the OCCA no longer construes 'conscious physical suffering' so that it distinguishes in a principled way between crimes deserving the death penalty and the many cases in which the death penalty is not imposed." App. 101a–102a. As the panel explained, "[v]irtually any murder in which the victim did not die instantly could qualify for the enhancement as presently construed if there is a possibility that the act of murder did not immediately render the victim unconscious and the wounds could have caused pain." App. 102a.

The Tenth Circuit concluded that Oklahoma's "especially heinous, atrocious, or cruel" aggravator "cannot constitutionally be applied in this case" and the OCCA's rejection of Pavatt's challenge to his sentence was therefore "'contrary to clearly established federal law'"—requiring habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d). App. 106a–107a. The Tenth Circuit accordingly reversed Pavatt's capital sentence and affirmed his conviction. App. 108a.

The Tenth Circuit rejected the State's effort to foreclose review of the merits of Pavatt's Eighth Amendment claim. It concluded that, at a minimum, the State had waived any procedural objections to Pavatt's timely presentation of his Eighth Amendment claim to the OCCA. App. 101a–102a.

4. Over Three Dissents, The *En Banc* Tenth Circuit Reinstated The Capital Sentence.

The State filed a petition for rehearing *en banc*, which the Tenth Circuit granted. The *en banc* court—over a three-judge dissent—vacated the prior opinion and reinstated Pavatt's capital sentence. App. 59a. The *en banc* majority declined to reach the merits of Pavatt's Eighth Amendment claim, finding it "procedurally barred." App. 3a. The majority stated that it was "not persuaded" that Pavatt had "fairly presented to the OCCA" his challenge to the State's application of the "especially heinous, atrocious, or cruel" aggravator. App. 33a. The majority also construed the State's waiver of any procedural objections as limited to a purportedly different constitutional challenge to the aggravator (under *Jackson v. Virginia*, 443 U.S. 307 (1979)) that, according to the majority, "only hinted at the possibility of an as-applied challenge to the . . . aggravator." App. 35a. Finally, the majority asserted that the Tenth Circuit's COA did not cover "any as-applied challenge to the . . . aggravator." App. 37a.

Judge Hartz (the author of the original panel decision), joined by Judges Kelly and Lucero, dissented. They pointed to this Court's decision in *Maynard*—holding that, absent a proper limiting construction, Oklahoma's "especially heinous, atrocious, or cruel" aggravator failed to distinguish "in a principled way" capital-eligible cases from other murders—and noted that despite Oklahoma's attempt to supply the narrowing construction required, "several members of this [circuit] have

expressed concern that the aggravating factor is being interpreted by the OCCA too broadly to satisfy the Eighth Amendment." App. 60a–61a.

The dissenting judges also noted that, under the State's logic—which was adopted by the OCCA, and which the *en banc* opinion allows to stand—"the very act of committing the murder makes one eligible for the death penalty unless the victim was rendered unconscious immediately upon receiving the fatal blow." App. 61a. But "no fairminded jurist could think that this requirement distinguishes in a principled manner those deserving the death penalty from the many first-degree murderers who do not." *Id.* Indeed, this application of the aggravator—which turns on the "merely fortuitous" fact of whether the victim was "rendered unconscious upon receiving the fatal blow"—is entirely "arbitrary" and at odds with "the Supreme Court's 'narrowing jurisprudence.'" 61a–62a.

Finally, the dissenting judges disputed the majority's conclusion that Pavatt had not timely presented (or "exhausted") his Eighth Amendment claim before the OCCA, *see* App. 62a, 65a–68a, and recounted in detail the State's waiver of any such objection. App. 62a–65a.

REASONS FOR GRANTING THE PETITION

Over a three-judge dissent, the *en banc* court of appeals fundamentally erred in refusing to reach the merits of the life-and-death constitutional question in this case based on a clearly erroneous ruling that Pavatt's Eighth Amendment claim was procedurally barred. As the panel (and *en banc* dissent) explained,

at a minimum, the State expressly waived any failure-to-exhaust objection to Pavatt's claim. And that claim was fairly and timely presented to the OCCA in any event. This Court, therefore, should summarily reverse.

In the alternative, the Court should grant the petition and conduct plenary review to restore uniformity to the law on an important and frequently recurring Eighth Amendment issue. Under the decision below, Oklahoma is free to apply a sentencing regime that allows the death penalty to hinge on the happenstance of an instantaneous—rather than a non-instantaneous—death. If a gunshot results in an immediate death, the assailant cannot be executed, but if the shot goes a little wide of the mark, resulting in death a few minutes later, he can. That arbitrary regime runs afoul of this Court's precedents, and conflicts with numerous other appellate decisions (including decisions of the Ninth Circuit and Supreme Courts of California, Connecticut, Louisiana, North Carolina, and Utah). Absent this Court's intervention, Pavatt will be executed in violation of the Eighth Amendment.

I. THIS COURT SHOULD SUMMARILY REVERSE THE TENTH CIRCUIT'S MANIFESTLY ERRONEOUS PROCEDURAL RULING.

A. As The Original Panel Opinion Held, The State Waived Any Objections To Preservation And Exhaustion.

This Court should summarily reverse the *en banc* court of appeals' clearly erroneous refusal to reach the merits of Pavatt's Eighth Amendment claim.

The *en banc* majority held that Pavatt's claim was "procedurally barred," App. 3a, noting it was "not persuaded" that Pavatt had "fairly presented to the OCCA" his Eighth Amendment challenge to the State's application of the "especially heinous, atrocious, or cruel" aggravator. App. 33a. The majority acknowledged that the State had explicitly waived procedural objections to at least one of Pavatt's claims, App. 36a, but misconstrued that waiver as limited to a different constitutional challenge to the aggravator that, according to the majority, "only hinted at the possibility of an as-applied challenge." App. 35a. Based on those procedural rulings, coupled with a misreading of the Tenth Circuit's COA, the *en banc* majority refused to address the merits of Pavatt's Eighth Amendment claim. That conclusion was manifestly incorrect as a matter of federal law, results in an especially grave injustice in this capital case, and warrants summary reversal.

"A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance

upon the requirement *unless* the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3) (emphasis added). The State of Oklahoma did exactly that here. As the original panel decision correctly held, *see* App. 101a, the State expressly waived the exhaustion requirement as to Pavatt's Eighth Amendment claim by conceding that Pavatt had exhausted that claim before the state court. The State's waiver was clear, express, and unequivocal. Its response to Pavatt's habeas petition included the following statement:

> In Ground Ten, Petitioner alleges that insufficient evidence was presented at trial to support the jury's finding of the especially heinous, atrocious or cruel aggravator. Doc. 42 at 147–57.
>
> **A. Exhaustion.**
>
> *This claim was raised on direct appeal* and the OCCA rejected it on the merits. *Pavatt*, 159 P.3d at 294–95. *It is therefore exhausted for purposes of federal habeas review*.

App. 442a (emphases added). This express waiver cross-referenced Ground Ten of Pavatt's habeas petition, which was captioned, "Petitioner's Sentence Does Not Comport with the Eighth and Fourteenth Amendments to the United States Constitution Because There is Insufficient Evidence to Support that the Murder was 'Especially Heinous, Atrocious, or Cruel.'" App. 458a (original in all caps and bold). And, in the text of Ground Ten, Pavatt clearly argued that the OCCA applied the State's aggravator in a

manner inconsistent with the Eighth Amendment. He contended, for example:

- "[F]or the 'especially heinous, atrocious, or cruel' aggravator to be constitutionally supported, 'the evidence must support anguish that goes beyond that which necessarily accompanies the underlying killing,'" App. 466a–467a (internal quotation marks omitted);
- "[T]he Oklahoma court's approach of finding 'serious physical abuse' . . . simply does not comport with the narrowing process [for capital-eligible murders] that the Constitution requires," App. 467a;
- The victim "died within minutes of being shot, and . . . his murder, while tragic, was not the 'most egregious' kind of murder that would set it apart from other murders," App. 468a;
- "Even if [the victim] experienced 'some conscious suffering,' he clearly was not tortured, and there was no physical abuse beyond that accomplished with all murders," App. 468a;
- "[T]he court failed to identify what serious physical abuse occurred, beyond what naturally occurs in *any* shooting," App. 459a; and
- The evidence did not support application of the aggravator to justify the death penalty and "the OCCA applied an incorrect standard of

> review when addressing this claim," App. 458a.

Finely parsing Pavatt's arguments, the *en banc* majority reasoned that the State's explicit waiver of any procedural objections did not cover Pavatt's Eighth Amendment claim—which the majority asserted was "only hinted at." App. 35a. According to the majority, the waiver was somehow limited to a sufficiency-of-the-evidence claim under *Jackson*, 443 U.S. 307. *See* App. 35a–37a. But the majority failed to grasp that a sufficiency-of-the-evidence challenge and a challenge to the OCCA's application of the "especially heinous, atrocious, or cruel" aggravator are merely part and parcel of the same Eighth Amendment claim.[3] *See*, *e.g.*, *Pike v. Guarino*, 492 F.3d 61, 72 (1st Cir. 2007) (concluding that State's "waiver" of failure-to-exhaust objection under 28 U.S.C. § 2254(b)(3) "extend[ed] to the claim stated and *any variants of the claim* that [we]re readily ascertainable from the language of the petition," and "[a] party who chooses to waive a defense surrenders

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[3] For the same reason, the *en banc* majority erred in construing the COA as excluding Pavatt's Eighth Amendment challenge to the OCCA's application of the "especially heinous, atrocious, or cruel" aggravator. *See* App. 37a. One of the issues on which a COA was granted included "[w]hether there was sufficient evidence to support the 'especially heinous, atrocious, or cruel' aggravator (raised in Ground 10 of Mr. Pavatt's habeas petition)[.]" App. 156a. As shown above, Ground Ten of Pavatt's habeas petition unequivocally raised his Eighth Amendment claim and was therefore well within the scope of the COA. In any event, as the original Tenth Circuit panel decision explained, the State waived any objection based on scope of the COA. *See* App. 101a–102a.

that defense to the claim asserted and *any claim fairly encompassed within it*.") (emphases added).

Moreover, as the original panel opinion pointed out, the State clearly understood that Pavatt was challenging the arbitrary and overbroad application of the aggravator under the Eighth Amendment. "[T]he State included substantial references to the Eighth Amendment constraints on aggravators" in its response to Ground Ten of Pavatt's habeas petition (the portion raising what the *en banc* majority construed as a freestanding *Jackson* claim). App. 101a; *see also* App. 64a (Hartz, J., joined by Kelly and Lucero, JJ., dissenting).[4] And, "although the State's

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[4] For example, the State argued: "To the extent Petitioner suggests, by citing to these other cases, that the OCCA's application of the especially heinous, atrocious or cruel aggravator in this case renders it unconstitutional, he is not entitled to relief." App. 450a. Directly responding to Pavatt's challenge to the OCCA's arbitrary and overbroad application of the aggravator, the State added: "To be constitutional, an aggravating circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." App. 451a–452a. The State also acknowledged, quoting *Arave*, that "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." App. 452a. And the State asserted that "[n]othing about the OCCA's discussion of the legal or factual basis for its conclusion here in any way suggests an overbroad or an erroneous interpretation, let alone application, of Oklahoma's aggravator." App. 452a.

The State's briefing before the Tenth Circuit similarly recognized how Pavatt's argument based on the sufficiency of the evidence and his argument that the OCCA applied the State's aggravator in an unprincipled and unconstitutional way were

brief on appeal argued procedural bar with respect to several of Mr. Pavatt's claims, it did not argue" that either Pavatt's sufficiency-of-the-evidence argument or his related argument challenging the State's application of its aggravator as unconstitutionally arbitrary and overbroad was procedurally barred. App. 101a–102a. To the contrary, the State addressed the Eighth Amendment claim at length on the merits. *See supra* note 4.

In that respect, this case is like *Wood v. Milyard*, 566 U.S. 463 (2012), where this Court held that the State waived a statute of limitations defense under Section 2254(b)(3) where it "deliberately steered the District Court away from the question and towards the merits of [the petitioner's] petition" and "chose . . . to refrain from interposing a timeliness 'challenge.'" *Id.* at 474. There, like here (*see* App. 262a–267a, 278a–279a), "[t]he District Court therefore reached and decided the merits of the petition" and "[t]he Tenth Circuit should have done so as well." *Id.*

For all these reasons, the State's express waiver applied to Pavatt's Eighth Amendment claim challenging the State's overbroad and arbitrary

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inextricably intertwined elements of his overarching Eighth Amendment claim. *See*, *e.g.*, App. 402a–403a ("[I]f a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty,' [*Maynard v.*] *Cartwright*, 486 U.S. [356], 362, has been satisfied.") (quoting *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990)).

application of its aggravator. This is one independent reason why there is no procedural obstacle to reviewing the constitutional question presented and summary reversal is warranted.

B. In Any Event, Pavatt Timely Raised His Eighth Amendment Argument.

Another independent reason is that, as the above discussion shows, Pavatt timely raised and exhausted his Eighth Amendment claim. "Resolving whether a petitioner has fairly presented his claim to the state courts, thus permitting federal review of the matter, is an intrinsically federal issue that must be determined by the federal courts." *Wyldes v. Hundley*, 69 F.3d 247, 251 (8th Cir. 1995). A petitioner need not cite "book and verse on the federal constitution" to fairly present his argument to the court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). A "citation of any case that might have alerted the court to the alleged federal nature of the claim" is sufficient for fair presentation purposes. *Baldwin v. Reese*, 541 U.S. 27, 33 (2004).

In his initial direct appeal to the OCCA, Pavatt argued (among other things) that "[t]he evidence does not support the fact that the murder was 'especially' heinous, atrocious or cruel" and noted (quoting the closing argument of Pavatt's trial counsel) that "[t]o some degree I suppose all homicides are heinous, atrocious or cruel." App. 479a. He also relied on the Tenth Circuit's decision in *Thomas v. Gibson*, 218 F.3d 1213 (10th Cir. 2000). *Id.* That case addressed (1) an Eighth Amendment "argu[ment] that Oklahoma's heinous, atrocious, or cruel aggravating

circumstance is unconstitutionally vague in that it fails to adequately narrow the class of murders wherein the perpetrator is subject to the death penalty," 218 F.3d at 1226 (citing *Maynard* and *Godfrey*), and (2) an intertwined sufficiency-of-the-evidence claim: "Even assuming the heinous, atrocious, or cruel aggravator is constitutional on its face, [petitioner] asserts that the state did not present sufficient evidence that his conduct during the murder of [the victim] fell within the parameters of the aggravator." *Id.* (citing *Lewis v. Jeffers*, 497 U.S. 764 (1990)). This was sufficient for Pavatt to "alert" the OCCA to his Eighth Amendment claim. *See Baldwin*, 541 U.S. at 33; *Cotto v. Herbert*, 331 F.3d 217, 237 (2d Cir. 2003) ("[A] state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution[,] so long as he relies on pertinent federal cases.") (citations and internal quotation marks omitted).

Further, in his second post-conviction application, Pavatt explicitly argued that Oklahoma has failed to apply its "especially heinous, atrocious, or cruel" aggravator in a rational way that performs the requisite narrowing function. *See* App. 425a ("Inexplicably, this Court found serious physical abuse in Mr. Pavatt's case, even though there was no gratuitous violence, and the killing was much like that in [*Maynard v.*] *Cartwright*."). Again, Pavatt fairly presented his Eighth Amendment claim to the state court.

The *en banc* majority faults Pavatt for failing to raise in his first direct appeal an as-applied Eighth

Amendment argument that specifically "focuse[d] on the manner in which the OCCA applied the . . . aggravator in rejecting Pavatt's *Jackson* claim." App. 33a. But that makes no sense. As Judge Hartz pointed out in his dissenting opinion, "Mr. Pavatt could not have argued in his original postconviction application that the OCCA opinion *in this case* construed the . . . aggravator in an unconstitutional manner, because he filed the original application *before* the OCCA decided his direct appeal." App. 66a (emphases added). Indeed, the majority conceded that this particular argument "could not have been" made "in [the] direct appeal." App. 33a.[5] In effect, the *en banc* majority held Pavatt to an impossible standard—requiring not just "fair presentation" of an argument, but clairvoyance.

Pavatt's Eighth Amendment claim was not procedurally barred, and the Tenth Circuit was required to address the issue on the merits. At a

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[5] Judge Hartz also explained that it is doubtful Pavatt could have raised this particular Eighth Amendment claim (i.e., a challenge to the OCCA's reasoning in this case) on a petition for rehearing. *See* App. 66a–67a. Petitions for rehearing may be filed only if "[s]ome question decisive of the case . . . has been overlooked by the Court, or . . . [t]he decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called." Okla. R. Crim. App. 3.14. The OCCA has held that, with regard to whether the court was on notice "in the brief or in oral argument," defendants "clearly c[annot] raise a *new* issue in a petition for rehearing." *Ellis v. Oklahoma*, 941 P.2d 527, 530 (Okla. Crim. App. 1997). Under the *en banc* majority's own logic, Pavatt's Eighth Amendment claim would be a new issue, and thus could not have been raised in a petition for rehearing.

minimum, its contrary decision should be summarily reversed.

II. THE TENTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE DECISIONS OF VARIOUS APPELLATE COURTS ON AN IMPORTANT AND RECURRING CONSTITUTIONAL QUESTION.

A. The Tenth Circuit's Holding Flouts This Court's Precedents.

If the Court does not summarily reverse, it should instead grant certiorari and conduct plenary review on the important constitutional question presented.

This Court has long held that, under the Eighth Amendment, a State's capital-sentencing scheme "must *genuinely narrow* the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (emphasis added). "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Godfrey*, 446 U.S. at 427 (opinion of Stewart, J., joined by Blackmun, Powell, and Stevens, JJ.) (citation omitted). States frequently use aggravating circumstances to "narrow[] the class of death-eligible persons and thereby channel[] the jury's discretion." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). But their use of these aggravators—such as Oklahoma's "especially heinous, atrocious, or cruel" factor here—"must provide a *principled basis*"

for "distinguish[ing] those who deserve capital punishment from those who do not." *Arave*, 507 U.S. at 474 (citing, *inter alia*, *Godfrey*, 446 U.S. at 433) (emphasis added). If an aggravating circumstance may apply "to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Id.* (citing *Maynard*, 486 U.S. at 364, and *Godfrey*, 446 U.S. at 428–29).

Godfrey illustrates the Eighth Amendment requirement of a principled and rational capital-sentencing scheme. In that case, this Court reversed a Georgia Supreme Court decision that upheld a capital sentence based on a broad application of the State's aggravating factor that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." 446 U.S. at 422. Although the Court had previously rejected a facial challenge to the aggravating factor, the *Godfrey* Court held that the Georgia Supreme Court's overbroad application of the factor violated the Eighth Amendment. As the plurality opinion explained:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost *every* murder as "outrageously or wantonly vile, horrible and inhuman."

Id. at 428–29 (emphasis added).

In *Maynard*, this Court applied *Godfrey* to find Oklahoma's "especially heinous, atrocious, or cruel"

aggravating factor unconstitutional. *See Maynard*, 486 U.S. at 363–64. Oklahoma argued that it had avoided an unbounded application of the aggravator, but this Court rejected that argument. The Court started with the premise that "our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id.* at 362. The Court then held that Oklahoma's approach—allowing the jury to conduct a freewheeling totality-of-the-circumstances type of analysis of the Oklahoma aggravator—was constitutionally deficient: "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that *every* unjustified, intentional taking of human life is 'especially heinous.'" *Id.* at 364 (citing *Godfrey*, 446 U.S. at 428–29) (emphasis added).

In the wake of *Maynard*, Oklahoma purported to limit its aggravator to cases involving torture or serious physical abuse. *Stouffer v. Oklahoma*, 742 P.2d 562, 563 (Okla. Crim. App. 1987). But the Tenth Circuit has acknowledged that the OCCA's decisions have increasingly "begun to blur the common understanding of the requisite torture and conscious serious physical suffering, more and more often finding the existence of these elements in almost every murder." *Romano*, 239 F.3d at 1176 (citing cases). Moreover, despite the misgivings of many Tenth Circuit judges, the court as a whole has

affirmatively embraced the OCCA's arbitrary and unprincipled application of the "especially heinous, atrocious, or cruel" aggravator. *See*, *e.g.*, *Welch v. Workman*, 639 F.3d 980, 1006 (10th Cir. 2011) (following OCCA cases relying on the State's failure to prove that "the victim was conscious" or that the victim's "death was not nearly instantaneous"); *Hooker v. Mullin*, 293 F.3d 1232, 1242–43 (10th Cir. 2002) (finding the aggravator was met because the death was not instantaneous where the victim "died between one and ten minutes after the attack," and the medical examiner inferred that the victim was conscious).

The *en banc* opinion here deepens and exacerbates this trend, requiring this Court's urgent intervention to ensure that its precedent is respected, *see*, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), and to vindicate the proposition that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement." *Maynard*, 486 U.S. at 362. Here, too, the linchpin of the OCCA's reasoning justifying the death penalty—the most serious of all punishments—was that "[e]vidence that the victim was conscious and aware of the attack [in the moments before death] supports a finding of torture." App. 372a. But, as Judge Hartz (joined by two other judges) pointed out in his dissent from the *en banc* opinion, under the State's logic, "the very act of committing the murder makes one eligible for the death penalty unless the victim was rendered unconscious immediately upon receiving the fatal blow." App. 61a.

In direct conflict with *Maynard*, *Godfrey*, and other precedents of this Court, this untrammeled application of Oklahoma's aggravator fails to "distinguish[] in a *principled* manner those deserving the death penalty from the many first-degree murderers who do not." *Id.* Instead, whether the victim is conscious after the attack is often "purely a matter of chance"—providing "what could be described as a *'sharpshooter bonus.*'" App. 103a, 62a (emphasis added). As the *en banc* dissent explained, "[i]f the perpetrator has the skill to render an immediately fatal blow, he or she escapes the death penalty under this aggravator," but "[s]uch an arbitrary aggravator is not consistent with the Supreme Court's 'narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death.'" App. 62a.

The Tenth Circuit had it right the first time. "By expanding the meaning of 'conscious physical suffering' to encompass 'the brief period of conscious suffering necessarily present in virtually all murders,' . . . —as it did in this case—Oklahoma has construed the [torture] aggravator in a constitutionally impermissible manner." App. 103a. And, for the reasons explained in the original panel opinion, the OCCA's affirmance of the capital sentence relied on an unreasonable interpretation of clearly established federal law, namely, this Court's Eighth Amendment jurisprudence. App. 100a–108a. The Court should grant certiorari to ensure that its precedents are followed.

B. The Tenth Circuit's Holding Conflicts with Other Appellate Decisions.

Given the inherently arbitrary nature of the Tenth Circuit and OCCA's heavy reliance on the instantaneous versus non-instantaneous nature of the victim's death in capital cases, it should come as no surprise that several other appellate courts reject this approach.

The Supreme Court of North Carolina, for example, rejected the State's attempt to apply its identically worded "especially heinous, atrocious, or cruel" aggravator in a case involving a non-instantaneous shooting death. *North Carolina v. Lloyd*, 552 S.E.2d 596 (N.C. 2001). In *Lloyd*, the State argued that the aggravator applied because "the victim did not lose consciousness immediately after being shot and consequently was aware of the inevitability of death," *id.* at 629, but the court disagreed, explaining that "[it] ha[s] never held that the fact that death was somewhat lingering necessarily makes a murder especially heinous, atrocious, or cruel." *Id.* Indeed, the court noted that in cases involving fatal shootings "frequently death is not instantaneous and the victim remains conscious for at least a few minutes before expiring. Accordingly, the fact that a victim's death is not immediate does not by itself establish that a killing was especially heinous, atrocious, or cruel." *Id.* at 629–30; *see also North Carolina v. Stanley*, 312 S.E.2d 393, 397–98, 401 (N.C. 1984) (overturning capital sentence in case involving fatal shooting where victim's death from multiple shots "was not instantaneous," though the victim was rendered

"unconscious within minutes"; the fact that the death was "not instantaneous . . . does not alone make a murder especially heinous, atrocious or cruel," nor did the fact that the victim "might have remained conscious for a matter of minutes after being shot . . . distinguish this case from the ordinary death-by-shooting cases").

Similar reasoning guided the Supreme Court of Louisiana in another case whose core holding conflicts with the OCCA's and Tenth Circuit's approach here. As the court explained, "[a]lthough the jury found the instant offense to have been committed in an 'especially heinous, atrocious or cruel manner,' this finding cannot stand." *Louisiana v. Monroe*, 397 So. 2d 1258, 1274 (La. 1981). The court acknowledged "the murder was brutal, the victim lost over two quarts of blood, her lungs were punctured and one of her ribs was severed. Her death was not instantaneous, and she lived long enough to call out for her daughter and reach for the telephone." *Id.* at 1275. Nevertheless, the court explained, "in order for a murder to be 'especially heinous,' there must exist evidence that there was 'torture or the pitiless infliction of unnecessary pain on the victim.'" *Id.* (citation omitted). Mere consciousness for minutes preceding a non-instantaneous death, in other words, was insufficient to justify the death penalty under the "especially heinous, atrocious, or cruel" aggravator.

The Supreme Court of Connecticut's precedent is along similar lines. *See Connecticut v. Johnson*, 751 A.2d 298 (Conn. 2000). As the court explained, "[t]o qualify for the imposition of the death penalty, a murder by shooting must be distinguished somehow

from the 'norm' of murders." *Id.* at 340 (citation omitted). Thus, the aggravator was not met where the victim was conscious for ninety seconds after being shot once because an instantaneous death "is quite rare, occurring only when there is a direct injury to the brain stem or sufficient trauma to the brain cavity," and "virtually *any gunshot wound* will involve some pain." *Id.* at 342.

Finally, the Tenth Circuit and OCCA's approach here is fundamentally at odds with that of the Ninth Circuit and California Supreme Court. Those courts have concluded that, to comport with the Eighth Amendment, California's torture aggravator must be interpreted to require proof of intent to cause "extreme pain to the victim." *Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir. 1994) (citing *California v. Davenport*, 710 P.2d 861, 875 (1986)), *overruled on other grounds*, *Rohan ex rel. Gates v. Woodford*, 334 F.3d 813 (9th Cir. 2003), *abrogated on other grounds*, *Ryan v. Gonzales*, 568 U.S. 57 (2013). Quoting the California Supreme Court with approval, the Ninth Circuit explained that a contrary rule (i.e., one that merely required proof of an intent to kill "with the possible exception of those occasions on which the victim's death was instantaneous") would rely on a distinction that fails to provide "a principled basis for distinguishing capital murder from any other murder" and, therefore, would violate the Eighth Amendment. *Id.* Without the lower court's narrowing construction, the Ninth Circuit held that the aggravator "would fail to provide a principled basis for distinguishing capital murder from any other murder" and would contravene "the Eighth

Amendment standard prescribed by *Zant* . . . and *Godfrey*." *Id.*[6]

Taken together, these cases confirm that the Tenth Circuit and OCCA's approach is both untenable as a practical matter and directly conflicts with controlling precedent of this Court and the approach of other appellate courts. Indeed, if Pavatt had been sentenced in a court subject to the Ninth Circuit's jurisdiction (or in the States of Connecticut, Louisiana, North Carolina, and Utah), he would not face the death penalty based on the fact that his victim did not die instantly. This Court's guidance is needed to restore uniformity to the law.

C. The Eighth Amendment Issue Is Important, Recurring, And Squarely Presented By This Case.

If Pavatt had been the sort of "sharpshooter" described by the *en banc* dissent—or if, due to some other happenstance, the victim in this case had instantly lost consciousness and died—the Oklahoma

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[6] Other courts also require a finding of intent to torture the victim in order to apply the relevant aggravating factor. *See*, *e.g.*, *Smith v. Moore*, 137 F.3d 808, 814 (4th Cir. 1998) (holding that South Carolina law requires "intent to torture," which does not apply to every defendant who intended to kill his victim) (quoting *South Carolina v. Elmore*, 308 S.E.2d 781, 785 n.2 (S.C. 1983) (per curiam), *overruled on other grounds*, *South Carolina v. Burdette*, 832 S.E.2d 575 (S.C. 2019)); *Pennsylvania v. Johnson*, 42 A.3d 1017, 1036–37 (Pa. 2012) ("the Commonwealth . . . carries the burden of proving the defendant acted with 'an intent to cause pain and suffering in addition to the intent to kill'") (citations and some internal quotation marks omitted).

court would have been unable to find the death penalty justified based on the "especially heinous, atrocious, or cruel" aggravator.

As Judge Briscoe (the author of the Tenth Circuit's *en banc* opinion) acknowledged in her dissent from the prior panel opinion, the "distinction" that the OCCA has "dr[awn]" is "between murders in which the victim's death is instantaneous and murders in which the victim experiences conscious physical suffering for some period of time after being wounded." App. 148a; *see also Welch*, 639 F.3d at 1006 (recognizing that "the OCCA's decisions reached a different result because the state had failed to show the victim was conscious or establish the death was not nearly instantaneous").

On the one hand, in "many cases," the OCCA "has refused to allow application of the [especially heinous, atrocious, or cruel] aggravating circumstance where a murder victim's death was instantaneous or nearly so." App. 148a (Briscoe, J., dissenting). *See*, *e.g.*, *Simpson v. Oklahoma*, 230 P.3d 888, 903 (Okla. Crim. App. 2010) (death was "nearly immediate" for one of two shooting victims; because "he likely died within seconds after being shot," the "evidence d[id] not show" that his death "was preceded by torture or that he endured conscious physical suffering" and the aggravator therefore did not justify a capital sentence), *reh'g granted and motion to recall mandate denied*, 239 P.3d 155 (Okla. Crim. App. 2010) (denying relief); *Davis v. Oklahoma*, 888 P.2d 1018, 1021 (Okla. Crim. App. 1995) ("No testimony indicated that the victims who died were conscious or suffered pain at any time."); *Marquez v. Oklahoma*,

890 P.2d 980, 987 (Okla. Crim. App. 1995) (noting that two of three shots that hit the victim "would have caused death nearly instantaneously").

In contrast, another line of cases holds that non-instantaneous deaths—like the victim's death here—are eligible for capital punishment because the victim was conscious for some moments before dying. *See*, *e.g.*, *Tryon v. Oklahoma*, 423 P.3d 617, 651 (Okla. Crim. App. 2018) (applying aggravator where victim would have experienced pain and "surveillance video show[ed] the victim's death was not instantaneous"); *Simpson*, 230 P.3d at 902–03 (applying aggravator where one of the victims, who was shot four times, "was initially conscious after being shot, his breathing became labored and he made gurgling sounds" before death). Indeed, this was precisely why the OCCA found the "especially heinous, atrocious, or cruel" aggravator was established and therefore justified the death penalty here. As the OCCA reasoned in its decision rejecting Pavatt's Eighth Amendment challenge to his sentence, "[e]vidence that the victim was conscious and aware of the attack supports a finding of torture." App. 372a.

The arbitrary and unconstitutional distinction on which these two lines of cases hinge presents a recurring issue that calls for this Court's intervention. As noted above, various members of the Tenth Circuit have expressed increasing concern about Oklahoma's application of its "especially heinous, atrocious, or cruel" aggravator. *See*, *e.g.*, *Romano*, 239 F.3d at 1176 ("There is certainly a concern that Oklahoma's interpretation of its narrowing language could again render this aggravating factor unconstitutional.")

(citing cases); *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (per curiam) (Lucero, J., concurring) (application of Oklahoma's aggravator based on whether the victim briefly suffered, a condition "present in virtually all murders[,] would fail to narrow the sentencer's discretion as required by *Godfrey* . . . and *Maynard*"); *Thomas*, 218 F.3d at 1228 n.17 (Oklahoma's application of its aggravator "appears to raise serious constitutional questions about whether [the] . . . aggravator legitimately narrows the class of those eligible for death").

Nevertheless, the Tenth Circuit continues to hew to the Oklahoma court's approach, and the issue continues to arise with frequency. As Judge Hartz pointed out below, "the [State's "especially heinous, atrocious, or cruel"] aggravator is commonplace in Oklahoma death-penalty cases," App. 68a. Moreover, other courts across the country continue to grapple with similar issues, and numerous other States use identically worded "especially heinous, atrocious or cruel" aggravators. *See*, *e.g.*, Ala. Code § 13A-5-49(8) (Alabama); Ariz. Rev. Stat. § 13-751(F)(4) (Arizona); Idaho Code Ann. § 19-2515(9)(e) (Idaho); Kan. Stat. Ann. § 21-6624(f) (Kansas); 42 Pa. Cons. Stat. Ann. § 9711(d)(8) (Pennsylvania); Tenn. Code Ann. § 39-13-204(i)(5) (Tennessee); Utah Code Ann. § 76-5-202(1)(r) (Utah). Indeed, in contrast with the Ninth Circuit and state supreme court decisions cited above, some courts have adopted reasoning in line with the OCCA's. *See*, *e.g.*, *Rimmer v. Florida*, 825 So. 2d 304, 327 (Fla. 2002) (per curiam) ("[W]e have consistently held that instantaneous or near instantaneous deaths by gunshot, which are unaccompanied by any

additional acts by the defendant to mentally or physically torture the victims, are not heinous, atrocious, or cruel."); *Tennessee v. Pritchett*, 621 S.W.2d 127, 139 (Tenn. 1981) ("heinous, atrocious, or cruel" aggravator not satisfied because victim's "death was instantaneous from the first gunshot" and the "firing of the second shot did not inflict torture or physical abuse . . . before death").

This case squarely presents this important and recurring issue. The OCCA found the "especially heinous, atrocious, or cruel" aggravator was established because "[e]vidence that the victim was conscious and aware of the attack supports a finding of torture." App. 372a. This Court therefore has an ideal opportunity to reject Oklahoma's arbitrary approach to capital sentencing and restore uniformity to the law.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully submitted,

SARAH JERNIGAN MCGOVERN
PATTI PALMER GHEZZI
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
Capital Habeas Unit
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Tel. (405) 609-5975
Sarah_Jernigan@fd.org

PETER KARANJIA*
MICHAEL GELLER
JEAN CAMILLE GABAT
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, D.C. 20004
Tel. (202) 799-4000
peter.karanjia@dlapiper.com
**Counsel of Record*

Counsel for James Dwight Pavatt

NOVEMBER 25, 2019

APPENDIX

APPENDIX A — *EN BANC* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JUNE 27, 2019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6117

JAMES DWIGHT PAVATT,

Petitioner-Appellant,

v.

MIKE CARPENTER, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent-Appellee.

June 27, 2019, Filed

Appeal from the United States District Court
for the Western District of Oklahoma.
(D.C. No. 5:08-CV-00470-R).

Before TYMKOVICH, Chief Judge, KELLY, BRISCOE, LUCERO, HARTZ, HOLMES, MATHESON, BACHARACH, PHILLIPS, McHUGH, MORITZ, EID, and CARSON, Circuit Judges.

BRISCOE, Circuit Judge.

Appendix A

Petitioner James Pavatt was convicted by an Oklahoma jury of first degree murder and conspiracy to commit first degree murder. Pavatt was sentenced to death for the first degree murder conviction and ten years' imprisonment for the conspiracy conviction. After exhausting his state court remedies, Pavatt filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied Pavatt's petition, and also denied Pavatt a certificate of appealability (COA). Pavatt sought and was granted a COA by this court with respect to five issues.

The original hearing panel affirmed the district court's denial of relief with respect to Pavatt's convictions, but in a divided decision reversed the denial of relief with respect to Pavatt's death sentence and remanded to the district court for further proceedings. In doing so, the panel majority concluded that the Oklahoma Court of Criminal Appeals (OCCA) "did not apply a constitutionally acceptable interpretation of Oklahoma's [especially heinous, atrocious, or cruel (HAC)] aggravator in determining [on direct appeal] that the aggravator was supported by sufficient evidence." *Pavatt v. Royal*, 859 F.3d 920, 936 (10th Cir. 2017) (*Pavatt Federal Appeal*).[1]

1. The original panel decision issued on June 9, 2017. *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017). Later, a majority of the panel members denied panel rehearing, but filed an amended decision *sua sponte* and *nunc pro tunc* to the original filing date. *Pavatt Federal Appeal* (859 F.3d 920). In an order dated October 2, 2018, the respondent's petition for rehearing *en banc* was granted. *Pavatt v. Carpenter*, 904 F.3d 1195 (10th Cir. 2018). The grant of *en banc* rehearing vacated the original judgment and stayed the mandate. 10th Cir. R. 35.6.

Respondent filed a petition for rehearing *en banc*.[2] We granted respondent's petition and directed the parties to file supplemental briefs addressing a number of questions concerning Pavatt's challenges to the HAC aggravator. Having received those briefs and after additional oral arguments addressing those questions, we conclude that Pavatt's Eighth Amendment "as-applied" challenge to the HAC aggravator—the issue that the original panel majority relied on in granting him relief—is, for a number of reasons, procedurally barred. We also conclude that the other issues raised by Pavatt on appeal lack merit. Consequently, we vacate the prior panel opinion and affirm the district court's denial of federal habeas relief with respect to both Pavatt's convictions and death sentence. We also deny Pavatt's request for an additional COA.

I

Factual background

The background facts of Pavatt's crimes were outlined by the OCCA in resolving Pavatt's direct appeal:

> [Pavatt] and his co-defendant, Brenda Andrew, were each charged with conspiracy and first-degree capital murder following the shooting death of Brenda's husband, Robert ("Rob") Andrew, at the Andrews' Oklahoma City home on November 20, 2001. [Pavatt] met the

2. We note that Pavatt did not seek rehearing of the original panel's unanimous affirmance of his convictions.

Andrews while attending the same church, and [Pavatt] and Brenda taught a Sunday school class together. [Pavatt] socialized with the Andrews and their two young children in mid-2001, but eventually began having a sexual relationship with Brenda. Around the same time, [Pavatt], a life insurance agent, assisted Rob Andrew in setting up a life insurance policy worth approximately $800,000. [Pavatt] divorced his wife in the summer of 2001. In late September, Rob Andrew moved out of the family home, and Brenda Andrew initiated divorce proceedings a short time later.

Janna Larson, [Pavatt]'s adult daughter, testified that in late October 2001, [Pavatt] told her that Brenda had asked him to murder Rob Andrew. On the night of October 25-26, 2001, someone severed the brake lines on Rob Andrew's automobile. The next morning, [Pavatt] and Brenda Andrew concocted a false "emergency," apparently in hopes that Rob would have a traffic accident in the process. [Pavatt] persuaded his daughter to call Rob Andrew from an untraceable phone and claim that Brenda was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone

in south Oklahoma City. The plan failed; Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police.

One contentious issue in the Andrews' divorce was control over the insurance policy on Rob Andrew's life. After his brake lines were severed, Rob Andrew inquired about removing Brenda as beneficiary of his life insurance policy. However, [Pavatt], who had set up the policy, learned of Rob's intentions and told Rob (falsely) that he had no control over the policy because Brenda was the owner. Rob Andrew spoke with [Pavatt]'s supervisor, who assured him that he was still the record owner of the policy. Rob Andrew then related his suspicions about [Pavatt] and Brenda to the supervisor. When [Pavatt] learned of this, he became very angry and threatened to harm Rob for putting his job in jeopardy. At trial, the State presented evidence that in the months preceding the murder, [Pavatt] and Brenda actually attempted to transfer ownership of the insurance policy to Brenda without Rob Andrew's knowledge, by forging his signature to a change-of-ownership form and backdating it to March 2001.

On the evening of November 20, 2001, Rob Andrew drove to the family home to pick up his children for a scheduled visitation over

the Thanksgiving holiday. He spoke with a friend on his cell phone as he waited in his car for Brenda to open the garage door. When she did, Rob ended the call and went inside to get his children. A short time later, neighbors heard gunshots. Brenda Andrew called 911 and reported that her husband had been shot. Emergency personnel arrived and found Rob Andrew's body on the floor of the garage; he had suffered extensive blood loss and they were unable to revive him. Brenda Andrew had also suffered a superficial gunshot wound to her arm. The Andrew children were not, in fact, packed and ready to leave when Rob Andrew arrived; they were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.

Brenda was taken to a local hospital for treatment. Her behavior was described by several witnesses, experienced in dealing with people in traumatic situations, as uncharacteristically calm for a woman whose husband had just been gunned down. One witness saw Brenda chatting giddily with [Pavatt] at the hospital later that night.

Rob Andrew was shot twice with a shotgun. A spent shotgun shell found in the garage fit a 16-gauge shotgun, which is a rather unusual gauge. Andrew owned a 16-gauge shotgun, but

had told several friends that Brenda refused to let him take it from the home when they separated. Rob Andrew's shotgun was missing from the home when police searched it. One witness testified to seeing Brenda Andrew engaging in target practice at her family's rural Garfield County home about a week before the murder. Several 16-gauge shotgun shells were found at the site.

Brenda told police that her husband was attacked in the garage by two armed, masked men, dressed in black, but gave few other details. Brenda's superficial wound was caused by a .22-caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance as she ran from the garage into the house. About a week before the murder, [Pavatt] purchased a .22-caliber handgun from a local gun shop. On the day of the murder, [Pavatt] borrowed his daughter's car and claimed he was going to have it serviced for her. When he returned it the morning after the murder, the car had not been serviced, but his daughter found a .22-caliber bullet on the floorboard. In a conversation later that day, [Pavatt] told Larson never to repeat that Brenda had asked him to kill Rob Andrew, and he threatened to kill Larson if she did. He also told her to throw away the bullet she had found in her car.

Police also searched the home of Dean Gigstad, the Andrews' next-door neighbor. There they found evidence that someone had entered the Gigstads' attic through an opening in a bedroom closet. A spent 16-gauge shotgun shell was found on the bedroom floor, and several .22-caliber bullets were found in the attic itself. There were no signs of forced entry into the Gigstads' home. Gigstad and his wife were out of town when the murder took place, but Brenda Andrew had a key to their home. The .22-caliber bullet found in Janna Larson's car was of the same brand as the three .22-caliber bullets found in the Gigstads' attic; the .22-caliber bullet fired at Brenda and retrieved from the Andrews' garage appeared consistent with them in several respects. These bullets were capable of being fired from the firearm that [Pavatt] purchased a few weeks before the murder; further testing was not possible because that gun was never found. The shotgun shell found in the Gigstads' home was of the same brand and odd gauge as the 16-gauge shell found in the Andrews' garage. Ballistics comparison showed similar markings, indicating that they could have been fired from the same weapon. Whether these shells were fired from the 16-gauge shotgun Rob Andrew had left at the home was impossible to confirm because, as noted, that gun also turned up missing.

In the days following the murder, [Pavatt] registered his daughter as a signatory on his

> checking account, and asked her to move his belongings out of his apartment. He obtained information over the Internet about Argentina, because he had heard that country had no extradition agreement with the United States. Larson also testified that after the murder, Brenda and [Pavatt] asked her to help them create a document, with the forged signature of Rob Andrew, granting permission for the Andrew children to travel with Brenda out of the country. Brenda also asked Larson to transfer funds from her bank account to Larson's own account, so that Larson could wire them money after they left town.
>
> Brenda Andrew did not attend her husband's funeral. Instead, she and [Pavatt] drove to Mexico, and took the Andrew children with them. [Pavatt] called his daughter several times from Mexico and asked her to send them money. Larson cooperated with the FBI and local authorities in trying to track down [Pavatt] and Brenda. In late February 2002, having run out of money, [Pavatt] and Brenda Andrew re-entered the United States at the Mexican border. They were promptly placed under arrest.

Pavatt v. State, 2007 OK CR 19, 159 P.3d 272, 276-78 (Okla. Crim. App. 2007) (paragraph numbers and footnotes omitted) (*Pavatt I*).

Appendix A

State trial proceedings

On November 29, 2001, the State of Oklahoma filed an information in the District Court of Oklahoma County charging Pavatt and Brenda Andrew jointly with first degree murder. An amended information was filed on July 19, 2002, charging Pavatt and Brenda Andrew with one count of first degree murder and one count of conspiracy to commit first degree murder. At that same time, the State filed a bill of particulars alleging the existence of three aggravating circumstances: (1) that Pavatt committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration; (2) the murder 'was especially heinous, atrocious, or cruel; and (3) the existence of a probability that Pavatt would commit criminal acts of violence that would constitute a continuing threat to society.

The case against Pavatt proceeded to trial on August 25, 2003.[3] At the conclusion of the first-stage evidence, the jury found Pavatt guilty of both counts charged in the amended information. At the conclusion of the second-stage evidence, the jury found the existence of two aggravating circumstances: (1) that Pavatt committed the murder, or employed another to commit the murder, for remuneration or the promise thereof; and (2) that the murder was especially heinous, atrocious, or cruel. The jury also found that these aggravating circumstances outweighed

3. Brenda Andrew was tried separately, convicted of both counts, and sentenced to death. Her federal habeas appeal is currently pending in this court.

the mitigating circumstances and it recommended that Pavatt be sentenced to death for the first degree murder conviction.

Pavatt was sentenced in accordance with the jury's recommendations on each count of conviction.

Pavatt's direct appeal

Pavatt filed a direct appeal asserting eighteen propositions of error. The OCCA rejected all of Pavatt's propositions of error and affirmed his convictions and sentences. *Pavatt I*, 159 P.3d at 297. Pavatt filed a petition for rehearing, which was denied by the OCCA.

Pavatt filed a petition for writ of certiorari with the United States Supreme Court. The Supreme Court denied Pavatt's petition on February 19, 2008. *Pavatt v. Oklahoma*, 552 U.S. 1181, 128 S. Ct. 1229, 170 L. Ed. 2d 62 (2008).

Pavatt's application for post-conviction relief

On April 17, 2006, Pavatt filed with the OCCA an application for post-conviction relief asserting three propositions of error. Approximately two years later, on April 11, 2008, the OCCA issued an unpublished opinion denying Pavatt's application. *Pavatt v. State*, No. PCD-2004-25 (Okla. Crim. App. Apr. 11, 2008) (*Pavatt II*).

Appendix A

The filing of Pavatt's federal habeas petition

Pavatt initiated these federal habeas proceedings on May 5, 2008, by filing a motion for appointment of counsel. The district court granted that motion and appointed counsel to represent Pavatt. On April 1, 2009, Pavatt's appointed counsel filed a petition for writ of habeas corpus asserting fifteen grounds for relief. In his petition, Pavatt conceded that certain of the claims asserted therein were "newly developed" and "m[ight] require further exhaustion." ROA, Vol. 1 at 243 (Dist. Ct. Docket No. 42 at 213). As a result, Pavatt requested that his petition "be held in abeyance so that he [could] return to state court to accomplish any necessary exhaustion." *Id.* At no point, however, did the district court stay the case or otherwise hold it in abeyance to allow Pavatt to exhaust his state court remedies.

Pavatt's second application for post-conviction relief

On September 2, 2009, while his federal habeas petition was pending in federal district court, Pavatt filed with the OCCA a second application for post-conviction relief asserting six propositions of error. On February 2, 2010, the OCCA issued an unpublished opinion denying Pavatt's second application. *Pavatt v. State*, No. PCD-2009-777 (Okla. Crim. App. Feb. 2, 2010) (*Pavatt III*).

The denial of Pavatt's federal habeas petition and the instant appeal

On May 1, 2014, the district court issued an order denying Pavatt's petition. On that same date, the district

court entered final judgment in the case and also issued an order denying Pavatt a COA with respect to all of the issues raised in his habeas petition.

Pavatt filed a notice of appeal on June 2, 2014. In a case management order issued on November 24, 2014, we granted Pavatt a COA on the following issues: (1) "[w]hether there was sufficient evidence to support the [HAC] aggravator (raised in Ground 10 of . . . Pavatt's habeas petition)"; (2) "whether the trial court's failure to provide an adequate instruction to the jury that it must find 'conscious physical suffering' beyond a reasonable doubt before finding that the murder was 'especially heinous, atrocious, or cruel' violated . . . Pavatt's constitutional rights to a fair trial, a reliable sentencing determination, and due process (raised in Ground 11 of . . . Pavatt's habeas petition)"; (3) "[w]hether there was constitutionally ineffective assistance of trial counsel regarding the investigation of mitigating evidence or the presentation of a meaningful case for life imprisonment (raised in Ground 15, Claim I.I., of . . . Pavatt's habeas petition)"; (4) "whether appellate counsel was constitutionally ineffective in failing to raise a claim that trial counsel was ineffective" regarding the investigation of mitigating evidence or the presentation of a meaningful case for life imprisonment; and (5) "[w]hether trial counsel provided constitutionally ineffective assistance regarding the introduction of a camping video, live photographs of the victim, or testimony regarding the victim's good traits (raised in Ground 15, Claim I.E., of . . . Pavatt's habeas petition), and whether appellate counsel was constitutionally ineffective in failing to raise a claim that trial counsel was ineffective in these regards." Case Mgmt. Order at 1-2.

The original hearing panel affirmed the district court's denial of relief with respect to Pavatt's convictions, but in a divided decision reversed the denial of relief with respect to Pavatt's death sentence and remanded to the district court for further proceedings. Respondent filed a petition for rehearing *en banc*, which we granted.[4]

II

Standard of review

"The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner seeking federal habeas relief first to 'exhaus[t] the remedies available in the courts of the State.'" *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1604, 194 L. Ed. 2d 701 (2016) (per curiam) (alteration in original) (quoting 28 U.S.C. § 2254(b)(1)(A)). "If the state courts adjudicate the prisoner's federal claim 'on the merits,' § 2254(d), then AEDPA mandates deferential, rather than *de novo*, review . . . ." *Id.* Specifically, this court cannot grant relief unless that adjudication:

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

4. Because we are vacating the original panel opinion, we must address all of the issues originally raised by Pavatt in his opening appellate brief. That said, Pavatt did not seek rehearing of the original panel's unanimous affirmance of his convictions. Consequently, our analysis of the issues related to his conviction adheres closely to the original panel opinion.

> (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 proceedings.

28 U.S.C. § 2254(d)(1)-(2).

"'Clearly established Federal Law' refers to the Supreme Court's holdings, not its dicta." *Wood v. Carpenter*, 907 F.3d 1279, 1289 (10th Cir. 2018) (citing *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)), *petition for cert. filed*, No. 18-8666 (U.S. Mar. 29, 2019). "A state-court decision is only contrary to clearly established federal law if it 'arrives at a conclusion opposite to that reached by' the Supreme Court, or 'decides a case differently' than the Court on a 'set of materially indistinguishable facts.'" *Id.* (quoting *Williams*, 529 U.S. at 412-13). "But a state court need not cite the Court's cases or, for that matter, even be aware of them." *Id.* "So long as the state-court's reasoning and result are not contrary to the Court's specific holdings, § 2254(d)(1) prohibits [this court] from granting relief." *Id.* (citing *Early v. Packer*, 537 U.S. 3, 9, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam)).

"A state court's decision unreasonably applies federal law if it 'identifies the correct governing legal principle' from the relevant Supreme Court decisions but applies those principles in an objectively unreasonable manner." *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). "Critically, an '*unreasonable* application of federal law is different from

an *incorrect* application of federal law.'" *Id.* (quoting *Williams*, 529 U.S. at 410 (emphasis in original)). "[A] state court's application of federal law is only unreasonable if 'all fairminded jurists would agree the state court decision was incorrect.'" *Id.* (quoting *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014)).

"Finally, a state-court decision unreasonably determines the facts if the state court 'plainly misapprehend[ed] or misstate[d] the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim.'" *Id.* (quoting *Byrd v. Workman*, 645 F.3d 1159, 1170-72 (10th Cir. 2011)). "But this 'daunting standard' will be 'satisfied in relatively few cases.'" *Id.* (quoting *Byrd*, 645 F.3d at 1172).

Sufficiency of evidence challenge to the HAC aggravator

In Proposition One of his appellate brief, Pavatt challenges the sufficiency of the evidence supporting the HAC aggravator found by the jury at the conclusion of the second-stage proceedings. Aplt. Br. at 20. According to Pavatt, the evidence presented at his trial was "constitutionally insufficient" to establish that the murder of Rob Andrew was "especially heinous, atrocious, or cruel," and, he asserts, "[t]he OCCA's determination" to the contrary was "unreasonable." *Id.* at 20-21.

Appendix A

a) Clearly established federal law applicable to the claim

It is clearly established that "the fundamental protection of due process of law" requires that the evidence presented at a criminal trial, viewed in the light most favorable to the prosecution, be sufficient to allow "*any* rational trier of fact [to] have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis in original). Because most states' "enumerated aggravating factors" for capital cases "operate as 'the functional equivalent of an element of a greater offense,'" *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)), this same due process requirement applies to any aggravating factor alleged by the prosecution and found by the jury in a capital case. Thus, in sum, a state capital defendant seeking federal habeas relief from his or her death sentence can assert a sufficiency-of-the-evidence challenge to any of the aggravating factors found by the jury.

b) The OCCA's general construction of the HAC aggravator

Before we examine whether and how the OCCA addressed Pavatt's sufficiency-of-evidence challenge to the HAC aggravator, we pause briefly to review how the OCCA has generally construed the HAC aggravator. In *Stouffer v. State*, 1987 OK CR 166, 742 P.2d 562, 563

(Okla. Crim. App. 1987), the OCCA expressly "restrict[ed] . . . application" of the HAC aggravator "to those murders in which torture or serious physical abuse is present." More specifically, the OCCA "identified two kinds of cases in which 'torture or serious physical abuse' [will be deemed to be] present: those characterized by the infliction of 'great physical anguish' and those characterized by the infliction of 'extreme mental cruelty.'" *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring) (quoting *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 80 (Okla. Crim. App. 1995)). "In the mental cruelty context, the OCCA has emphasized that the torture required for finding the 'heinous, atrocious, or cruel' aggravator must produce mental anguish in addition to that which of necessity accompanies the underlying killing." *Id.* (quotation marks omitted). And, with respect to the physical anguish branch of its test, the OCCA has held that, "[a]bsent evidence of conscious physical suffering by the victim prior to death, the required torture or serious physical abuse standard is not met." *Battenfield v. State*, 1991 OK CR 82, 816 P.2d 555, 565 (Okla. Crim. App. 1991).

In *Nuckols v. State*, 1991 OK CR 10, 805 P.2d 672, 674 (Okla. Crim. App. 1991), the OCCA held that the HAC aggravator "contemplates a two-step analysis." The first step of this analysis, the OCCA stated, requires the jury to determine whether the death of the victim was preceded by torture or serious physical abuse. *Id.* "Once this foundational assessment is made," the OCCA stated, "then the jury may apply the definitions given to them . . . to measure whether or not the crime can be considered to have been heinous, atrocious or cruel." *Id.*

c) The OCCA's resolution of Pavatt's challenge to the HAC aggravator

In his direct appeal, Pavatt challenged the sufficiency of the evidence supporting the HAC aggravator. Proposition XIV of Pavatt's direct appeal brief was titled: "There was insufficient evidence to support the 'especially heinous, atrocious or cruel' aggravating circumstance." Direct Appeal Br. at iv (capitalization omitted). In the body of his direct appeal brief, Pavatt argued, in support of Proposition XIV, that "[t]he evidence does not support the fact that the murder was 'especially' heinous, atrocious or cruel." *Id.* at 47. He in turn quoted the following statement made by his defense counsel during the second-stage closing arguments: "'To some degree I suppose all homicides are heinous, atrocious or cruel. I think that's the reason why our legislature has inflicted the term especially to that phrase.'" *Id.* Lastly, Pavatt commented briefly on the evidence presented by the state in support of the HAC aggravator:

> Interestingly, the State attempts to prove the existence of the aggravating circumstance on the basis of the information provided by Brenda Andrew in her 911 call to the police. (Tr. 3763) The medical examiner's testimony was that either of the two wounds could have been fatal. Death occurred in a matter of minutes. The medical examiner could not tell how long Mr. Andrew was conscious. (Tr. 3764)

Id.

Appendix A

The OCCA rejected this claim on the merits:

> In Propositions 14 and 15, [Pavatt] challenges the sufficiency of the evidence to support the two aggravating circumstances alleged by the State as warranting the death penalty. Such challenges are reviewed under the same standard as challenges to the evidence supporting a criminal conviction. We consider the evidence in a light most favorable to the State, and determine whether any rational juror could have found the existence of the challenged aggravating circumstance beyond a reasonable doubt. *DeRosa [v. State]*, 2004 OK CR 19 at ¶ 85, 89 P.3d at 1153; *Lockett v. State*, 2002 OK CR 30, ¶ 39, 53 P.3d 418, 430.
>
> In Proposition 14, [Pavatt] claims the evidence was insufficient to support the jury's finding that the murder of Rob Andrew was "especially heinous, atrocious, or cruel." To establish this aggravator, the State must present evidence from which the jury could find that the victim's death was preceded by either serious physical abuse or torture. Evidence that the victim was conscious and aware of the attack supports a finding of torture. *Davis v. State*, 2004 OK CR 36, ¶ 39, 103 P.3d 70, 81; *Black v. State*, 2001 OK CR 5, ¶ 79, 21 P.3d 1047, 1074 (evidence that victim consciously suffered pain during and after stabbing was sufficient to support this aggravating circumstance); *Le [v. State*], 1997

OK CR 55 at ¶ 35, 947 P.2d at 550; *Romano v. State*, 1995 OK CR 74, ¶ 70, 909 P.2d 92, 118; *Berget v. State*, 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373. Our evaluation is not a mechanistic exercise. As we stated in *Robinson v. State*, 1995 OK CR 25, ¶ 36, 900 P.2d 389, 401:

> As much as we would like to point to specific, uniform criteria, applicable to all murder cases, which would make the application of the "heinous, atrocious or cruel" aggravator a mechanical procedure, that is simply not possible. Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was proved. Unfortunately, no two cases present identical fact scenarios for our consideration, therefore the particulars of each case become the focus of our inquiry, as opposed to one case's similarity to another, in resolving a sufficiency of the evidence claim supporting the heinous, atrocious or cruel aggravator.

The evidence presented at trial showed that Rob Andrew suffered numerous wounds resulting from two shotgun blasts, which damaged his internal organs. The medical examiner testified that either wound would have caused sufficient blood loss to be independently

fatal, but that death was not instantaneous. When emergency personnel arrived, Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggested that he either tried to ward off his attacker or shield himself from being shot. Brenda Andrew called 911 twice after the shooting; together, the two calls spanned several minutes. During the second call, she claimed that her husband was still conscious and attempting to talk to her as he lay bleeding to death on the garage floor. All of these facts tend to show that Rob Andrew suffered serious physical abuse, and was conscious of the fatal attack for several minutes. *See Ledbetter v. State*, 1997 OK CR 5, ¶ 53, 933 P.2d 880, 896 (evidence that murder victim was likely aware that she was about to be assaulted because defendant had attempted to kill her one week earlier, that she tried to defend herself from the fatal attack, and that she attempted to communicate with a neighbor after the attack was sufficient to show that the murder was especially heinous, atrocious or cruel).

After finding that the murder was accompanied by torture or serious physical abuse, the jury may also consider the attitude of the killer and the pitiless nature of the crime. *Lott [v. State*], 2004 OK CR 27 at ¶ 172, 98 P.3d at 358; *Phillips v. State*, 1999 OK CR 38, ¶ 80, 989 P.2d 1017, 1039. That the victim was acquainted

with his killers is a fact relevant to whether the murder was especially heinous, atrocious, or cruel. In finding the murder in *Boutwell v. State*, 1983 OK CR 17, ¶ 40, 659 P.2d 322, 329 to be especially heinous, atrocious, or cruel, this Court observed:

> In this case the killing was merciless. The robbers planned well in advance to take the victim's life. Even more abhorrent and indicative of cold pitilessness is the fact that the appellant and the victim knew each other.

We find the situation in the present case even more pitiless. Rob Andrew correctly suspected his wife of having an affair with a man he trusted as his insurance agent. He correctly suspected his wife and her lover of trying to wrest control of his life insurance away from him. He correctly suspected his wife and her lover of attempting to kill him several weeks before by severing the brake lines on his car. He confided in others that he was in fear of his life. Having separated from his wife, Rob Andrew was murdered as he returned to the family home to pick up his children for the Thanksgiving holiday. From the evidence, a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he

> died. The evidence supported this aggravating circumstance, and this proposition is denied.

Pavatt I, 159 P.3d at 294-95 (paragraph numbers omitted).

d) Pavatt's challenge to the OCCA's decision

In challenging the OCCA's decision, Pavatt begins by offering his own summary of the relevant evidence, arguing that the crime at issue resulted in "[a] shotgun death" that involved "no conscious suffering beyond what accompanies any murder." Aplt. Br. at 21. According to Pavatt, "[t]here was no gratuitous violence," "no torture," and "no anguish or suffering beyond that which necessarily accompanied the underlying killing." *Id.* Further, Pavatt argues that "[t]he two shotgun blasts were both independently fatal" and Rob Andrew "could not have remained conscious for more than a few moments, before going into shock and quickly bleeding to death." *Id.* at 21-22. In sum, Pavatt argues, "[i]f Rob Andrew's homicide was 'heinous, atrocious or cruel,' then any murder in which the victim does not die instantly satisfies this factor." *Id.* at 22.

The problem with Pavatt's description of the evidence, however, is that it wholly ignores not only the evidence the jury heard, but also the standard of review mandated by the Supreme Court in *Jackson*. As we have noted, *Jackson* requires a reviewing court to "view[] the evidence in the light most favorable to the prosecution." 443 U.S. at 319. When that standard is applied to the evidence presented in Pavatt's case, it simply does not support his description of what occurred. Although it is true that each of the shotgun

blasts were independently lethal, Pavatt is incorrect in asserting that Rob Andrew "could not have remained conscious for more than a few moments." Aplt. Br. at 21. Indeed, the medical examiner who testified on behalf of the prosecution conceded it was possible that Rob Andrew remained conscious for several minutes after sustaining the wounds. And that testimony, combined with Brenda Andrew's statements to the 911 operator regarding Rob Andrew's condition (which we will discuss in greater detail below), would have allowed the jury to reasonably find that he indeed remained conscious far longer than "a few moments."

Pavatt also argues that the OCCA "relied on irrelevant speculation about what Rob [Andrew] was feeling." *Id.* at 24. In support, Pavatt examines and attempts to discredit each of the factors cited by the OCCA in support of its determination. To begin with, Pavatt asserts that "[t]he 'numerous wounds' referred to by the OCCA were caused by pellets from the same shotgun, shot at nearly the same time." *Id.* at 32. Although Pavatt is correct on this point, that does not prove the OCCA's determination to be wrong. Indeed, the medical examiner testified at trial that the two shotgun blasts damaged Rob Andrew's right lung, aorta, and liver. In addition, the photographs of Rob Andrew's body quite clearly indicate that the shotgun pellets caused numerous, separate entry and exit wounds on his body. And, although Pavatt asserts that these wounds "did not contribute to an inordinate amount of conscious pain prior to death," *id.* at 30, the medical examiner testified to the contrary, noting the wounds would, indeed, have been painful.

Pavatt in turn argues that, contrary to the OCCA's determination, "the quick loss of blood from both wounds resulted in shock and loss of consciousness within one minute." *Id.* But this argument ignores, and is ultimately contrary to, the testimony of the medical examiner. The medical examiner testified that, as a result of the blood loss associated with the wounds, Rob Andrew would have lost consciousness before he actually died. The medical examiner opined that Rob Andrew would have died "[l]ess than ten" minutes after sustaining the gunshot wounds, but could have survived for five or six minutes. Tr., Vol. X at 2457-58. The medical examiner declined on direct examination to "give . . . an exact time" frame that Rob Andrew would have maintained consciousness. *Id.* at 2458. On cross-examination, the medical examiner agreed that it was possible that Rob Andrew died less than one minute after sustaining the wounds. *Id.* at 2466. On redirect, the medical examiner testified it was also possible that Rob Andrew remained conscious for more than one minute after sustaining the wounds. Ultimately, the medical examiner's testimony, construed in the light most favorable to the prosecution, and considered together with other evidence presented by the prosecution, would have allowed the jury to find that Rob Andrew remained conscious for several minutes after sustaining the wounds.

Pavatt argues that the fact that Rob Andrew was found "clutching the plastic trash bag was meaningless in determining whether [he] consciously suffered and thus, it was unreasonable for the OCCA to speculate about why [he] may have been holding the bag." Aplt. Br. at 30. We disagree. At trial, the prosecution presented testimony

from two witnesses on this very point. The first witness, Norman Nunley, was a longtime friend of the Andrews. Tr., Vol. V at 1363. Nunley testified that he first learned of Rob Andrew's death from Brenda Andrew, when she called him the morning after the murder. *Id.* at 1381. According to Nunley, Brenda Andrew gave him a brief description of the shooting and, in particular, "said [that] prior to the second shot [Rob Andrew] had grabbed a trash bag full of, like, pop cans or something and tried to hold it up between him and the gun." *Id.* at 1382. The second witness, Roger Frost, was an Oklahoma City police officer and one of the first people to respond to Brenda Andrew's 911 call. Frost testified that when he arrived at the Andrews' house, he discovered Brenda Andrew sitting in the doorway to the garage, approximately three feet from Rob Andrew's body. *Id.*, Vol. IX at 2170. Frost further testified that he removed Brenda Andrew from the crime scene, walked her to an area outside of her house, and had her sit on the curb so that the paramedics could treat her. *Id.* at 2174-75. Frost testified that he asked Brenda Andrew for information about what had happened and that she told him, in pertinent part, that Rob Andrew had grabbed the plastic bag full of cans as an apparent means of self-defense. *Id.* at 2176. Because the OCCA was obligated under Jackson to view the evidence in the light most favorable to the prosecution, it was entirely reasonable for it to accept this testimony of Nunley and Frost as true. And that determination was relevant to the OCCA's assessment of the sufficiency of the evidence supporting the HAC aggravator because it would have supported a finding that Rob Andrew remained not only conscious, but mobile and acting defensively, after the first shotgun blast.

Somewhat relatedly, Pavatt complains that it was unreasonable for the OCCA "to conclude that Rob [Andrew] consciously suffered based on Brenda[Andrew]'s statements in her 911 calls, when everything she said in those calls was determined to be false." Aplt. Br. at 30. The fallacy of this argument, however, is the notion that all of Brenda Andrew's statements to the 911 operator (or, for that matter, her statements to other people, such as Mr. Nunley) were proven to be false. The fact of the matter is that at least some of Brenda Andrew's statements during the two 911 calls were obviously true. For example, it is undisputed that she was physically present with Rob Andrew after he suffered the two shotgun blasts and during at least the second 911 call. Further, her statements to the 911 operator that she and Rob Andrew had been shot were indisputably true. Likewise, some of her statements describing what she was witnessing, such as the arrival of police officers to her house, were also quite clearly true (indeed, officers' voices can be heard in the background during the second 911 call at the precise time that Brenda Andrew tells the 911 operator that the police have arrived on the scene). Thus, the jury, having listened to recordings of both 911 calls, was left to decide whether her statements to the 911 operator regarding Rob Andrew's condition, including her statement that he was conscious and attempting to talk to her, and her repeated statements that he was breathing, were credible or not. Although the jury was not bound to give credence to those statements, it was certainly within the jury's province to do so. *See Perry v. New Hampshire*, 565 U.S. 228, 252, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012) (Sotomayor, J., dissenting) (noting it is "the jury's task [to] assess[]

witness credibility and reliability"). Consequently, we conclude it was in turn reasonable for the OCCA, applying the standard of review mandated by *Jackson*, to treat as credible Brenda's statements regarding Rob Andrew's condition in assessing the sufficiency of the evidence to support the HAC aggravator.

Finally, Pavatt argues that no "deference [should be] afforded [the jury's verdict] under *Jackson*" because "[t]here were no conflicting facts about how Rob [Andrew] died." Aplt. Br. at 22. We reject that argument. *Jackson* provides, in relevant part, that "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." 443 U.S. at 326. That is precisely the situation we have here. As we have already explained, the evidence presented at Pavatt's trial most certainly "supports conflicting inferences" regarding how long Rob Andrew remained conscious after sustaining the first and then the second shotgun blasts. We therefore must presume that the jury in Pavatt's trial, having found the existence of the HAC aggravator, resolved these conflicts in favor of the prosecution. And, in turn, we, like the OCCA, must defer to that resolution.

In sum, we conclude that Pavatt has failed to establish that the OCCA's determination that the evidence was sufficient to support the HAC aggravator was contrary to, or involved an unreasonable application of, clearly established federal law. Thus, Pavatt is not entitled to federal habeas relief on this claim.

Appendix A

Pavatt's as-applied challenge to the HAC aggravator

As part of Proposition One of his appellate brief, Pavatt also attempts to assert an as-applied challenge to the HAC aggravator. Specifically, Pavatt argues that the OCCA, in considering his *Jackson* challenge to the HAC aggravator on direct appeal, "unreasonably failed to follow its own precedent" that had adopted a constitutionally narrow construction of the HAC aggravator, "compounded its historically inconsistent approach to what Oklahoma requires to support the HAC aggravator," and, ultimately, applied an unconstitutionally overbroad definition of the HAC aggravator in affirming his death sentence. Aplt. Br. at 24.

In our October 2, 2018 order granting respondent's petition for rehearing *en banc*, we directed the parties to file supplemental briefs addressing a number of questions concerning whether this as-applied challenge to the HAC aggravator is properly before us. To begin with, we asked the parties whether Pavatt's as-applied challenge was "presented to and addressed by the OCCA," i.e., "did Pavatt exhaust th[is] claim[] in the Oklahoma state courts," and, relatedly, whether the claim was procedurally barred. Order at 2, Oct. 2, 2018.

A threshold question in any case involving a request for federal habeas relief under § 2254 is whether "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Generally speaking, "[a] federal court may not grant" an application for federal habeas relief "unless . . . the applicant has

exhausted state remedies before filing his petition." *Simpson v. Carpenter*, 912 F.3d 542, 564 (10th Cir. 2018). "[T]o exhaust state remedies, a petitioner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *Id.* at 565 (quotations omitted). "This is accomplished by providing the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Id.* (quotations omitted). "A claim is exhausted only after it has been fairly presented to the state court." *Id.* (quotations omitted). "Fair presentation requires that the substance of the federal claim was raised in state court." *Id.* (quotations omitted).

Pavatt, as we have noted, asserted a *Jackson* challenge to the HAC aggravator in his direct appeal and the OCCA rejected that *Jackson* challenge. Pavatt's original application for state postconviction relief did not assert any issue relating to the HAC aggravator. Proposition Five of Pavatt's second application for state postconviction relief asserted the following challenge to the HAC aggravator: "The Eighth and Fourteenth Amendments to the United States Constitution are violated by Oklahoma's continued use of the facially vague aggravating circumstance that a murder is: especially heinous, atrocious, or cruel." Second Appl. for Post-Conviction Relief, at vii (capitalization omitted). In support, Pavatt cited to various OCCA cases applying the HAC aggravator, and he argued that, "[i]nexplicably," the OCCA "found serious physical abuse in [his] case, even though there was no gratuitous violence, and the killing was much like that in *Cartwright[v.*

Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc)]."[5] *Id.* at 32. The OCCA concluded that Proposition Five was procedurally barred. Specifically, the OCCA concluded

5. In *Cartwright*, the defendant "fire[d] two blasts from [a] shotgun" into the victim, resulting in the victim's death. *Cartwright v. State*, 1985 OK CR 4, 695 P.2d 548, 550 (Okla. Crim. App. 1985). On direct appeal, the OCCA concluded that the evidence presented at trial supported the jury's finding of the HAC aggravator. *Id.* at 554. In doing so, however, the OCCA did not discuss whether the victim remained conscious after the two shotgun blasts. Instead, the OCCA considered "the circumstances attendant to the murder," including the fact that the defendant had expressed the intention to get even with the victims, that the defendant had hid inside the victims' home waiting for them to return, that he attacked the female victim (who survived the attack) upon being discovered, that the murder victim "doubtless heard" his wife being shot and "quite possibly experienced a moment of terror as he was confronted by the [defendant] and realized his impending doom," that the defendant "again attempted to kill [the female victim] in a brutal fashion upon discovery that his first attempt was unsuccessful," that the defendant "attempted to conceal his deeds by disconnecting the telephone and posting a note on the door," and that the defendant attempted to steal goods belonging to the victims. *Id.*

On federal habeas review, this court, sitting *en banc*, held that the OCCA "failed to apply a constitutionally required narrowing construction of [the HAC aggravator] in this case." *Cartwright*, 822 F.2d at 1491. The Supreme Court subsequently granted certiorari in the case and affirmed this court's decision. *Maynard v. Cartwright*, 486 U.S. 356, 366, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

Following this court's decision in *Cartwright*, the OCCA "restricted the [HAC aggravator] to those murders in which torture or serious physical abuse is present." *Id.* at 365 (citing *Stouffer*, 1987 OK CR 166, 742 P.2d 562).

that this "legal argument could have been raised in prior proceedings, but was not," and was "therefore waived." *Pavatt III*, No. PCD-2009-777 at 6 (citing Okla. Stat. tit. 22, § 1089(D)(8)).

We are not persuaded, after reviewing the state court pleadings, that Pavatt fairly presented to the OCCA the as-applied arguments that he now seeks to assert in this federal habeas appeal. To begin with, we reject the notion that the *Jackson* challenge that Pavatt asserted in his direct appeal necessarily incorporated an as-applied challenge to the HAC aggravator.[6] Indeed, Pavatt's *Jackson* claim could not have incorporated the as-applied arguments that he now attempts to make in this federal habeas appeal because his as-applied arguments challenge only the manner in which the OCCA, in disposing of his *Jackson* challenge on direct appeal, construed the HAC aggravator. We further conclude that Pavatt's second application for post-conviction relief plainly asserted a facial vagueness challenge to the HAC aggravator, but, at best, only hinted at an as-applied challenge to the HAC aggravator. Consequently, we conclude that the as-applied

6. A *Jackson* challenge to a jury's finding of the HAC aggravator, which relies on the Due Process Clause of the Fourteenth Amendment, is a separate and distinct legal claim from an Eighth Amendment challenge to the HAC aggravator. That said, we do not foreclose the possibility that a petitioner may, depending on the circumstances, assert a *Jackson* claim and an Eighth Amendment claim in the same proceeding. We hold only that the Eighth Amendment as-applied claim that Pavatt now seeks to assert was not, and could not have been, asserted in his direct appeal because it focuses on the manner in which the OCCA applied the HAC aggravator in rejecting Pavatt's *Jackson* claim on direct appeal.

arguments Pavatt now presents in his federal appellate brief were not fairly presented to the OCCA and are thus unexhausted and, in turn, subject to an anticipatory procedural bar.[7] *See Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002).

That is not the end of the matter, however, because in our October 2, 2018 order we directed the parties to address whether "respondent, through counsel, expressly waived the exhaustion requirement for purposes of 28 U.S.C. § 2254(b)(3)" with respect to Pavatt's as-applied challenge to the HAC aggravator. Order at 2, Oct. 2, 2018. We also directed the parties to address whether "respondent expressly waived [procedural bar] as a defense." *Id.*

Section 2254(b)(3), which we referenced in our order, provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Having reviewed the parties' supplemental briefs and the record in this case, we conclude that respondent

7. In our October 2, 2018 order, we directed the parties to address the question of whether "this court [should] *sua sponte* raise the exhaustion issue." Order at 2. Pavatt concedes, as he must, that we possess the authority to consider the issue of exhaustion *sua sponte*. Aplt. Supp. Br. at 19; *see United States v. Mitchell*, 518 F.3d 740, 746 n.8 (10th Cir. 2008) (noting that "*[s]ua sponte* consideration of exhaustion of state remedies . . . is explicitly permitted by Supreme Court precedent.") (citing *Granberry v. Greer*, 481 U.S. 129, 133 (1987), and *Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994)).

did not expressly waive the exhaustion requirement with respect to the arguments that Pavatt now seeks to assert on appeal.

Ground Ten of Pavatt's federal habeas petition plainly asserted a *Jackson* challenge to the HAC aggravator, but at best (similar to his second application for state postconviction relief) only hinted at the possibility of an as-applied challenge to the HAC aggravator. In particular, Ground Ten of Pavatt's federal habeas petition, in addition to discussing in detail why the evidence presented at trial was insufficient to allow the jury to reasonably find the HAC aggravator, mentioned but did not discuss the Eighth and Fourteenth Amendments, and also mentioned, but did not discuss the meaning of, "a constitutionally narrowed construction of the [HAC] aggravator." ROA, Vol. 1 at 185 (Dist. Ct. Docket No. 42 at 155).

Not surprisingly, neither respondent nor the district court read Ground Ten as asserting a separate, as-applied challenge to the HAC aggravator, i.e., that the OCCA failed, on direct appeal, to apply the HAC aggravator in a constitutionally permissible manner.[8] Thus, neither

8. The district court interpreted Ground Ten as asserting a *Jackson* claim and also an argument "that the OCCA applied the incorrect standard of review" in assessing Pavatt's insufficiency-of-evidence challenge on direct appeal. ROA, Vol. 3 at 1128 (Dist. Ct. Docket No. 91 at 80). More specifically, the district court interpreted Ground Ten of Pavatt's habeas petition as arguing, in part, "that the OCCA should have applied the reasonable hypothesis test instead of *Jackson*" in reviewing the evidence presented at trial, including the statements made by Brenda Andrew during the 911 call. *Id.* at 1131 (Dist. Ct. Docket No. 91 at 83 n.40). In rejecting this latter

respondent nor the district court addressed the question of whether Pavatt had exhausted his state court remedies with respect to an as-applied challenge to the HAC aggravator. And, accordingly, at no time did respondent expressly waive the exhaustion requirement with respect to an as-applied challenge to the HAC aggravator.

To be sure, Pavatt argues in his supplemental response brief that respondent "expressly waived" the exhaustion requirement with respect to Pavatt's as-applied arguments. Aplt. Supp. Br. at 18. In support, Pavatt cites to page 128 of respondent's answer to Pavatt's habeas petition. A review of that cited page, however, reveals that respondent conceded exhaustion only as to Pavatt's *Jackson* claim. ROA, Vol. 3 at 560 (Dist. Ct. Docket No. 69 at 128) ("In Ground Ten, Petitioner alleges that insufficient evidence was presented at trial to support the jury's finding of the [HAC] aggravator.); *id.* ("This claim was raised on direct appeal and the OCCA rejected it on the merits. *Pavatt [I]*, 159 P.3d at 294-95. It is therefore exhausted for purposes of federal habeas review."). Thus, Pavatt's assertion that respondent expressly waived the exhaustion requirement with respect to Pavatt's as-applied arguments is without merit.

We likewise conclude that respondent did not expressly waive procedural bar as a defense. As we have discussed, it was far from clear that Pavatt intended to assert an as-applied challenge to the HAC aggravator in

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argument, the district court noted: "it is clear that the OCCA applied *Jackson* and that it was the correct (and constitutional) standard to be applied." *Id.* at 1130-31 (Dist. Ct. Docket No. 91 at 82-83).

his federal habeas petition, and, in fact, both respondent and the district court reasonably interpreted Pavatt's habeas petition as asserting only a *Jackson* challenge to the HAC aggravator. Consequently, we do not construe any of respondent's district court pleadings as expressly waiving procedural bar as a defense to the as-applied claim.

Finally, our October 2, 2018 order directed the parties to address the questions of whether Pavatt's as-applied challenge was "resolved by the district court," whether "a COA [was] granted on th[is] claim[]," and whether the claim was "included in this court's case management order as [an] issue[] to be raised by Pavatt." Order at 2, Oct. 2, 2018. Because the district court reasonably did not perceive Pavatt's habeas petition as asserting an as-applied challenge to the HAC aggravator, it did not address, let alone resolve, that claim, and it did not grant a COA on the claim. Nor, in turn, did this court grant a COA on any as-applied challenge to the HAC aggravator. Consequently, the as-applied claim was not included in this court's case management order as an issue to be raised by Pavatt and briefed by the parties.

For all of these reasons, we conclude that the as-applied challenge to the HAC aggravator that Pavatt asserts in his federal appellate brief is not properly before us and cannot serve as the basis for the grant of federal habeas relief.[9]

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9. Consequently, we do not reach the issues outlined in Questions 2(h), (i), (j), or (k) of our October 2, 2018 Order directing the parties to file supplemental briefs, all of which concerned the merits of Pavatt's as-applied challenge to the HAC aggravator.

Appendix A

Facial challenge to the HAC aggravator

In both Ground Eleven and Ground Thirteen of his federal habeas petition, Pavatt referred to the HAC aggravator as being facially vague. ROA, Vol. 1 at 191, 202 (Dist. Ct. Docket No. 42 at 161, 172). Neither Ground Eleven nor Ground Thirteen, however, directly asserted a facial challenge to the HAC aggravator. Instead, Ground Eleven focused on the adequacy of the instructions given to the jury in Pavatt's case regarding the HAC aggravator, and Ground Thirteen asserted that Oklahoma's Uniform Jury Instruction defining the terms "heinous," "atrocious," and "cruel" failed to adhere to the constitutionally narrowing construction that had been adopted by the OCCA following this court's decision in *Cartwright*.

Respondent did not interpret Pavatt's habeas petition as asserting a facial challenge to the HAC aggravator. But the district court, perhaps out of an abundance of caution, construed Ground Thirteen as challenging the HAC aggravator "on the ground that it is unconstitutionally vague on its face." *Id.*, Vol. 3 at 1138 (Dist. Ct. Docket No. 91 at 90). The district court concluded, however, that this facial challenge was "barred from federal review" because it was "not presented to the OCCA until [Pavatt's] second post-conviction application." *Id.* The district court also noted, in any event, that the OCCA had, in response to this court's decision in *Cartwright*, adopted a constitutionally narrowing construction of the HAC aggravator.

The district court did not grant a COA as to Ground Thirteen. Likewise, we did not grant a COA as to

Ground Thirteen (or to any facial challenge to the HAC aggravator) or include it in our case management order as an issue to be raised by Pavatt on appeal. And, in turn, Pavatt's opening appellate brief makes no mention of Ground Thirteen or any facial challenge to the HAC aggravator.

For these reasons, we conclude that there is no facial challenge to the HAC aggravator that is properly before us.

Adequacy of instruction on the HAC aggravator

In Proposition Two of his appellate brief, Pavatt contends that the state trial court's instructions to the jury regarding the HAC aggravator failed to adequately inform them that they must find "conscious physical suffering" before concluding that the murder was "especially heinous, atrocious, or cruel."

a) Facts relevant to this claim

Prior to trial, Pavatt filed an objection "to the pattern verdict form, OUJI-CR 2d 4-84, on the grounds [that] the special findings, *i.e.*, the aggravating circumstances, [we]re ill-defined, vague and d[id] not check the unbridled discretion of the sentencer." State R., Vol. VII at 1286. Pavatt subsequently filed an objection to the uniform instruction and verdict form regarding the HAC aggravator, arguing "that [they were] unconstitutional" in light of the Supreme Court's decision in *Cartwright*. *Id.*, Vol. VIII at 1471.

Appendix A

The state trial court overruled Pavatt's objections and, at the conclusion of the second-stage proceedings, gave the jury the following instruction regarding the HAC aggravator:

Instruction Number 5

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile: "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

Id., Vol. XI at 2052. As for the second-stage verdict form, it simply asked the jury to check whether or not they found the existence of each of the alleged aggravating circumstances. *Id.* at 2063. The verdict form did not otherwise explain or attempt to define the HAC aggravator.

The jury, after deliberating, indicated that they found the existence of the HAC aggravator. The jury also indicated that it found that Pavatt committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration.

b) Pavatt's presentation of the issue to the OCCA

Although Pavatt argued on direct appeal that the evidence presented at trial was insufficient to support the HAC aggravator, he did not challenge on direct appeal the adequacy of the HAC instruction or the verdict form. Nor did he raise the issue in his initial application for post-conviction relief. Instead, Pavatt waited until he filed his second application for post-conviction relief to raise the issue. In Proposition Four of that application, Pavatt argued that the state trial court violated his constitutional rights by failing to provide an adequate instruction that informed the jury that it must find "conscious physical suffering" beyond a reasonable doubt before concluding that the murder was "especially heinous, atrocious, or cruel." Second Appl. for Post-Conviction Relief, at 27-31.

c) The OCCA's resolution of the claim

In its opinion denying Pavatt's second application for post-conviction relief, the OCCA concluded that this claim was procedurally barred: "Because this argument is based on the trial record, it could have been made in prior proceedings, and may not be considered now." *Pavatt III*, No. PCD-2009-777 at 5 (citing Okla. Stat. tit. 22, § 1089(D)(8)). In a related footnote, the OCCA also stated:

> In any event, we have rejected the same argument several times in the past. [Pavatt] essentially asks this Court to retroactively require an instruction that we promulgated—after [Pavatt]'s conviction — in *DeRosa v.*

> *State*, 2004 OK CR 19, ¶¶ 91-97, 89 P.3d 1124, 1154-57. That instruction elaborates on the meaning of "heinous, atrocious, or cruel," and the relevant Uniform Jury Instruction already in existence (No. 4-73) was amended a year later. *DeRosa* was handed down several months after [Pavatt]'s trial. *DeRosa* does not hold that the Uniform Jury Instruction on this issue, being used at the time of DeRosa's and [Pavatt]'s trials, was materially deficient. *DeRosa*, 2004 OK CR 19, ¶ 97, 89 P.3d at 1156 ("This opinion should not be interpreted as a ruling that the former uniform instruction was legally inaccurate or inadequate"). This same attack on the pre-*DeRosa* version of OUJI-CR (2nd) No. 4-73 has been rejected several times by this Court. *Jackson v. State*, 2006 OK CR 45, ¶¶ 36-38, 146 P.3d 1149, 1161-63; *Browning v. State*, 2006 OK CR 8, ¶¶ 52-56, 134 P.3d 816, 843-45; *Rojem v. State*, 2006 OK CR 7, ¶¶ 68-73, 130 P.3d 287, 300-01.

Id. at 5 n.5.

In *DeRosa*, the OCCA incorporated the two-step analysis into its uniform jury instruction defining the HAC aggravator and directed that this instruction was to "be used in all future capital murder trials in which the" HAC aggravator was alleged. 89 P.3d at 1156. The instruction read as follows:

> The State has alleged that the murder was "especially heinous, atrocious, or cruel." This

aggravating circumstance is not established unless the State proves beyond a reasonable doubt:

> *First*, that the murder was preceded by either torture of the victim or serious physical abuse of the victim; and
>
> *Second*, that the facts and circumstances of this case establish that the murder was heinous, atrocious, or cruel.

You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that you cannot find that "serious physical abuse" or "great physical anguish" occurred unless you also find that the victim experienced conscious physical suffering prior to his/her death.

In addition, you are instructed that the term "heinous" means extremely wicked or shockingly evil; the term "atrocious" means outrageously wicked and vile; and the term "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

Id. The OCCA emphasized that "[t]his instruction d[id] not change any of the legal requirements of the

[HAC aggravator]." *Id.* "Rather," the OCCA noted, "it [wa]s intended to more fully inform the jury regarding the findings that must be made in order to properly apply the aggravator and to ensure that a jury determination is made regarding each of these findings." *Id.*

d) The district court's procedural bar ruling

The district court concluded that Pavatt's challenge to the state trial court's HAC instruction was "barred from federal review." ROA, Vol. 3 at 1138 (Dist. Ct. Docket No. 91 at 90). In support, the district court stated that "[t]he Tenth Circuit has repeatedly recognized the application of a procedural bar to claims which could have been raised in an initial post-conviction application but were not." *Id.* at 1079 (Dist. Ct. Docket No. 91 at 31). The district court also concluded that "the OCCA's procedural bar here [wa]s adequate and independent." *Id.* at 1080 (Dist. Ct. Docket No. 91 at 32). Lastly, the district court concluded that Pavatt had "not made any showing of cause and prejudice to excuse his default of th[is] claim[]," nor had he shown "that a fundamental miscarriage of justice w[ould] occur if the claim [wa]s not heard." *Id.* at 1081 (Dist. Ct. Docket No. 91 at 33).

e) Pavatt's challenge to the district court's procedural bar ruling

Pavatt contends that "[t]he district court erred in finding this claim procedurally barred from federal review." Aplt. Br. at 41. In support, Pavatt asserts that "*Valdez v. State*, 2002 OK CR 20, 46 P.3d 703 (Okla.

Crim. App. 2002), gives the OCCA the option to permit consideration on the merits 'when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.'" *Id.* (quoting *Valdez*, 46 P.3d at 710). "The merits inquiry," Pavatt asserts, "is thus part of the default consideration, and therefore, lacks independence as in *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)." *Id.*

In *Ake*, "the OCCA held that [the defendant] had waived his claims that he was entitled to a court-appointed psychiatrist to assist him in an insanity defense because he had not renewed his request for a psychiatrist in a new-trial motion." *Black v. Workman*, 682 F.3d 880, 918, 485 Fed. Appx. 917 (10th Cir. 2012). "But under Oklahoma law there was no procedural bar if the alleged error was 'fundamental trial error'; and federal constitutional error was considered an error of that type." *Id.* (quoting *Ake*, 470 U.S. at 74-75). "Thus, the OCCA could not apply the waiver rule without first addressing the federal constitutional error." *Id.* "The Supreme Court concluded that the state waiver rule was therefore not an independent state ground for barring review." *Id.*

In Pavatt's case, the OCCA based its denial upon Oklahoma's Post-Conviction Procedure Act, Okla. Stat. tit. 22, § 1089(D)(8). That statute provides, in pertinent part, that "if a subsequent application for post-conviction relief is filed after filing an original application," the OCCA "may not consider the merits of or grant relief based on the subsequent . . . application unless" it "contains claims

and issues that have not been and could not have been presented previously in a timely original application . . . because the legal basis for the claim was unavailable." Okla. Stat. tit. 22, § 1089(D)(8).

"Federal habeas courts generally refuse to hear claims 'defaulted . . . in state court pursuant to an independent and adequate state procedural rule.'" *Johnson v. Lee*, 136 S. Ct. 1802, 1803-04, 195 L. Ed. 2d 92 (2016) (per curiam) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). "State [procedural] rules count as 'adequate' if they are 'firmly established and regularly followed.'" *Id.* at 1804 (quoting *Walker v. Martin*, 562 U.S. 307, 316, 131 S. Ct. 1120, 179 L. Ed. 2d 62 (2011)).

We have repeatedly held that the Oklahoma statute that was relied on by the OCCA in this case—§ 1089(D)(8) of Oklahoma's Post-Conviction Procedure Act—"satisfies both adequacy criteria." *Id.* at 1804; *see Williams v. Trammell*, 782 F.3d 1184, 1212 (10th Cir. 2015) (holding "that the OCCA's ban on successive post-conviction applications is . . . a firmly established and consistently followed rule."); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012) (same); *Moore v. Reynolds*, 153 F.3d 1086, 1097 (10th Cir. 1998) (same).

But Pavatt asserts, like some other Oklahoma capital defendants have in the past, that in light of *Valdez*, the exception makes the rule and the OCCA's reliance on § 1089(D)(8) "does not preclude merits review because the state bar is not independent of federal law." *Fairchild*

v. Trammell, 784 F.3d 702, 719 (10th Cir. 2015). More specifically, Pavatt "is asserting that the OCCA will not impose a procedural bar [pursuant to § 1089(D)(8)] unless it first determines that any federal claims lack merit." *Id.*

We have held, however, "the *Valdez* exception only applies in cases involving an exceptional circumstance, and it is insufficient to overcome Oklahoma's regular and consistent application of its procedural-bar rule in the vast majority of cases."[10] *Williams*, 782 F.3d at 1213 (quotations and citations omitted). In this case, Pavatt's challenge to the HAC jury instruction is far from exceptional: it is a claim that was readily apparent from the trial record and that could and arguably should have been raised on direct appeal. Moreover, although the OCCA opined in a footnote that there was no merit to Pavatt's claim, the clear and unequivocal basis for its denial of his claim was procedural bar under § 1089(D)(8). *See Cole v. Trammell*, 755 F.3d 1142, 1158-59 (10th Cir. 2014) (acknowledging and applying the OCCA's procedural bar ruling, even though the OCCA, on an alternative basis, briefly addressed and rejected the merits of the petitioner's claim); *Thacker*, 678 F.3d at 834 n.5 (same). We therefore agree with the district court that Pavatt's challenge to the HAC instruction is procedurally barred.

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10. "*Valdez* was special because the lawyers there knew that their client was a citizen of Mexico and nonetheless failed to comply with the Vienna Convention when they failed to contact the Mexican Consulate, thereby depriving the Consulate [of] the ability to intervene and present its discovery that the defendant suffered from organic brain damage." *Williams*, 782 F.3d at 1213.

f) The merits of Pavatt's claim

Even if we were to conclude that the claim is not procedurally barred, it cannot provide Pavatt with a valid basis for federal habeas relief. In *Workman v. Mullin*, 342 F.3d 1100 (10th Cir. 2003) and *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), we considered HAC jury instructions identical to the one utilized in Pavatt's case and rejected claims identical to the one now asserted by Pavatt. In doing so, we concluded that the language of the instructions was sufficient to narrow the jury's discretion, as required by Supreme Court precedent. *Mullin*, 342 F.3d at 1116; *Wilson*, 536 F.3d at 1108.

Ineffective assistance of trial and appellate counsel

We granted a COA in our case management order on three distinct ineffective assistance of counsel claims. Pavatt addresses these claims in Proposition Three of his opening brief. First, he argues that his trial counsel was ineffective for failing to prevent the prosecution from presenting what he describes as pervasive victim-impact evidence in both stages of trial. Second, Pavatt contends that his trial counsel was also ineffective in failing to investigate and present a compelling mitigation case. Lastly, Pavatt contends that his counsel on direct appeal was ineffective for failing to assert these claims of ineffective assistance of trial counsel.

Appendix A

a) Clearly established federal law applicable to the claims

The clearly established federal law applicable to these claims is the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the Supreme Court held that "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." 466 U.S. at 687. "First," the Court noted, "the defendant must show that counsel's performance was deficient." *Id.* "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "Second," the Court noted, "the defendant must show that the deficient performance prejudiced the defense." *Id.* "Unless a defendant makes both showings," the Court held, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* In other words, "[t]o prevail on a Sixth Amendment claim of ineffective assistance of counsel under *Strickland* . . . , a defendant must show both that (1) counsel committed serious errors in light of prevailing professional norms such that his legal representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Grant v. Trammell*, 727 F.3d 1006, 1017 (10th Cir. 2013) (quotations omitted).

The right to effective assistance of counsel extends to direct appeals, *Evitts v. Lucey*, 469 U.S. 387, 396-97, 105 S.

Ct. 830, 83 L. Ed. 2d 821 (1985), and the same standards apply in this context, *see Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000) (holding that "the proper standard for evaluating [a] claim that appellate counsel was ineffective . . . is that enunciated in *Strickland*"). This means that a defendant asserting a claim of ineffective assistance of appellate counsel "must show a reasonable probability that, but for his counsel's unreasonable failure to" raise a particular nonfrivolous issue, "he would have prevailed on his appeal." *Id.*

b) Trial counsel's failure to challenge the admission of testimony regarding Rob Andrew's religious beliefs and practice and his good, moral character, as well as photographs and a video-recording showing Rob Andrew while alive

Pavatt complains that during the first-stage proceedings, the State, "[w]ithout objection from [his] defense counsel, . . . elicited from Rob Andrew's friends and family detailed and glowing accounts of him as a husband, father, and friend." Aplt. Br. at 49. As a result, Pavatt complains, "[t]he trial was saturated with descriptions of Rob [Andrew] as a young, healthy, and successful professional who pursued active and wholesome interests." *Id.* Pavatt also complains that "[t]he jury was repeatedly informed regarding the extent of Rob[Andrew]'s religious faith, including details of his Bible study." *Id.* "This evidence," Pavatt asserts, "was designed to describe Rob [Andrew] in especially devout terms and in marked contrast to Pavatt, who according to

the prosecution's theory, abandoned his Christian values to follow Brenda [Andrew] into the sins of adultery and murder." *Id.* Finally, Pavatt complains that "[t]he verbal descriptions of Rob [Andrew] were magnified by visual images," including "four photographs of Rob in life and a video-recording of him with his brother and friends and Pavatt during a hunting excursion during the winter prior to his death." *Id.*

Pavatt in turn argues that his "[t]rial counsel's failures to object to inadmissible evidence continued in the punishment phase of the trial." *Id.* Specifically, he notes, "[t]he prejudicial and improper evidence" that was admitted during the first-stage proceedings "was incorporated into the sentencing stage without objection." *Id.* "This emotion-driven evidence," Pavatt argues, "compounded by the victim-impact testimony from Rob[Andrew]'s father and brothers, presented much more than the quick glimpse of the life of Rob Andrew that is constitutionally allowed." *Id.* at 49-50.

In his original application for state post-conviction relief, Pavatt asserted a host of claims alleging ineffective assistance of trial and appellate counsel. Included was a claim that his appellate counsel failed to challenge the admission of a pre-mortem studio photograph of Rob Andrew in a suit and tie (State's Exhibit 219), and that the admission of that photograph "rendered . . . Pavatt's trial fundamentally unfair, depriving him of the Due Process of Law, and unconstitutionally injected passion, prejudice, and other arbitrary factors into the sentencing proceeding." Original Appl. for Post-Conviction Relief at

54 (citations omitted). The OCCA concluded that this claim was "not accompanied by newly-discovered facts or new controlling case law" and was "therefore barred by *res judicata*." *Pavatt II*, No. PCD-2004-25 at 6. The OCCA also noted that it had rejected a similar claim in *Marquez-Burrola v. State*, 2007 OK CR 14, 157 P.3d 749, 760 (Okla. Crim. App. 2007). *Pavatt II*, No. PCD-2004-25 at 6 n.6.

In his second application for post-conviction relief, Pavatt alleged that he was denied the effective assistance of trial, direct appeal, and post-conviction counsel. In support, Pavatt alleged, in pertinent part, that "[t]rial counsel objected to the admission of the video recording of the hunting trip,"[11] but "failed to object to the admission of the other live photographs of Rob Andrew and of Rob and Brenda Andrew together." Second Application for Post-Conviction Relief at 37-38. Pavatt further alleged "that trial counsel allowed multiple witnesses, who were friends and family of Rob Andrew, to testify to entirely irrelevant matters that could only raise sympathy in the minds of jurors." *Id.* at 38. Pavatt in turn alleged that "[d]irect appeal counsel and post-conviction counsel were ineffective in failing to raise this part of trial counsel's deficiencies." *Id.*

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11. The hunting trip video was relevant to show that Rob Andrew owned a 16-gauge shotgun and that Pavatt, who accompanied Rob Andrew on the trip, was familiar with and had actually used that particular shotgun. As the OCCA outlined in its description of the underlying facts, Rob Andrew was shot and killed with a 16-gauge shotgun, and the 16-gauge shotgun that Rob Andrew owned was found missing from Brenda Andrew's house after the murder.

Appendix A

In its opinion denying Pavatt's second application for post-conviction relief, the OCCA noted that, under Oklahoma's Post-Conviction Procedure Act, its "consideration of successive applications for relief [wa]s even more limited than the review afforded to initial applications," and that it could "not consider the merits of any claim made in a subsequent application for post-conviction relief, unless (1) the legal basis for that claim was previously unavailable, or (2) the facts supporting the claim were not previously ascertainable through the exercise of reasonable diligence." *Pavatt III*, No. PCD-2009-777 at 2-3. Turning to Pavatt's claims of ineffective assistance of counsel, the OCCA noted that Pavatt "concede[d] that none of these claims [we]re based on newly-discovered evidence, or on any material change in the law." *Id.* at 7. As a result, the OCCA concluded it was "barred by the provisions of [Oklahoma's] Post-Conviction Procedure Act from considering these arguments and materials." *Id.* (citing Okla. Stat. tit. 22, § 1089(D)(8)).

The federal district court in this case considered on the merits only Pavatt's claim that his appellate counsel was ineffective for failing to challenge the admission of a pre-mortem photograph of Rob Andrew (State's Exhibit 219). With respect to that claim, the district court concluded that Pavatt had failed to demonstrate that the OCCA's decision was contrary to or an unreasonable application of *Strickland*. ROA, Vol. 3 at 1125 (Dist. Ct. Docket No. 91 at 77). More specifically, the district court concluded it was "clear that based on the case cited by the OCCA in its denial of [Pavatt]'s claim, *Marquez-Burrola*, 157 P.3d at 759-61, as well as other cases decided by the OCCA

prior to [Pavatt]'s appeal, . . . that [Pavatt] would not have prevailed on appeal had the claim been raised." *Id.* As for the remaining claims of ineffective assistance asserted by Pavatt, the district court concluded that they were either procedurally barred from federal habeas review, id. at 1146-47 (Dist. Ct. Docket No. 91 at 98-99) (addressing Pavatt's claim that his trial counsel was ineffective for failing to object to the admission of live photographs of Rob Andrew, other than State's Exhibit 219), or were inadequately presented by Pavatt in his habeas petition, *id.* at 1152-53 (Dist. Ct. Docket No. 91 at 104-05).

In this appeal, Pavatt argues that we should review his claims de novo for two reasons. First, he contends that "[t]he OCCA did not clearly impose a procedural bar of these claims, but instead stated the 'current arguments merely modify or expand the claims made, and rejected, in prior proceedings.'" Aplt. Br. at 50 (quoting *Pavatt III*, No. PCD-2009-777 at 4). As discussed above, however, and as Pavatt ultimately concedes in a related footnote, the OCCA quite clearly concluded that these claims were procedurally barred under Oklahoma's Post-Conviction Procedure Act. *Id.* at 50-51 n.14. And, as we have previously discussed, this procedural bar ruling is considered both independent and adequate and thus serves to preclude federal habeas review. *See Johnson*, 136 S. Ct. at 1803-04.

That leads to Pavatt's second argument: "[e]ven if this Court determines the OCCA imposed a procedural bar, such a bar is not without exception," and "[p]ost-conviction counsel's ineffectiveness in not fully challenging the failures of prior counsel to object to the inadmissible

sympathy evidence is the 'cause' that excuses any default." *Id.* at 50-51. In other words, Pavatt argues that the ineffectiveness of his post-conviction counsel establishes the "cause" for his failure to comply with Oklahoma's procedural requirements. Pavatt contends that his position on this point is supported by *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013).

In *Martinez*, the Supreme Court held that if

> under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

566 U.S. at 17. In *Trevino*, the Supreme Court explained that, in determining whether *Martinez* applies in a particular case, four requirements must be met:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceedings was the "initial" review proceeding in respect to the "ineffective-

> assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.

569 U.S. at 423 (alterations and emphasis in original) (quoting *Martinez*, 566 U.S. at 13-18). And the Court in *Trevino* ultimately extended the rule in *Martinez* to circumstances in which state law does not expressly require claims of ineffective assistance of trial counsel to be brought in collateral proceedings, but, by way of its "structure and design . . . make[s] it virtually impossible for an ineffective assistance claim to be presented on direct review." *Id.* at 417 (quotations omitted).

Pavatt argues that the rule outlined in *Martinez* and *Trevino* should be applied in his case because (a) he was represented at trial and on direct appeal by the same attorney, (b) consequently, his initial application for state post-conviction relief was his first real opportunity to assert ineffective assistance of trial counsel claims, and (c) his post-conviction counsel was ineffective for failing to raise these claims of ineffective assistance of trial counsel and appellate counsel.[12]

Martinez and *Trevino* are distinguishable from Pavatt's case, however, because in both of those cases, the Supreme Court focused on whether the "structure and design" of the state system at issue actually or

12. Attorney Michael Arnett represented Pavatt both at trial and on direct appeal. On direct appeal, Pavatt was also represented by another attorney, Gloyd McCoy.

effectively prevented the petitioner from raising his or her ineffective assistance claim for the first time until state post-conviction proceedings. We are not persuaded that the same holds true with respect to Oklahoma's system and Pavatt does not argue otherwise.[13] Indeed, Pavatt's argument is based exclusively on his own unique circumstances, i.e., the fact that he was represented at trial and on appeal by the same attorney. Thus, Pavatt has not established an exception to the procedural bar rule that would otherwise apply to his ineffective assistance of trial counsel claims.

Pavatt also, as previously noted, asserts in this appeal that his appellate counsel was ineffective for failing to raise these ineffective assistance of trial counsel claims on direct appeal. The OCCA rejected these ineffective assistance of appellate counsel claims as procedurally barred under Oklahoma's Post-Conviction Procedure Act. Because the OCCA treated these claims as procedurally barred, and because *Martinez* and *Trevino* do not apply to ineffective assistance of appellate counsel claims, we conclude that those claims are also barred from federal habeas review.

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13. Oklahoma law generally requires that a claim of ineffective assistance of trial counsel be raised on direct appeal. *See Cole*, 755 F.3d at 1159. But we do not treat this procedural bar rule as "adequate" if the petitioner was represented by the same counsel at trial and on direct appeal. *Id.*

c) Trial counsel's failure to investigate and present a compelling mitigation case

Pavatt also complains that his trial counsel failed to investigate and present sufficient mitigating evidence during the second-stage proceedings. Pavatt argues that trial "[c]ounsel's meager presentation of mitigation, based on a last-minute and superficial investigation, was an afterthought." Aplt. Br. at 65. According to Pavatt, his trial counsel, "believing [Pavatt] would be acquitted, put his time and resources into the guilt/innocence stage of trial" and "operated under the unreasonable belief that residual doubt of Pavatt's guilt would be enough to persuade jurors to spare his life." *Id.* Pavatt argues that his "[t]rial counsel had no reasonable strategy to shun the thorough investigation that would have uncovered Pavatt's significant psychological impairments and explained how those impairments, and his unique background, caused him to be easily influenced by Brenda Andrew." *Id.* at 65-66.

Pavatt first raised this claim in his second application for state post-conviction relief. The OCCA concluded that, because the claim was not "based on newly-discovered evidence . . . or on any material change in the law," it was "barred by the provisions of [Oklahoma's] Post-Conviction Procedure Act from considering" this claim. *Pavatt III*, No. PCD-2009-777 at 7.

For the same reasons discussed above, we conclude that the OCCA's procedural bar ruling precludes federal habeas review of this ineffective assistance of trial

counsel claim, and that Pavatt has failed to satisfy the requirements outlined in *Martinez* and Trevino in order to establish an exception to this procedural bar rule.

d) Ineffective assistance of appellate counsel

Finally, Pavatt contends that his appellate counsel was ineffective for failing to "raise the claims of trial counsel's ineffectiveness" outlined above. Aplt. Br. at 99. This claim, like his ineffective assistance of trial counsel claims, is procedurally barred due to Pavatt's failure to raise the claim in his original application for state post-conviction relief. Further, this claim of ineffective assistance of appellate counsel does not fall within the *Martinez/Trevino* exception.

III

We VACATE the prior panel opinion, AFFIRM the judgment of the district court, and DENY Pavatt's request for an additional COA.

HARTZ, Circuit Judge, dissenting, joined by **KELLY**, J. and **LUCERO**, J. Circuit Judges.

I respectfully dissent.

In *Maynard v. Cartwright*, 486 U.S. 356, 363, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the Supreme Court held that Oklahoma's statutory HAC aggravator was too vague to satisfy the Eighth Amendment absent a limiting construction from the state courts, because under the statutory language there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." In response, the Oklahoma Court of Criminal Appeals (OCCA) construed the statutory aggravator to require that one of several alternatives must be satisfied. One of those alternatives was that the victim experienced conscious physical suffering. *See Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 80 (Okla. Crim. App. 1995) ("Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met.")

This court upheld the constitutionality of the aggravator in *Hatch v. Oklahoma*, 58 F.3d 1447, 1468-69 (10th Cir. 1995). Early on, the OCCA sent some signals that the necessary conscious physical suffering must be more than merely the natural consequence of being murdered. *See Cudjo v. State*, 1996 OK CR 43, 925 P.2d 895, 901-02 (Okla. Crim. App. 1996) ("[T]he manner of [the victim's] killing did not involve any acts of injury or cruelty beyond the scope of the act of killing itself."); *Cheney*, 909 P.2d at

80 ("The torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing."); *Booker v. State*, 1993 OK CR 16, 851 P.2d 544, 548 (Okla. Crim. App. 1993) ("The record does not support a finding of mental anguish beyond that which necessarily accompanied the underlying killing."). Since then, however, several members of this court have expressed concern that the aggravator is being interpreted by the OCCA too broadly to satisfy the Eighth Amendment. *See Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001); *Thomas v. Gibson*, 218 F.3d 1213, 1228 n.17 (10th Cir. 2000); *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring). I now agree that the Oklahoma HAC aggravator, as presently construed by the OCCA, does not satisfy the Eighth Amendment requirement that the aggravator distinguish in a principled way those first-degree murderers who deserve the death penalty from the many who do not.

At oral argument before the en banc court, counsel for the State acknowledged what is apparent from the OCCA opinion in this case: a defendant "qualifies for the [HAC] aggravator if the victim was conscious for some period of time (a couple minutes) after receiving the fatal blow and experienced some pain during that time." Oral argument at 39:20-38. In other words, the very act of committing the murder makes one eligible for the death penalty unless the victim was rendered unconscious immediately upon receiving the fatal blow. In my view, no fairminded jurist could think that this requirement distinguishes in a *principled* manner those deserving the death penalty from the many first-degree murderers who do not. To

the extent that it is not merely fortuitous that the victim remains conscious, this test provides what could be described as a "sharpshooter bonus." If the perpetrator has the skill to render an immediately fatal blow, he or she escapes the death penalty under this aggravator. Such an arbitrary aggravator is not consistent with the Supreme Court's "narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death." *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

The majority opinion does not address this issue. It holds that Mr. Pavatt did not exhaust in state court his Eighth Amendment challenge to the HAC aggravator and therefore he is procedurally barred from raising it here. I respectfully disagree. It is not clear to me that it was not exhausted. But in any event, the State waived the exhaustion defense.

The majority of the panel that heard this case understood Mr. Pavatt's briefs in this court as arguing that the OCCA, in affirming his sentence, had construed the HAC aggravator in a way that violated the Eighth Amendment. As pointed out in the original panel opinion, *Pavatt v. Royal*, 859 F.3d 920, 935 (10th Cir. 2017), Mr. Pavatt's original appellate briefs raised this issue in three places. Page 21 of the opening brief said: "[T]he evidence here—as related to the core element of conscious suffering—is constitutionally insufficient." The argument on pages 35-36 was more developed:

> The Eighth and Fourteenth Amendments require that an aggravator serve a narrowing

> function rather than become a standardless catch-all. *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993) and *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Oklahoma has veered off the course forced on it by *Cartwright*, coming full circle and no longer limiting this clearly vague aggravating circumstance in a manner that minimizes "the risk of wholly arbitrary and capricious action." *Maynard*, 486 U.S. at 362-63.

And the reply brief at 5 challenged "whether there was sufficient evidence to support a constitutional reading and application of the [HAC] aggravator." Yet, as noted in the original panel opinion:

> Although the State has argued procedural bar with respect to several of Mr. Pavatt's claims, it did not argue in its appellate brief that the sufficiency-of-the-evidence claim or any of its components was procedurally barred, nor did it argue procedural bar when questioned at oral argument about the insufficient-narrowing component of that claim.

859 F.3d at 936 n.4.

The failure of the State's original appellate briefing to raise exhaustion should not be surprising because in federal district court the State had explicitly conceded exhaustion. Its brief in response to the § 2254 application

said that Mr. Pavatt's Ground Ten had been "exhausted for purposes of federal habeas review." Resp. to Pet. for Writ of Habeas Corpus, *Pavatt v. Workman*, No. Civ-08-470-R (D. Okla. Jul. 31, 2009), ECF No. 69 at 128. The majority opinion says that the State was conceding exhaustion of only a *Jackson* challenge to the sufficiency of the evidence. *See* En Banc. Op. at 30; *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). But the State brief's 10-page discussion of Ground Ten clearly indicates otherwise. It included substantial references to the Eighth Amendment constraints on aggravators. For example, one paragraph begins: "To be constitutional, an aggravating circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. It must not also be unconstitutionally vague." Resp. to Pet. for Writ of Habeas Corpus at 135. The paragraph ends: "Nothing about the OCCA's discussion of the legal or factual basis for its conclusion here in any way suggests an overbroad or an erroneous interpretation, let alone application, of Oklahoma's [HAC] aggravator." *Id.* at 136. In discussing the Eighth Amendment, the State's brief included nary a hint that its acknowledgment of exhaustion of Mr. Pavatt's Ground Ten did not encompass this component of the issue.

Further, even after the panel dissent argued that Mr. Pavatt's Eighth Amendment claim had not been exhausted, the State was at best halfhearted in arguing in its original petition for rehearing that it had not waived exhaustion. It wrote: "It is debatable whether Respondent waived an exhaustion defense by asserting in district court that Petitioner's sufficiency claim is exhausted." Pet. for Panel

Reh'g or Reh'g En Banc at 5 n.1. This sentence is followed by a "compare" citation that notes one published opinion in which we held that exhaustion was not waived and one unpublished case in which we held that exhaustion was waived. There is no real argument on the issue. Moreover, the perfunctory statement is only in a footnote, which under this court's precedent is not adequate to preserve an issue. *See United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived.")

Perhaps the State thought that Mr. Pavatt had a good argument for exhaustion. [1] But the State may also have

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1. Mr. Pavatt clearly raised an Eighth Amendment claim in his second application to the OCCA for postconviction relief. A fair construction of that argument is that the OCCA decision in his case demonstrated that the OCCA had expanded the meaning of "conscious physical suffering" so broadly that the requirements of *Maynard* were no longer satisfied. This strikes me as an appropriate argument under the Eighth Amendment. To determine how a state court construes an aggravating circumstance, we can examine that court's opinions. *See Arave*, 507 U.S. at 477. The opinions we examine can include the opinion rendered in the very case before us. If we could not consider that opinion in determining whether the state courts have improperly expanded the meaning of the state aggravator, then state courts would have one "freebie" that is immune from Eighth Amendment review.

The OCCA rejected the claim in the second application on the ground that it was waived because the "legal argument could have been raised in prior proceedings, but was not." Op. Den. Second Appl. at 6. But the only authority cited in support was Okla. Stat. tit. 22, § 1089(D)(8) (2019), which did not apply. That statutory provision permits review of "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 . . . 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 Mr. Pavatt could not have argued in his original postconviction application that the OCCA opinion in his case construed the HAC aggravator in an unconstitutional manner, because he filed the original application before the OCCA decided his direct appeal.

At the en banc oral argument, counsel for the State asserted that the issue was barred from consideration in the second postconviction application because it could have been raised in a petition for rehearing in the direct appeal. Counsel was apparently relying on Okla. Stat. tit. 22, § 1089(C) (2019), which states that the only issues that can be raised in an application for postconviction relief are those that "[w]ere not and could not have been raised in a direct appeal." But it is not at all clear that a petition for rehearing would have been a proper way to raise a claim that the OCCA opinion on appeal adopted an unconstitutional interpretation of the HAC aggravator. OCCA Rule 3.14 provides, in relevant part: "A petition for rehearing shall not be filed, as a matter of course, but only for the following reasons: (1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or (2) The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument." Apparently, the OCCA has interpreted the second alternative as limited to issues raised in the brief in chief or at oral argument. *See White v. State*, 1995 OK CR 15, 900 P.2d 982, 995-96 (Okla. Crim. App. 1995) (petition for rehearing did not satisfy the rule because "the decision upon which [defendant] relies is not controlling of the issues presented in his brief-in-chief."). Thus, in *Ellis v. State*, 1997 OK CR 36, 941 P.2d 527, 530 (Okla. Crim. App. 1997), the court said that the defendant "clearly could not raise a *new* issue in a petition for rehearing." In keeping with this

interpretation of the rehearing rule, on at least two occasions the OCCA on postconviction review has heard constitutional challenges to the way that the OCCA had addressed issues on direct appeal, even though the challenges had not been raised in petitions for rehearing. *See Cannon v. State*, 1997 OK CR 13, 933 P.2d 926, 929 (Okla. Crim. App. 1997) (The defendant argued that "his constitutional rights were violated when this Court held that reversing his rape and sodomy convictions did not require reversal or modification of his murder conviction or death sentence."); *Nguyen v. State*, 1992 OK CR 81, 844 P.2d 176, 180-81 (Okla. Crim. App. 1992) (The defendant argued that the OCCA violated his constitutional rights when it upheld his death sentence even after determining that there was insufficient evidence to support the HAC aggravator.) A member of this court has also expressed this view of Oklahoma procedure. In his dissent in *Bear v. Boone*, 173 F.3d 782, 783-84 (10th Cir. 1999), Judge Ebel contended that the defendant could properly raise in a postconviction application a claim that the OCCA on direct appeal had unconstitutionally assumed the rule of a jury in modifying his conviction to that of a lesser-included offense. He wrote: "[T]he first opportunity [the defendant] had to raise his due process challenge to the modification of his crime of conviction arose after the Court of Criminal Appeals issued its opinion. Because I believe it would have been inappropriate for [the defendant] to raise his due process claim under the limited rehearing procedures set out in Oklahoma Court of Criminal Appeals Rule 3.14, I believe [the defendant] can now present his due process claim by way of an application for postconviction relief in the Oklahoma courts." *Id.* at 786. The panel majority in *Bear* did not address the issue.

In short, the second application to the OCCA for postconviction relief was the first occasion on which Mr. Pavatt could have raised his claim that the decision by the OCCA on direct appeal established that the court had adopted an unconstitutional construction of the HAC aggravator. The OCCA's procedural bar of the claim on the ground that it "could have been raised in prior proceedings, but was not," Op. Den. Second Appl. at 6, appears to be unsupported by the

had strategic reasons for waiving exhaustion. The HAC aggravator is a commonplace in Oklahoma death-penalty cases. If new challenges to the aggravator are going to be made, it may be advantageous to deal with them sooner rather than later. A successful challenge years down the road could be extremely disruptive. If the State believes that the defendant is even more unsympathetic than usual and that the present composition of the courts is favorable, it may welcome an early challenge even if there is a respectable exhaustion argument. There is nothing wrong with that approach. It would be wrong, however, to waive exhaustion and then, after losing on the merits, argue that it is so plain that the prisoner failed to exhaust remedies that the State cannot possibly have meant what it said when it conceded exhaustion.

I continue to believe that the State waived its exhaustion argument, and I think there is a reasonable argument that Mr. Pavatt exhausted his Eighth Amendment claim in state court and was procedurally barred on an inadequate state ground. I would therefore

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relevant rule and statute as interpreted in state-court precedent. For a state procedural bar to bind a federal court, it must rest on "independent and adequate" state-law grounds. *Walker v. Martin*, 562 U.S. 307, 316, 131 S. Ct. 1120, 179 L. Ed. 2d 62 (2011). "To qualify as an adequate procedural ground, a state rule must be firmly established and regularly followed." *Id.* (internal quotation marks omitted); *see Johnson v. Mississippi*, 486 U.S. 578, 587-89, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). One may therefore question the adequacy of the OCCA's procedural bar of Mr. Pavatt's Eighth Amendment issue in the second application. Unfortunately, this issue has not been developed in this court because exhaustion was raised at such a late stage.

address the merits of the Eighth Amendment issue and hold that no reasonable jurist could say that the OCCA's interpretation of the HAC aggravator satisfies Eighth Amendment standards set by the Supreme Court.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JUNE 9, 2017, AMENDED JULY 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6117

JAMES DWIGHT PAVATT,

Petitioner-Appellant,

v.

TERRY ROYAL, WARDEN, OKLAHOMA STATE PENITENTIARY,

Respondent-Appellee.

June 9, 2017, Filed
July 2, 2018, Amended

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. 5:08-CV-00470-R)

Before **KELLY**, **BRISCOE** and **HARTZ**, Circuit Judges.

HARTZ, Circuit Judge.

James Pavatt was convicted by an Oklahoma jury of first-degree murder and conspiracy to commit first-degree murder. He was sentenced in accordance with

the jury's recommendations to death on the first-degree-murder conviction and ten years' imprisonment on the conspiracy conviction. After exhausting his state-court remedies, he filed an application for relief under 28 U.S.C. § 2254. The district court denied the application, and also denied a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1) (requiring COA to appeal denial of relief under § 2254). Mr. Pavatt sought from this court and was granted a COA on several issues. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's denial of relief with respect to his conviction, but we reverse the denial of relief with respect to his sentence and remand to the district court for further proceedings.

I. FACTUAL BACKGROUND

The Oklahoma Court of Criminal Appeals (OCCA) summarized the crime:

> [Pavatt] and his co-defendant, Brenda Andrew, were each charged with conspiracy and first-degree capital murder following the shooting death of Brenda's husband, Robert ("Rob") Andrew, at the Andrews' Oklahoma City home on November 20, 2001. [Pavatt] met the Andrews while attending the same church, and [Pavatt] and Brenda taught a Sunday school class together. [Pavatt] socialized with the Andrews and their two young children in mid—2001, but eventually began having a sexual relationship with Brenda. Around the same time, [Pavatt], a life insurance agent, assisted Rob Andrew

in setting up a life insurance policy worth approximately $800,000. [Pavatt] divorced his wife in the summer of 2001. In late September, Rob Andrew moved out of the family home, and Brenda Andrew initiated divorce proceedings a short time later.

Janna Larson, [Pavatt's] adult daughter, testified that in late October 2001, [Pavatt] told her that Brenda had asked him to murder Rob Andrew. On the night of October 25-26, 2001, someone severed the brake lines on Rob Andrew's automobile. The next morning, [Pavatt] and Brenda Andrew concocted a false "emergency," apparently in hopes that Rob would have a traffic accident in the process. [Pavatt] persuaded his daughter to call Rob Andrew from an untraceable phone and claim that Brenda was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone in south Oklahoma City. The plan failed; Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police.

One contentious issue in the Andrews' divorce was control over the insurance policy on Rob

Andrew's life. After his brake lines were severed, Rob Andrew inquired about removing Brenda as beneficiary of his life insurance policy. However, [Pavatt], who had set up the policy, learned of Rob's intentions and told Rob (falsely) that he had no control over the policy because Brenda was the owner. Rob Andrew spoke with [Pavatt's] supervisor, who assured him that he was still the record owner of the policy. Rob Andrew then related his suspicions about [Pavatt] and Brenda to the supervisor. When [Pavatt] learned of this, he became very angry and threatened to harm Rob for putting his job in jeopardy. At trial, the State presented evidence that in the months preceding the murder, [Pavatt] and Brenda actually attempted to transfer ownership of the insurance policy to Brenda without Rob Andrew's knowledge, by forging his signature to a change-of-ownership form and backdating it to March 2001.

On the evening of November 20, 2001, Rob Andrew drove to the family home to pick up his children for a scheduled visitation over the Thanksgiving holiday. He spoke with a friend on his cell phone as he waited in his car for Brenda to open the garage door. When she did, Rob ended the call and went inside to get his children. A short time later, neighbors heard gunshots. Brenda Andrew called 911 and reported that her husband had been shot.

Emergency personnel arrived and found Rob Andrew's body on the floor of the garage; he had suffered extensive blood loss and they were unable to revive him. Brenda Andrew had also suffered a superficial gunshot wound to her arm. The Andrew children were not, in fact, packed and ready to leave when Rob Andrew arrived[1]; they were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.

Brenda was taken to a local hospital for treatment. Her behavior was described by several witnesses, experienced in dealing with people in traumatic situations, as uncharacteristically calm for a woman whose husband had just been gunned down. One witness saw Brenda chatting giddily with [Pavatt] at the hospital later that night.

Rob Andrew was shot twice with a shotgun. A spent shotgun shell found in the garage fit a 16—gauge shotgun, which is a rather unusual gauge. Andrew owned a 16—gauge shotgun, but had told several friends that Brenda refused to let him take it from the home when they

1. In its opinion reviewing the conviction of Brenda Andrews, the OCCA corrected this statement. There was not evidence that the bags were not packed. *See* Order Denying Appellant's Motion for Rehearing, But Ordering That The Opinion Be Corrected (Okla. Crim. App. Sept. 11, 2017, at 3).

separated. Rob Andrew's shotgun was missing from the home when police searched it. One witness testified to seeing Brenda Andrew engaging in target practice at her family's rural Garfield County home about a week before the murder. Several 16—gauge shotgun shells were found at the site.

Brenda told police that her husband was attacked in the garage by two armed, masked men, dressed in black, but gave few other details. Brenda's superficial wound was caused by a .22—caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance as she ran from the garage into the house. About a week before the murder, [Pavatt] purchased a .22—caliber handgun from a local gun shop. On the day of the murder, [Pavatt] borrowed his daughter's car and claimed he was going to have it serviced for her. When he returned it the morning after the murder, the car had not been serviced, but his daughter found a .22—caliber bullet on the floorboard. In a conversation later that day, [Pavatt] told Larson never to repeat that Brenda had asked him to kill Rob Andrew, and he threatened to kill Larson if she did. He also told her to throw away the bullet she had found in her car.

Police also searched the home of Dean Gigstad, the Andrews' next-door neighbor. There they

found evidence that someone had entered the Gigstads' attic through an opening in a bedroom closet. A spent 16—gauge shotgun shell was found on the bedroom floor, and several .22—caliber bullets were found in the attic itself. There were no signs of forced entry into the Gigstads' home. Gigstad and his wife were out of town when the murder took place, but Brenda Andrew had a key to their home. The .22—caliber bullet found in Janna Larson's car was of the same brand as the three .22—caliber bullets found in the Gigstads' attic; the .22—caliber bullet fired at Brenda and retrieved from the Andrews' garage appeared consistent with them in several respects. These bullets were capable of being fired from the firearm that [Pavatt] purchased a few weeks before the murder; further testing was not possible because that gun was never found. The shotgun shell found in the Gigstads' home was of the same brand and odd gauge as the 16—gauge shell found in the Andrews' garage. Ballistics comparison showed similar markings, indicating that they could have been fired from the same weapon. Whether these shells were fired from the 16—gauge shotgun Rob Andrew had left at the home was impossible to confirm because, as noted, that gun also turned up missing.

In the days following the murder, [Pavatt] registered his daughter as a signatory on his

> checking account, and asked her to move his belongings out of his apartment. He obtained information over the Internet about Argentina, because he had heard that country had no extradition agreement with the United States. Larson also testified that after the murder, Brenda and [Pavatt] asked her to help them create a document, with the forged signature of Rob Andrew, granting permission for the Andrew children to travel with Brenda out of the country.
>
> Brenda also asked Larson to transfer funds from her bank account to Larson's own account, so that Larson could wire them money after they left town. Brenda Andrew did not attend her husband's funeral. Instead, she and [Pavatt] drove to Mexico, and took the Andrew children with them. [Pavatt] called his daughter several times from Mexico and asked her to send them money. Larson cooperated with the FBI and local authorities in trying to track down [Pavatt] and Brenda. In late February 2002, having run out of money, [Pavatt] and Brenda Andrew re-entered the United States at the Mexican border. They were promptly placed under arrest.

Pavatt v. State (*Pavatt I*), 2007 OK CR 19, 159 P.3d 272, 276-78 (Okla. Crim. App. 2007) (paragraph numbers and footnotes omitted).

Appendix B

On November 29, 2001, nine days after the murder, an information was filed in state court charging Mr. Pavatt and Brenda Andrew with first-degree murder. An amended information was filed on July 19, 2002, charging them with one count of first-degree murder and one count of conspiracy to commit firstdegree murder. The prosecution also filed a bill of particulars alleging three aggravating circumstances for Mr. Pavatt: (1) that he committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration (the remuneration aggravator); (2) that the murder was especially heinous, atrocious, or cruel (the HAC aggravator); and (3) that he constituted a continuing threat to society.

Mr. Pavatt was tried separately from Ms. Andrew (who was also convicted on both counts and sentenced to death). His trial, which began on August 25, 2003, included a guilt phase followed by a sentencing phase. The jury found him guilty on both counts and found the remuneration and HAC aggravators. It also found that these aggravating circumstances outweighed the mitigating circumstances, and it recommended that Mr. Pavatt be sentenced to death on the first-degree-murder conviction.

Mr. Pavatt filed a direct appeal asserting 18 propositions of error. On May 8, 2007, the OCCA rejected Mr. Pavatt's arguments and affirmed his convictions and sentences. *See Pavatt I*, 159 P.3d at 297. Mr. Pavatt's petition for rehearing was denied by the OCCA on June 26,

and the United States Supreme Court denied his petition for a writ of certiorari on February 19, 2008. *See Pavatt v. Oklahoma*, 552 U.S. 1181, 128 S. Ct. 1229, 170 L. Ed. 2d 62 (2008).

On April 17, 2006, while his direct appeal was pending, Mr. Pavatt filed with the OCCA an application for postconviction relief asserting three propositions of error (one of which, ineffective assistance of appellate and trial counsel, included 23 subpropositions). On April 11, 2008, the OCCA issued an unpublished opinion denying the application. *See Pavatt v. State* (*Pavatt II*), No. PCD-2004-25 (Okla. Crim. App. Apr. 11, 2008).

Mr. Pavatt initiated his § 2254 proceedings on May 5, 2008, by filing a motion for appointment of counsel, which the district court granted. On April 1, 2009, his counsel filed a § 2254 application asserting 15 grounds for relief. The application conceded that some of the claims were "newly developed" and "m[ight] require further exhaustion." R. Vol. 3 at 335. For that reason, Mr. Pavatt requested that his application "be held in abeyance so that he [could] return to state court to accomplish any necessary exhaustion." *Id.* But the district court declined to stay the case or otherwise hold it in abeyance. Briefing in the case was completed on October 14, 2009, when Mr. Pavatt filed a reply brief in support of his application.

Meanwhile, on September 2, 2009, Mr. Pavatt filed with the OCCA a second application for postconviction relief asserting six propositions of error. On February 2, 2010, the OCCA issued an unpublished opinion denying

the application. *See Pavatt v. State* (*Pavatt III*), No. PCD-2009-777 (Okla. Crim. App. Feb. 2, 2010).

On May 1, 2014, the federal district court issued an order denying Mr. Pavatt's § 2254 application, entered final judgment in the case, and issued an order denying a COA with respect to all issues raised in the application.

Mr. Pavatt filed a notice of appeal on June 2, 2014. In a case-management order issued on November 24, 2014, we granted Mr. Pavatt a COA on the following issues:

> A. [1] Whether there was sufficient evidence to support the "especially heinous, atrocious, or cruel" aggravator . . . and [2] whether the trial court's failure to provide an adequate instruction to the jury that it must find "conscious physical suffering" beyond a reasonable doubt before finding that the murder was "especially heinous, atrocious, or cruel" violated Mr. Pavatt's constitutional rights to a fair trial, a reliable sentencing determination, and due process . . .
>
> B. Whether there was constitutionally ineffective assistance of trial counsel regarding the investigation of mitigating evidence or the presentation of a meaningful case for life imprisonment . . . [,] and whether appellate counsel was constitutionally ineffective in failing to raise a claim that trial counsel was ineffective in these regards; and

> C. Whether trial counsel provided constitutionally ineffective assistance of counsel regarding the introduction of a camping video, live photographs of the victim, or testimony regarding the victim's good traits . . . and whether appellate counsel was constitutionally ineffective in failing to raise a claim that trial counsel was ineffective in these regards.

(Case Management Order, Nov. 24, 2014). Because we reverse on issue A[1], we need not address issues A[2] and B. We affirm on issue C.

II. STANDARD OF REVIEW

In a challenge to a state-court conviction under § 2254, "the appropriate standard of review depends upon whether a claim was decided on the merits in state court." *Stouffer v. Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013) (citation omitted). When, as here, the claims we must resolve on the merits were addressed on the merits, our standard of review is governed by 28 U.S.C. § 2254(d), which provides:

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"[A] state-court decision is contrary to [Supreme Court] precedent if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the [Supreme Court's]." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). "On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* at 406.

As for the "unreasonable application" clause of § 2254(d)(1), the Supreme Court has said, "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular

prisoner's case certainly would qualify as a decision involving an unreasonable application of clearly established Federal law." *Id.* at 407-08 (brackets and ellipsis omitted) (internal quotation marks omitted). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. Notably, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410. Thus, "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.

III. PAVATT'S CHALLENGES TO VERDICT OF GUILTY

Mr. Pavatt's sole challenge to his conviction is that his trial counsel was ineffective in failing to object to the admission of three categories of evidence allegedly designed to evoke sympathy for the victim, Rob Andrew: (1) a videotape showing Mr. Pavatt and Mr. Andrew on a hunting trip, (2) "glowing accounts" of Mr. Andrew from his friends and family, and (3) four photographs of him taken before his death. Aplt. Br. at 49. The first two claims are procedurally barred, and the third lacks merit.

The claim of inadequate assistance with respect to the first two categories of evidence was not adequately raised in federal district court. The only challenge at all related to category 1 in Mr. Pavatt's amended petition

under § 2254 was headed: "Counsel Failed to Object to the Admission of Live Photographs of Rob Andrew." App., Vol. 3 at 317. But that section of the 216-page petition (which served as the brief in support) does not claim ineffective assistance with respect to the video. Indeed, it begins with the sentence, "Trial counsel objected to the admission of the video recording of the hunting trip." *Id.* In this court Mr. Pavatt argues that the trial objection to the video was inadequate; but that claim was not made below.

As for category 2, one sentence in the "Live Photographs" section of the petition states, "A review of his conduct further reveals that trial counsel allowed multiple witnesses, who were friends and family of Rob Andrew, to testify to entirely irrelevant matters that could only raise sympathy in the minds of jurors. *See* Grounds 2, 7, *infra*." *Id.* at 318.[2] But this one sentence, which is not developed further, and which is buried in a section whose heading does not encompass the point, does not adequately preserve this ineffectiveness issue. The district court, not perceiving it as an issue, did not address it in the 112-page opinion denying relief.

Thus, the only ineffectiveness claim relating to the guilt phase of the trial that was preserved in federal

2. Ground 2 of the petition is a Confrontation Clause challenge to alleged hearsay introduced at trial; the word *sympathy* does not appear in the petition's discussion of that ground. Ground 7 addresses alleged prosecutorial misconduct. The petition contains a section under that ground entitled "First Stage Victim Sympathy," but it does not say anything about what, if any, sympathy evidence was objected to by trial counsel. *Id.* at 224.

district court is that trial counsel did not adequately object to the admission of the photographs (and that appellate counsel did not raise on appeal this deficiency of trial counsel). Mr. Pavatt has not argued that admission of this evidence during the guilt phase violated any federal constitutional right. The alleged ineffectiveness was only counsel's failure to argue that the evidence should have been excluded under Oklahoma law. This ineffectiveness challenge clearly fails with respect to one of the pictures (State's Exhibit 219). In his first state postconviction petition, Mr. Pavatt argued that his trial and appellate counsel should have objected to the admission of the exhibit. But the OCCA rejected the argument, holding that the claim was barred by res judicata and noting that it had sustained the admissibility of a similar photograph in a prior case. *See Pavatt II*, No. PCD-2004-25 at 6 n.6. A claim of ineffective assistance of counsel for failure to object to evidence cannot be sustained if the objection was doomed to fail. *See Williams v. Trammell*, 782 F.3d 1184, 1198 (10th Cir. 2015).

That leaves only a challenge to the failure to object to three other photographs taken of Mr. Andrew during his life. But even if competent counsel should have objected to the evidence, Mr. Pavatt's ineffectiveness claim fails for lack of prejudice. To prevail on such a claim, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [guilt phase] would have been different." *Id.* at 1197-98 (internal quotation marks omitted). We are at a total loss to see how, in light of the compelling evidence of guilt, the three photographs could have been a significant factor in the

verdict; and Mr. Pavatt offers no argument in support. We therefore reject this portion of the claim on the merits.

IV. "HEINOUS, ATROCIOUS, OR CRUEL" (HAC) AGGRAVATOR

At the conclusion of the second-stage proceedings the jury found the murder to be "especially heinous, atrocious, or cruel."[3] The jury instruction on the HAC aggravating circumstance defined the terms as follows:

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

R. Vol. 1 at 188. According to Mr. Pavatt, the evidence presented at his trial was "constitutionally insufficient" to establish the HAC aggravator, Aplt. Br. at 21, and the OCCA's determination to the contrary was "contrary to or an unreasonable application of Supreme Court law," *id.* at 36.

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3. The jury also found the remuneration aggravator. The parties have not presented arguments on what effect that has on the disposition of this case. We leave the matter to the district court on remand.

Appendix B

"To assess the sufficiency of the evidence, we first determine the elements of the offense and then examine whether the evidence suffices to establish each element." *Anderson-Bey v. Zavaras*, 641 F.3d 445, 448 (10th Cir. 2011). Due process requires that the evidence presented at trial, viewed in the light most favorable to the prosecution, be sufficient to allow a "rational trier of fact [to] have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In a capital case the aggravating factors necessary for imposition of the death penalty "operate as the functional equivalent of an element of a greater offense." *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (internal quotation marks omitted).

The elements of a state offense are ordinarily purely a matter of state law. In reviewing a state conviction under § 2254, we do not second guess whether the state courts have correctly interpreted their law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). But States do not have a totally free hand in deciding how to define their aggravating circumstances for capital cases. The United States Constitution sets some limits. Since the Supreme Court held in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), that then-current capital-sentencing procedures were unconstitutional, the underlying principle guiding Supreme Court doctrine has been that "the Eighth and Fourteenth Amendments cannot tolerate the infliction

of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed." *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) (brackets, ellipsis, and internal quotation marks omitted). To prevent that intolerable result, discretion in imposing the death penalty "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* (internal quotation marks omitted). The State must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Id.* (internal quotation marks omitted).

Thus, a defendant challenging the sufficiency of the evidence to support a capital aggravator may, as Mr. Pavatt does here, raise both a *Jackson* challenge to the sufficiency of the evidence to establish the aggravator as defined by state law and an Eighth Amendment challenge to the constitutionality of the aggravator as so defined. Our focus is on the Eighth Amendment challenge. This requires a thorough review of Supreme Court precedent regarding how federal courts are required to examine a State's aggravating circumstances to see if they pass muster.

We start with *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), where the Supreme Court considered Georgia's outrageously-or-wantonly-vile aggravator, which included any murder that was "'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated

battery to the victim,'" *id.* at 210 (White, J., concurring) (quoting Georgia statute). The prevailing plurality stated that it was "arguable that any murder involves depravity of mind or an aggravated battery." *Id.* at 201 (joint opinion of Justices Stewart, Powell, and Stevens). But, in the view of those Justices, the aggravator's "language need not be construed in this way," and they would not invalidate the aggravator because "there [was] no reason to assume that the Supreme Court of Georgia [would] adopt such an open-ended construction." *Id.*; *see Lewis*, 497 U.S. at 775 (construing this as the holding in *Gregg*).

Later, however, in *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the Court took another look at the State's application of the aggravator. The prevailing plurality (two other Justices would have set aside the death sentence on broader grounds) framed the issue before the court as "whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the [pertinent] aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution." *Id.* at 423. Godfrey murdered his wife and mother-in-law after his wife, who had moved in with her mother, had ended a telephone conversation by telling him that reconciliation would be impossible. The Court described the facts of the murder as follows:

> At this juncture, the petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law

> lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

Id. at 425.[4] The Georgia Supreme Court rejected Godfrey's challenge to the aggravator as unconstitutionally vague, noting its prior rejection of such challenges and stating that the evidence supported the jury's finding of the aggravating circumstances. *See id.* at 427.

The United States Supreme Court reversed. Although it acknowledged that in prior cases the Georgia Supreme

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4. Justice White's dissent also described Godfrey's murder of his mother-in-law: "[After Godfrey killed his wife with a shotgun blast that left a hole in her head the size of a silver dollar,] he took out time not only to strike his daughter on the head, but also to reload his single-shot shotgun and to enter the house. Only then did he get around to shooting his mother-in-law, . . . whose last several moments as a sentient being must have been as terrifying as the human mind can imagine." 446 U.S. at 449 (White, J., dissenting). He continued, "[W]ho among us can honestly say that [the mother-in-law] did not feel 'torture' in her last sentient moments. . . . What terror must have run through her veins as she first witnessed her daughter's hideous demise and then came to terms with the imminence of her own." *Id.* at 449-50.

Court had applied constitutionally valid narrowing constructions of the aggravator, it said that there was no evidence that the Georgia court had applied a narrowing construction in that case. *See id.* at 429-32; *Lewis*, 497 U.S. at 775 (paraphrasing *Godfrey*). In particular, the state court had upheld the death sentence even though, in contrast to prior cases in which the sentence had been upheld, there was no claim of torture and no evidence that the defendant had "committed an aggravated battery upon [either victim] or, in fact, caused either of them to suffer any physical injury preceding their deaths." 446 U.S. at 432. The prevailing plurality said that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433; *see also id.* at 428-29 ("a person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'")

The Supreme Court's standard was succinctly stated in *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983): "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"; *see also Lewis*, 497 U.S. at 776 ("aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not"). The Court held that the two aggravating circumstances in that case (the defendant had escaped from lawful confinement and had a prior conviction for

a capital felony) "adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." 462 U.S. at 879.

Of particular significance to this appeal is *Maynard v. Cartwright*, 486 U.S. 356, 359, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), affirming *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987) (en banc), which considered Oklahoma's HAC aggravator. The operative language of the aggravator was the same as for this case—"especially heinous, atrocious, or cruel." And the jury had been instructed that "'the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.'" *Cartwright*, 822 F.2d at 1488. The Supreme Court said that in applying the aggravator, the OCCA "simply had reviewed all the circumstances of the murder and decided whether the facts made out the aggravating circumstance." 486 U.S. at 360. It held that the OCCA's approach did not satisfy the Eighth Amendment (1) because the statutory language "fail[ed] adequately to inform juries what they must find to impose the death penalty and as a result [left] them and appellate courts with the kind of open-ended discretion which [had been] held invalid in [*Furman*]," 486 U.S. at 361-62, and (2) because the OCCA had not construed the HAC aggravator in a manner sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment," *id.* at 364. "Court precedents," it said, "have insisted that the channeling

and limiting of the sentencer's discretion in imposing the death sentence is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id.* at 362. The Court compared the language of the Oklahoma aggravator to the "outrageously or wantonly vile, horrible and inhuman" language considered in *Godfrey*, where the Court had said: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* at 363 (internal quotation marks omitted). The vague language of the aggravator resulted in there being "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* (internal quotation marks omitted). The Court further rejected "[t]he State's contention that the addition of the word 'especially' somehow guides the jury's discretion, even if the term 'heinous' does not." *Id.* at 364. The contention was "untenable" because "[t]o say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Id.* The Court indicated, however, that Oklahoma could cure the problem by providing a limiting construction of the statutory language. It mentioned that this court had noted cases stating that imposing a requirement of torture or serious physical abuse is adequate but the Court left open the possibility that other limiting instructions could also suffice. *See id.* at 364-65.

Appendix B

In response to this court's *Cartwright* opinion, the OCCA narrowed its construction of the HAC aggravator. It required that "the murder of the victim [be] preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty." *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 80 (Okla. Crim. App. 1995); *see Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring) (summarizing Oklahoma law). "Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met." *Cheney*, 909 P.2d at 80 (internal quotation marks omitted). As for extreme mental cruelty, "torture creating extreme mental distress must be the result of intentional acts by the defendant" and "must produce mental anguish in addition to that which of necessity accompanies the underlying killing." *Id.*

Consequently, the HAC aggravator "contemplates a two-step analysis." *Nuckols v. State*, 1991 OK CR 10, 805 P.2d 672, 674 (Okla. Crim. App. 1991). The first step requires the jury to determine whether the "death of the victim was preceded by torture or serious physical abuse." *Id.* (internal quotation marks omitted). "Once this foundational assessment is made, . . . the jury may apply the definitions given to them . . . to measure whether or not the crime can be considered to have been heinous, atrocious or cruel." *Id.*

This two-step analysis is reflected in the uniform jury instruction set forth in *DeRosa v. State*, 2004 OK CR 19, 89 P.3d 1124 (Okla. Crim. App. 2004), decided after Mr. Pavatt's trial. The instruction—to "be used in all future

capital murder trials" in which the HAC aggravator is alleged—states:

> The State has alleged that the murder was "especially heinous, atrocious, or cruel." This aggravating circumstance is not established unless the State proves beyond a reasonable doubt:
>
> > *First*, that the murder was preceded by either torture of the victim or serious physical abuse of the victim; and
> >
> > *Second*, that the facts and circumstances of this case establish that the murder was heinous, atrocious, or cruel.
>
> You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that *you cannot find that "serious physical abuse" or "great physical anguish" occurred unless you also find that the victim experienced conscious physical suffering prior to his/her death.*
>
> In addition, you are instructed that the term "heinous" means extremely wicked or shockingly evil; the term "atrocious" means outrageously wicked and vile; and the term

> "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

Id. at 1156. "This instruction [did] not change any of the legal requirements of the 'heinous, atrocious, or cruel' aggravating circumstance as it ha[d] existed up until [that] time." *Id.* Its purpose was "to more fully inform the jury regarding the findings that must be made in order to properly apply the aggravator and to ensure that a jury determination is made regarding each of these findings." *Id.*

In short, the OCCA has confined the HAC aggravator, in the absence of extreme mental cruelty, to murders in which "the victim experiences conscious physical suffering" before death. This court has responded favorably. We first approved the *Cheney* narrowing construction in *Hatch v. State of Oklahoma*, 58 F.3d 1447, 1468-69 (10th Cir. 1995). In further holding that the trial judge properly applied the enhancement, we quoted the following from the judge's remarks at the sentencing proceeding:

> When the law talks of torturing people, that doesn't mean you have to put them on the rack or twist their arms or something. I can't think of anymore [sic] torture than to tie a man and a woman up, hog-tie them where they can't move and at the same time while they're laying there waiting to be shot, they listen to their twelve-year-old daughter crying and pleading not to be raped by two grown men.

Id. at 1469. We said that the judge "found the necessary facts to indicate that the crime involved torture or physical abuse." *Id.*

We repeated our endorsement of the narrowing construction in *Medlock v. Ward*, 200 F.3d 1314, 1321 (10th Cir. 2000), stating: "We have held that the 'heinous, atrocious, or cruel' aggravating circumstance as narrowed by the Oklahoma courts after *Maynard* to require torture or serious physical abuse characterized by conscious suffering can provide a principled narrowing of the class of those eligible for death." And we concluded that the defendant in that case had "fail[ed] to demonstrate that Oklahoma ha[d] applied its narrowing construction in an unconstitutional manner." *Id.* In support of that conclusion, we set forth the following evidence:

> [The defendant] repeatedly grabbed his victim by the arm, wrestled with her, struck her in the face, threw her onto his bed, and covered her mouth when she began screaming. He choked her until she temporarily passed out, then dragged her to the toilet and stuck her head into the bowl while she was conscious and gasping for air, keeping her there for ten minutes until she passed out again. When he noticed she was still breathing and alive, he used a steak knife to stab her in the back of the neck and, when that knife bent, took a hunting knife and stabbed her in the back of the neck again until she died.

Id. at 1322 (citations omitted); *see also Duvall v. Reynolds*, 139 F.3d 768, 792-94 (10th Cir. 1998) (after defendant

stabbed the victim more than 25 times on her head, chest, abdomen, and back, the victim asked for help, and he responded, "Well . . . , it's just too late for that," before proceeding to suffocate her with a pillow).

But our prior opinions are not an open-ended endorsement of any possible interpretation or application of the narrowing construction. On the contrary, in 2000, although reversing a death penalty based on the HAC aggravator for lack of evidence, we said that "we would be remiss if we failed to note" that Oklahoma's construction of the HAC aggravator in that case "appears to raise serious constitutional questions about whether [the] aggravator legitimately narrows the class of those eligible for death." *Thomas v. Gibson*, 218 F.3d 1213, 1228 n.17 (10th Cir. 2000). The following year we expressed a more general concern about Oklahoma's construction of the aggravator. We wrote:

> Recent Oklahoma cases . . . have begun to blur the common understanding of the requisite torture and conscious serious physical suffering, more and more often finding the existence of [the HAC] elements in almost every murder. . . . There is certainly a concern that Oklahoma's interpretation of its narrowing language could again render this aggravating factor unconstitutional. *See Thomas*, 218 F.3d at 1228 & n. 17; *see also Medlock*, 200 F.3d at 1324 (Lucero, J., concurring) (noting that if Oklahoma permitted capital sentencers to find the [HAC] aggravator, based merely on the brief period of conscious suffering necessarily

> present in virtually all murders it would fail to narrow the sentencer's discretion, as constitutionally required [by] *Godfrey*).

Romano v. Gibson, 239 F.3d 1156, 1176 (10th Cir. 2001) (original brackets and internal quotation marks omitted).

With this background, we turn to the case before us. The State agrees that it had to prove that Mr. Andrew experienced conscious physical suffering. But the supporting evidence is slim. The State points to three items of evidence. First, the testimony of the medical examiner. All he said, however, was that it was *possible* (he did not testify that it was *probable*) that Mr. Andrew could have been conscious for a time after the shooting; regarding pain, he said only that Mr. Andrew could have experienced pain while dying. *See* Tr. at 2457-67. Second, the conversation between Mrs. Andrew and the 911 operator. While reciting her fabricated account of the murder, Mrs. Andrew, prompted by the operator, said that Mr. Andrew was still breathing and trying to talk to her. (She did not mention any sign of suffering or pain.) Finally, Mr. Andrew's body was found holding a plastic bag of cans, which, in the OCCA's view, "reasonably suggested that he either tried to ward off his attacker or shield himself from being shot." *Pavatt I*, 159 P.3d at 294.

Perhaps a reasonable juror could have found this to be sufficient evidence of conscious physical suffering (although we note that the jury was never instructed that it needed to make that finding). But this is not the sort of suffering that could in a "principled way . . . distinguish

this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433. To repeat what Judge Lucero stated in his concurrence in *Medlock*,

> Under the Eighth Amendment, applying the narrowing construction of the aggravating circumstance in a manner that permitted Oklahoma courts to find 'torture or serious physical abuse' based merely on the brief period of conscious suffering necessarily present in virtually all murders would fail to narrow the sentencer's discretion as required by [*Godfrey*] and [*Maynard*], leaving the sentencer "with the kind of open-ended discretion which was held invalid in [*Furman*]."

200 F.3d at 1324 (Lucero, J., concurring) (quoting *Maynard*, 486 U.S. at 361-62). Indeed, the OCCA apparently recognized as much in one context, stating that "[t]he torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing." *Cheney*, 909 P.2d at 80. For example, in *Cudjo v. State*, 1996 OK CR 43, 925 P.2d 895, 901 (OCCA 1996), the victim "did experience some conscious physical or mental suffering prior to his death," but the court nevertheless held that "the evidence fails to demonstrate that his murder was preceded by torture or serious physical abuse."

Thus, we have a case controlled by the Supreme Court's holding in *Godfrey*. The State has an aggravator

that at one time it had been construing in a constitutionally acceptable manner. But, as in *Godfrey*, that does not immunize its decisions from review of whether it has departed from that acceptable construction. Mr. Pavatt has challenged "whether there was sufficient evidence to support a constitutional reading and application of the [HAC aggravator]." Reply Br. at 5; *see* Aplt. Br. at 21 ("the evidence here—as related to the core element of conscious suffering—is constitutionally insufficient"); *id.* at 35-36 ("The Eighth and Fourteenth Amendments require that an aggravator serve a narrowing function rather than become a standardless catch-all. *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993) and *Godfrey*. . . . Oklahoma has veered off the course forced on it by *Cartwright*, coming full circle and no longer limiting this clearly vague aggravating circumstance in a manner that minimizes 'the risk of wholly arbitrary and capricious action.' *Maynard*, 486 U.S. at 362-63."). We hold that this Eighth Amendment challenge is meritorious.[5]

5. The dissent appears to contend that the Eighth Amendment component of Mr. Pavatt's sufficiency-of-the-evidence claim is procedurally barred because it was inadequately briefed in his direct appeal to the OCCA. But we decline to sua sponte address the issue of procedural bar. In district court the State said that Mr. Pavatt's Ground Ten had been "exhausted for purposes of federal habeas review." Response to Petition for Writ of Habeas Corpus at 128. In its response to that ground the State included substantial references to the Eighth Amendment constraints on aggravators. And although the State's brief on appeal argued procedural bar with respect to several of Mr. Pavatt's claims, it did not argue in its appellate brief that the sufficiency-of-the-evidence claim or any of its components was procedurally barred, nor did it argue procedural bar when questioned at oral argument about

Maynard and other Supreme Court precedents have held that the Oklahoma HAC aggravator would not be constitutional absent a narrowing construction that would distinguish in a principled manner those cases meriting the death penalty under the aggravator from the many cases in which it was not imposed. *See* 486 U.S. at 363. And *Godfrey* established that even when a State has previously applied a constitutionally valid narrowing construction of an aggravator, a death penalty imposed under the aggravator must still be based on a construction that in a "principled way" can distinguish the case from the many in which the penalty was not imposed. 446 U.S. at 433. This case illustrates that the OCCA no longer construes "conscious physical suffering" so that it distinguishes in a principled way between crimes deserving death and the many cases in which the death penalty is not imposed. Virtually any murder in which the victim did not die instantly could qualify for the enhancement as presently construed if there is a possibility that the act of murder did not immediately render the victim unconscious and the wounds could have caused pain. The State has not offered any reason to believe, or even bothered to argue, that "the brief period of conscious suffering necessarily present in virtually all murders," *Medlock*, 200 F.3d at 1324 (Lucero, J., concurring), could provide a "principled way to distinguish this case, in which the death penalty

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the insufficient-narrowing component of that claim. Likewise, the State has not objected to the Eighth Amendment component of Mr. Pavatt's sufficiency-of-the-evidence claim on the ground that our grant of COA did not encompass the issue. Of course, our opinion implicitly (and now explicitly) grants a COA if such a grant is necessary.

was imposed, from the many cases in which it was not," *Maynard*, 486 U.S. at 363. Even if, though we doubt, many murder victims do not experience even a brief period of conscious physical suffering between the time of the fatal blow and death, that possibility would so often be purely a matter of chance that we think it is not a principled way to determine who should suffer the penalty of death and who should not. (Of course, the murderer's intent to cause such suffering would be another matter altogether.) Thus, the OCCA did not apply a constitutionally acceptable interpretation of Oklahoma's HAC aggravator in determining that the aggravator was supported by sufficient evidence.

An important point requires emphasis. We are not saying that the OCCA in this case unconstitutionally applied a constitutionally acceptable narrowing construction of the State's HAC aggravator. We are saying that it did not apply the narrowing construction that we previously approved. By expanding the meaning of "conscious physical suffering" to encompass "the brief period of conscious suffering necessarily present in virtually all murders," *Medlock*, 200 F.3d at 1324 (Lucero, J., concurring)—as it did in this case—Oklahoma has construed the HAC aggravator in a constitutionally impermissible manner. *Lewis* distinguished *Godfrey* on the ground that "[u]nlike in *Godfrey*, there is no dispute in this case that the Arizona Supreme Court applied its narrowing construction of Arizona's . . . aggravating circumstance to the facts of respondent's case." 497 U.S. at 776-77. In this case, however, there is such a dispute, and it is the heart of the matter. We are unwilling to hold that once we have held that an aggravator has been or

could be constitutionally construed, we cannot revisit the issue after it is clear that the state court has not adopted a constitutionally acceptable construction. That is the lesson of *Godfrey*, and *Lewis* did not reject that lesson.

We recognize that our standard of review in this appeal is established by AEDPA. We can grant relief "with respect to [a] claim that was adjudicated on the merits in State court proceedings," only if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Here, however, the decision of the OCCA failed to pass muster under this provision. To properly decide whether there was sufficient evidence to sustain the aggravator, the court needed to determine that the evidence would support a finding of *conscious physical suffering* under a definition of that term that satisfied both Oklahoma law and the Eighth Amendment. Although it could certainly determine how *conscious physical suffering* should be defined under Oklahoma law and (we will assume) it properly concluded that the evidence at trial satisfied that definition, it totally failed to consider the other component of the analysis—whether the definition it applied satisfies the Eighth Amendment. As Mr. Pavatt puts it, the OCCA did not address "whether there was sufficient evidence to support a constitutional reading and application of the [HAC] aggravator." Reply Br. at 5.

As we understand recent Supreme Court authority, the OCCA's rejection of Mr. Pavatt's sufficiency-of-the-evidence claim without applying or even considering

controlling Supreme Court precedent (or at least engaging in an equivalent analysis even if not citing Supreme Court precedent) rendered its decision contrary to clearly established federal law. In *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), the Court reviewed a decision of the Michigan appellate court denying the defendant's ineffective-assistance-of-counsel claim based on counsel's alleged incompetence in advising him to reject a prosecution plea offer. The defendant proceeded to trial and ultimately received a sentence much harsher than what had been offered. *See id.* at 161. The Court applied the two-part test for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which requires the defendant to establish deficient performance and prejudice from that deficiency. *See Lafler*, 566 U.S. at 162-63. Because there was no dispute that counsel's performance was deficient, "[t]he question for [the] Court [was] how to apply Strickland's prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." *Id.* at 163. This was a new issue for the Court. It had "never held that a defendant in [that] position can establish *Strickland* prejudice." *Id.* at 183 (Scalia, J., dissenting); *see Williams v. Jones*, 571 F.3d 1086, 1097-1101 (10th Cir 2009) (Gorsuch, J., dissenting) (arguing, in same circumstances, that defendant suffered no prejudice to a constitutional interest, given that he received a fair trial). But "AEDPA [did] not present a bar to granting [the defendant] relief." 566 U.S. at 173. The Court explained:

> That is because the [state court] identified [the defendant's] ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying *Strickland*, the state court simply found that [the defendant's] rejection of the plea was knowing and voluntary. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel. . . . *By failing to apply Strickland to assess the ineffective-assistance-of-counsel claim [the defendant] raised, the state court's adjudication was contrary to clearly established federal law.*

Id. (citations omitted) (emphasis added).

Likewise, in this case the OCCA's adjudication was "contrary to clearly established federal law" because its analysis did not discuss, apply, or even cite the Supreme Court decisions governing the constitutional requirements limiting death-penalty aggravators. The opinion did not address at all whether the evidence presented was sufficient to support a *constitutionally acceptable* HAC aggravator.[6] Therefore, "AEDPA does not present a bar to granting [Mr. Pavatt] relief." *Id.* "[I]n [this] circumstance,

6. Moreover, upholding the OCCA's construction of *conscious physical suffering* in this case as satisfying constitutional standards would be an "unreasonable application" of Supreme Court decisions. 28 U.S.C. § 2254(d)(1). The Supreme Court's oft-applied principles governing aggravators that have been set forth above compels our conclusion in this case.

the federal courts in this habeas action can determine the principles necessary to grant relief." *Id.* This we have done. Applying Supreme Court precedent, we hold that the HAC aggravator cannot constitutionally be applied in this case.

In following *Lafler* we are not proceeding contrary to *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). That opinion held that "§ 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Id.* at 98. It did not say that when the state court provides some reasons why a claim for relief has been denied, we should presume that it also had additional, more persuasive, reasons. The author of *Lafler*, who had written the Court's opinion in *Richter* a year earlier, did not speculate that the lower court had silently applied *Strickland* in denying relief. And there was much stronger reason to assume that the lower court in *Lafler* had silently applied *Strickland* than there is to believe that the OCCA in this case considered Eighth Amendment constraints on its construction of the HAC aggravator. As the dissent in *Lafler* pointed out, the state court in that case had recited the requirements of *Strickland* in the paragraph preceding the one relied on by the majority in concluding that the state court had not *applied* those requirements. *Lafler*, 566 U.S. at 182-83 (Scalia, J., dissenting). In our case, the OCCA resolved Mr. Pavatt's sufficiency-of-the-evidence issue without any mention of the Eighth Amendment or its principles.

V. CONCLUSION

We **AFFIRM** the judgment of the district court regarding Mr. Pavatt's conviction but **REVERSE** and **REMAND** with respect to his sentence. We **DENY** Mr. Pavatt's request for an additional COA.

Appendix B

BRISCOE, Circuit Judge, concurring in part and dissenting in part.

I concur in part and dissent in part. I agree with Part III of the majority's opinion, which rejects certain of Pavatt's ineffective assistance of counsel claims and affirms the denial of federal habeas relief on Pavatt's convictions for first degree murder and conspiracy to commit first degree murder. As I explain in greater detail below, however, I would add that there is no merit to any of Pavatt's ineffective assistance claims, or to his additional argument urging us to recognize an exception to the procedural bar that applies to most of his ineffective assistance of counsel claims.

As for Part IV of the majority's opinion, I disagree with it in full. As I shall discuss in greater detail below, Pavatt's appellate brief in this case attempts to assert three distinct challenges to the jury's second-stage finding that the murder was especially heinous, atrocious or cruel (the HAC aggravating circumstance): (1) that the jury was not properly instructed regarding the HAC aggravating circumstance; (2) that the evidence presented at his sentencing proceeding was constitutionally insufficient to support the HAC aggravating circumstance; and (3) that the HAC aggravator, as applied in his case, is unconstitutionally vague in violation of the Eighth Amendment. Part IV of the majority's opinion only briefly touches on and does not ultimately resolve the first and0 second of these issues. Instead, Part IV focuses on and ultimately grants federal habeas relief on the basis of the Eighth Amendment claim. In doing so, however, Part IV

ignores the undisputed fact that the Eighth Amendment claim is unexhausted because Pavatt never presented it to the OCCA. Part IV also ignores the undisputed fact that this court never granted Pavatt a certificate of appealability (COA) as to the Eighth Amendment claim. In short, Part IV grants Pavatt federal habeas relief on the basis of a claim that was never presented to or decided by the OCCA and that is not properly before this court.

Thus, in sum, I would affirm the judgment of the district court denying Pavatt's petition for writ of habeas corpus in its entirety.

I

Pavatt asserts a number of claims of ineffective assistance of counsel and appellate counsel, including the claims of ineffective assistance of trial counsel that are addressed and rejected in Part III of the majority opinion. Although I agree with the majority that Pavatt is not entitled to federal habeas relief on the basis of these claims, I would conclude that only one of Pavatt's ineffective assistance claims is properly before us, and that the remainder are procedurally barred due to Pavatt's failure to present them to the OCCA "in compliance with relevant state procedural rules." *Cone v. Bell*, 556 U.S. 449, 465, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009).

In his original application for state post-conviction relief, Pavatt asserted a host of claims alleging ineffective assistance of trial and appellate counsel. Only one of those claims, however, is now at issue in this appeal. That was

a claim that his appellate attorneys failed to challenge on direct appeal the admissibility of a photograph of Rob Andrew taken prior to his death (State's Exhibit 219), and that the admission of that photograph "rendered . . . Pavatt's trial fundamentally unfair, depriving him of the Due Process of Law, and unconstitutionally injected passion, prejudice, and other arbitrary factors into the sentencing proceeding." Original App. for Post-Conviction Relief at 54 (citations omitted). The OCCA denied relief on the claim, noting in part that it had rejected a similar claim in *Marquez-Burrola v. State*, 2007 OK CR 14, 157 P.3d 749, 760 (Okla. Crim. App. 2007). *Pavatt v. State*, No. PCD-2004-25 at 6 n.6 (Okla. Crim. App. Apr. 11, 2008). The OCCA also stated that this claim was "barred by *res judicata*." *Id.* at 6. Presumably, this was a reference to Pavatt's argument on direct appeal that the trial court erred in admitting gruesome photographs of Rob Andrew at the crime scene and his accompanying request that the OCCA review the premortem photographs of Rob Andrew. In any event, respondent does not argue that the claim is procedurally barred for purposes of federal habeas review.

The district court reviewed the claim on the merits and concluded that Pavatt had failed to demonstrate that the OCCA's decision was contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ROA, Vol. 3 at 1125 (ECF No. 91 at 77). More specifically, the district court concluded "it [wa]s clear that based on the case cited by the OCCA in its denial of [Pavatt]'s claim, *Marquez-Burrola*, as well as other cases decided by the OCCA prior to [Pavatt]'s appeal, that [Pavatt] would not have prevailed on appeal had the claim been raised." *Id.* (citations omitted).

I agree with the district court. In *Marquez-Burrola*, the OCCA considered and rejected a challenge to the constitutionality of § 2403 of the Oklahoma Evidence Code, which states, in pertinent part, that "an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive." Okla. Stat. tit. 12, § 2403 2016); *see Marquez-Burrola*, 157 P.3d at 760. The OCCA in that case also rejected the defendant's argument that the trial court abused its discretion by admitting, pursuant to § 2403, a single, premortem photograph of the victim. *Id.* at 760-61. Notably, the premortem photograph of Rob Andrew was admitted at Pavatt's trial without objection pursuant to § 2403, and I see nothing about that photograph or the facts of Pavatt's trial that would distinguish it from *Marquez-Burrola*. Further, the OCCA itself explicitly stated that, in light of *Marquez-Burrola*, it would not have granted relief to Pavatt had he challenged the admission of Exhibit 219 on direct appeal. Consequently, Pavatt has failed to establish that he was prejudiced by the failure of his appellate counsel to raise the issue on direct appeal.

All of the remaining ineffective assistance claims asserted by Pavatt in this appeal—trial counsel's failure to prevent the admission of pervasive victim-impact evidence in both stages of trial (other than Exhibit 219), trial counsel's failure to investigate and present a compelling mitigation case, and appellate counsel's failure to assert these claims of ineffective assistance on direct appeal—were first presented by Pavatt to the OCCA in his second application for state post-conviction relief. The OCCA concluded that these claims were procedurally

barred under the provisions of the Oklahoma Post-Conviction Procedure Act, Okla. Stat. tit. 22, §§ 1080 *et seq.* In reaching this conclusion, the OCCA noted that, under that Act, "[c]laims which could have been raised on direct appeal, but were not, are generally considered waived." *Pavatt v. State*, No. PCD-2009-777 at 2 (Okla. Crim. App. Feb. 2, 2010). Further, the OCCA noted that it could "not consider the merits of any claim made in a subsequent application for post-conviction relief, unless (1) the legal basis for that claim was previously unavailable, or (2) the facts supporting the claim were not previously ascertainable through the exercise of reasonable diligence." *Id.* at 2-3. The OCCA determined that all of Pavatt's ineffective assistance claims could have been raised at an earlier time, and it in turn concluded that it was "barred by the provisions of the Post-Conviction Procedure Act from considering these arguments." *Id.* at 7.

Despite the OCCA's ruling, Pavatt argues that we should review his claims *de novo* for two reasons. First, he contends that "[t]he OCCA did not clearly impose a procedural bar of these claims, but instead stated the 'current arguments merely modify or expand the claims made, and rejected, in prior proceedings.'" Aplt. Br. at 50 (quoting *Pavatt*, No. PCD-2009-777 at 4). This argument makes little sense when one recalls that the ineffective assistance of counsel claims he now asserts were first raised in his second application for state post-conviction relief. Further, as discussed above and as Pavatt ultimately concedes in a related footnote, the OCCA quite clearly concluded that these claims were procedurally

barred under Oklahoma's Post-Conviction Procedure Act. *Id.* at 50-51 n.14.

That leads to Pavatt's second argument: "Even if this Court determines the OCCA imposed a procedural bar, such a bar is not without exception. Post-conviction counsel's ineffectiveness in not fully challenging the failures of prior counsel to object to the inadmissible sympathy evidence is the 'cause' that excuses any default." Id. at 50-51 (citations omitted). In other words, Pavatt argues that the ineffectiveness of the attorney who represented him in filing his original application for post-conviction relief establishes the "cause" for his failure to comply with Oklahoma's procedural requirements.

In support of this argument, Pavatt relies on the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) and *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013). Aplt. Br. at 51. In *Martinez*, the Supreme Court held that if,

> under state law, claims of ineffective assistance of trial counsel *must* be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320 (emphasis added).

In *Trevino*, the Supreme Court explained that, in determining whether the *Martinez* exception to *Coleman v. Thompson*, 501 U.S. 722, 729-30, 753-54, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (holding that a defendant's state-law procedural default ordinarily prevents a federal habeas court from considering the defendant's federal constitutional claim, and that an attorney's errors in a post-conviction proceeding do not qualify as cause for such a default), applies in a particular case, four requirements must be met:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceedings was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.

133 S. Ct. at 1918 (alteration in original) (quoting *Martinez*, 132 S. Ct. at 1318-19, 1320-21). The Court in *Trevino* ultimately extended the rule in *Martinez* to circumstances in which state law does not expressly require claims of ineffective assistance of trial counsel to be brought in collateral proceedings, but, by way of its "structure and design . . . make[s] it virtually impossible for an ineffective assistance claim to be presented on direct review." *Id.* at 1915 (internal quotation marks omitted).

Pavatt argues that the rules outlined in *Martinez* and *Trevino* should be applied in his case because (a) he was represented at trial and on direct appeal by the same attorney, (b) consequently, his original application for post-conviction relief was his first real opportunity to assert ineffective assistance of trial counsel claims, and (c) the attorney who represented him in filing his original application for post-conviction relief was ineffective for failing to raise these claims of ineffective assistance of trial counsel and appellate counsel.

I disagree. *Martinez* and *Trevino* are distinguishable because, in both of those cases, the Supreme Court focused on whether the "structure and design" of the state system at issue, i.e., what the Supreme Court in *Trevino* characterized as the state's "procedural regime," 133 S. Ct. at 1915, expressly or effectively prevented the petitioner from raising his or her ineffective assistance claim for the first time until state post-conviction proceedings. Notably, in *Fairchild v. Trammell*, 784 F.3d 702, 721 (10th Cir. 2015), we differentiated Oklahoma's procedural regime from the state systems that were at issue in *Martinez* and *Trevino*. In particular, we noted that "Oklahoma provides a reasonable time to investigate a claim of ineffective assistance before raising it on direct appeal" and that, under Oklahoma law, "[a] claim of ineffective assistance can be raised with the opening brief on [direct] appeal."[1] *Id.* Thus, consistent with our holding in *Fairchild*, I would

1. Indeed, we have recognized that Oklahoma law generally *requires* that a claim of ineffective assistance of trial counsel be raised on direct appeal. *See Cole v. Trammell*, 755 F.3d 1142, 1159 (10th Cir. 2014).

conclude that neither *Martinez* nor *Trevino* allow us to bypass the OCCA's procedural bar ruling and review Pavatt's ineffective assistance claims on the merits. To hold otherwise would be to adopt an entirely new, and potentially much broader, rule than was announced in *Martinez* and *Trevino*.

II

As noted, Pavatt also asserts three distinct challenges to the HAC aggravating circumstance found by the jury: (1) that the jury in his case was not properly instructed regarding the HAC aggravating circumstance; (2) that the evidence presented at his sentencing proceeding was constitutionally insufficient to support the HAC aggravating circumstance; and (3) that the HAC aggravator, as applied by the Oklahoma Court of Criminal Appeals (OCCA), is unconstitutionally vague in violation of the Eighth Amendment. As discussed below, I conclude that all of these challenges lack merit, and that we must affirm the district court's denial of federal habeas relief with respect to those claims.

A

The Oklahoma legislature has outlined eight aggravating circumstances that may be found by a jury in the sentencing phase of a capital trial. *See* Okla. Stat. tit. 21, § 701.12. Included among those is the HAC aggravating circumstance. *Id.* § 701.12(4) ("The murder was especially heinous, atrocious, or cruel.").

Appendix B

In 1988, the Supreme Court addressed the constitutionality of Oklahoma's HAC aggravating circumstance in *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). The claim in that case, which was filed by an Oklahoma capital defendant, was that Oklahoma's HAC aggravator was unconstitutionally vague and overbroad. The Supreme Court unanimously agreed and held that the statutory language of the HAC aggravator, standing alone, failed to give a jury adequate guidance. *Id.* at 363-64. "[A]n ordinary person," the Court concluded, "could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Id.*

Notably, while *Maynard* was pending before the Supreme Court, the OCCA expressly "restricted the 'heinous, atrocious, or cruel' aggravating circumstance to those murders in which torture or serious physical abuse [wa]s present." *Id.* at 365 (citing *Stouffer v. State*, 1987 OK CR 166, 742 P.2d 562 (Okla. Crim. App. 1987)). More specifically, the OCCA in *Stouffer* "identified two kinds of cases in which 'torture or serious physical abuse' [wa]s present: those characterized by the infliction of 'great physical anguish' and those characterized by the infliction of 'extreme mental cruelty.'" *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring). "In the mental cruelty context, the OCCA . . . emphasized that the torture required for finding the 'heinous, atrocious, or cruel' aggravator must produce mental anguish in addition to that which of necessity accompanies the underlying killing." *Id.* (internal quotation marks omitted). And, with respect to the physical anguish branch of its test, the OCCA held that, "[a]bsent evidence of conscious physical

suffering by the victim prior to death, the required torture or serious physical abuse standard is not met." *Battenfield v. State*, 1991 OK CR 82, 816 P.2d 555, 565 (Okla. Crim. App. 1991).

In addition to the restrictions outlined in *Stouffer*, the OCCA has since indicated that the HAC aggravator "contemplates a two-step analysis." *Nuckols v. State*, 1991 OK CR 10, 805 P.2d 672, 674 (Okla. Crim. App. 1991). The first step of this analysis, the OCCA has stated, requires the jury to determine whether the death of the victim was preceded by torture or serious physical abuse. *Id.* "Once this foundational assessment is made," the OCCA has stated, "then the jury may apply the definitions given to them . . . to measure whether or not the crime can be considered to have been heinous, atrocious or cruel." *Id.*

In *DeRosa v. State*, 2004 OK CR 19, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004), the OCCA officially incorporated this two-step analysis into its uniform jury instructions. More specifically, the OCCA outlined a jury instruction defining the HAC aggravator and directed that this instruction was to "replace the current version of OUJI-CR(2d) 4-73 and that it shall be used in all future capital murder trials in which the" HAC aggravator is alleged. The instruction read as follows:

> The State has alleged that the murder was "especially heinous, atrocious, or cruel." This aggravating circumstance is not established unless the State proves beyond a reasonable doubt:

> *First*, that the murder was preceded by either torture of the victim or serious physical abuse of the victim; and
>
> *Second*, that the facts and circumstances of this case establish that the murder was heinous, atrocious, or cruel.
>
> You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that you cannot find that "serious physical abuse" or "great physical anguish" occurred unless you also find that the victim experienced conscious physical suffering prior to his/her death.
>
> In addition, you are instructed that the term "heinous" means extremely wicked or shockingly evil; the term "atrocious" means outrageously wicked and vile; and the term "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

Id. The OCCA emphasized that "[t]his instruction does not change any of the legal requirements of the 'heinous, atrocious, or cruel' aggravating circumstance as it has existed up until this time." *Id.* "Rather," the OCCA noted, "it is intended to more fully inform the jury regarding

the findings that must be made in order to properly apply the aggravator and to ensure that a jury determination is made regarding each of these findings." *Id.*

B

In the first of his challenges to the HAC aggravating circumstance found by the jury in his case, Pavatt contends that the state trial court's instructions to the jury regarding the HAC aggravating circumstance failed to inform them adequately that they must find "conscious physical suffering" before concluding that the murder was "especially heinous, atrocious, or cruel."

Facts relevant to this claim

Prior to trial, Pavatt filed an objection "to the pattern verdict form, OUJI-CR 2d 4-84, on the grounds the special findings, *i.e.*, the aggravating circumstances, [we]re ill-defined, vague and d[id] not check the unbridled discretion of the sentencer." State R. at 1286. Pavatt subsequently filed an objection to the standard instruction and verdict form on the HAC aggravating circumstance "on the grounds that [they were] unconstitutional" in light of the Supreme Court's decision in *Maynard. Id.* at 1471.

The state trial court overruled Pavatt's objections and, at the conclusion of the second-stage proceedings, gave the jury the following instruction regarding the HAC aggravating circumstance:

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Instruction Number 5

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

Id. at 2052. The second-stage verdict form simply asked the jury to check whether or not they found the existence of each of the alleged aggravating circumstances. *Id.* at 2063. The verdict form did not otherwise explain or attempt to define the HAC aggravating circumstance. *Id.*

Pavatt's presentation of the issue to the OCCA

Although Pavatt argued on direct appeal that the evidence presented at trial was insufficient to support the HAC aggravating circumstance, he did not challenge on direct appeal the adequacy of the HAC instruction or the verdict form. Nor did he raise the issue in his initial application for post-conviction relief. Instead, Pavatt waited until he filed his second application for post-conviction relief to raise the issue. In that application, Pavatt argued that the state trial court violated his constitutional rights by failing to provide an adequate

instruction that informed the jury that it must find conscious physical suffering beyond a reasonable doubt before concluding that the murder was especially heinous, atrocious, or cruel.

The OCCA's resolution of the claim

In its opinion denying Pavatt's second application for post-conviction relief, the OCCA concluded that this claim was procedurally barred: "Because this argument is based on the trial record, it could have been made in prior proceedings, and may not be considered now." *Pavatt*, No. PCD-2009-777 at 5 (citing Okla. Stat. title 22, § 1089(D)(8)). In a related footnote, the OCCA also stated:

> In any event, we have rejected the same argument several times in the past. [Pavatt] essentially asks this Court to retroactively require an instruction that we promulgated — after Petitioner's conviction — in *DeRosa v. State*, 2004 OK CR 19, ¶¶ 91-97, 89 P.3d 1124, 1154-57. That instruction elaborates on the meaning of "heinous, atrocious, or cruel," and the relevant Uniform Jury Instruction already in existence (No. 4-73) was amended a year later. *DeRosa* was handed down several months after [Pavatt]'s trial. *DeRosa* does not hold that the Uniform Jury Instruction on this issue, being used at the time of DeRosa's and [Pavatt]'s trials, was materially deficient. *DeRosa*, 2004 OK CR 19, ¶ 97, 89 P.3d at 1156 ("This opinion should not be interpreted as a

> ruling that the former uniform instruction was legally inaccurate or inadequate"). This same attack on the pre-*DeRosa* version of OUJI-CR (2nd) No. 4-73 has been rejected several times by this Court. *Jackson v. State*, 2006 OK CR 45, ¶¶ 36-38, 146 P.3d 1149, 1161-63; *Browning v. State*, 2006 OK CR 8, ¶¶ 52-56, 134 P.3d 816, 843-45; *Rojem v. State*, 2006 OK CR 7, ¶¶ 68-73, 130 P.3d 287, 300-01.

Id. at 5 n.5.

The district court's procedural bar ruling

The district court in this case concluded that Pavatt's challenge to the state trial court's HAC instruction was "barred from federal review." ROA, Vol. 3 at 1138. In support, the district court stated that "[t]he Tenth Circuit has repeatedly recognized the application of a procedural bar to claims which could have been raised in an initial post-conviction application but were not." *Id.* at 1079. The district court also concluded that "the OCCA's procedural bar here [wa]s adequate and independent." *Id.* at 1080. Lastly, the district court concluded that Pavatt had "not made any showing of cause and prejudice to excuse his default of th[is] claim[]," nor had he shown "that a fundamental miscarriage of justice w[ould] occur if the claim [wa]s not heard." *Id.* at 1081-82.

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Pavatt's challenge to the district court's procedural bar ruling

Pavatt now contends that "[t]he district court erred in finding this claim procedurally barred from federal review." Aplt. Br. at 41. In support, Pavatt asserts that "*Valdez v. State*, 2002 OK CR 20, 46 P.3d 703 (Okla. Crim. App. 2002) gives the OCCA the option to permit consideration on the merits 'when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.'" Aplt. Br. at 41 (quoting *Valdez*, 46 P.3d at 710). "The merits inquiry," Pavatt asserts, "is thus part of the default consideration, and therefore, lacks independence as in *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)." Aplt. Br. at 41.

"The doctrine of procedural default prevents a federal court from reviewing 'the merits of a claim—including constitutional claims—that a state court declined to hear because the prisoner failed to abide by a state procedural rule.'" *Williams v. Trammell*, 782 F.3d 1184, 1212 (10th Cir. 2015) (quoting *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)). "In order to bar federal review, a state procedural rule must be adequate to support the judgment and independent from federal law." *Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012). "These dual requirements seek to ensure state rules are not employed to defeat federal court review of constitutional rights." *Id.* "To satisfy the adequacy element, a state procedural rule must be strictly or regularly followed and applied evenhandedly to all

similar claims." *Id.* (internal quotation marks omitted) (citation omitted). This court "ha[s] repeatedly held that Oklahoma's procedural default rule meets the adequacy requirement." *Id.* "A state procedural rule is independent if it relies on state law, rather than federal law, as the basis for the decision." *Id.* (internal quotation marks omitted) (citation omitted).

"In *Ake v. Oklahoma*, . . . the OCCA had held that [defendant] Ake had waived his claims that he was entitled to a court-appointed psychiatrist to assist him in an insanity defense because he had not renewed his request for a psychiatrist in a new-trial motion." *Black v. Workman*, 682 F.3d 880, 918, 485 Fed. Appx. 917 (10th Cir. 2012). "But under Oklahoma law there was no procedural bar if the alleged error was 'fundamental trial error'; and federal constitutional error was considered an error of that type." *Id.* (quoting *Ake*, 470 U.S. at 74-75). "Thus, the OCCA could not apply the waiver rule without first addressing the federal constitutional error." *Id.* "The Supreme Court concluded that the state waiver rule was therefore not an independent state ground for barring review." *Id.*

In Pavatt's case, as in *Banks*, the OCCA based its denial "upon the state procedural rule in § 1089(D)(8)." 692 F.3d at 1145. "Because § 1089 is purely a state law rule, we have held that Oklahoma decisions resting entirely upon § 1089(D)(8) are independent." *Id.* But Pavatt, relying on *Valdez* and parroting other Oklahoma capital defendants who have mounted similar challenges, essentially argues that the OCCA's reliance on § 1089(D)

(8) "does not preclude merits review because the state bar is not independent of federal law." *Fairchild*, 784 F.3d at 719. More specifically, Pavatt "is asserting that the OCCA will not impose a procedural bar [pursuant to § 1089(D)(8)] unless it first determines that any federal claims lack merit," *id.*, and thus the OCCA "sometimes forgives noncompliance with the bar on successive post-conviction applications." *Williams*, 782 F.3d at 1213.

As we have noted, however, "the *Valdez* exception only applies in cases involving an exceptional circumstance, and it is insufficient to overcome Oklahoma's regular and consistent application of its procedural-bar rule in the vast majority of cases."[2] *Id.* (internal quotation marks omitted) (citations omitted). In this case, Pavatt's challenge to the HAC jury instruction is far from exceptional: it is a claim that was readily apparent from the trial record and that could and arguably should have been raised on direct appeal. Moreover, although the OCCA opined in a footnote that there was no merit to Pavatt's claim, the clear and unequivocal basis for its denial of his claim was procedural bar under § 1089(D)(8). *See Cole*, 755 F.3d at 1158-59 (acknowledging and applying the OCCA's procedural bar ruling, even though the OCCA, on an alternative basis, briefly addressed and rejected the merits of the petitioner's claim); *Thacker v. Workman*, 678 F.3d 820,

2. "*Valdez* was special because the lawyers there knew that their client was a citizen of Mexico and nonetheless failed to comply with the Vienna Convention when they failed to contact the Mexican Consulate, thereby depriving the Consulate [of] the ability to intervene and present its discovery that the defendant suffered from organic brain damage." *Williams*, 782 F.3d at 1213.

834 n.5 (10th Cir. 2012) (same). I therefore agree with the district court that the claim is procedurally barred.

The merits of Pavatt's claim

Even if we were to assume that the claim was not procedurally barred, it cannot provide Pavatt with a valid basis for federal habeas relief. In *Workman v. Mullin*, 342 F.3d 1100 (10th Cir. 2003) and *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), we considered HAC jury instructions identical to the one utilized in Pavatt's case and rejected claims identical to the one now asserted by Pavatt. In doing so, we concluded that the language of the instructions was sufficient to narrow the jury's discretion, as required by Supreme Court precedent. *Workman*, 342 F.3d at 1116; *Wilson*, 536 F.3d at 1108. We also noted in *Wilson* that "[e]ven if the jury instruction did not sufficiently narrow the jury's discretion," the OCCA could "also perform this narrowing function on review" and actually did so. 536 F.3d at 1108. The same holds true in Pavatt's case.

C

In the second of his challenges to the HAC aggravating circumstance, Pavatt argues that the evidence presented at the sentencing phase of his trial was constitutionally insufficient to support the HAC aggravating circumstance. In support of his challenge to the constitutional sufficiency of the evidence supporting the HAC aggravator, Pavatt offers his view of the evidence:

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> Rob Andrew was shot twice with a shotgun at relatively close range. There was no gratuitous violence. There was no torture. There was no anguish or suffering beyond that which necessarily accompanied the underlying killing. The two shotgun blasts were both independently fatal. Pellets from both shots hit vital internal organs. Rob could not have remained conscious for more than a few moments, before going into shock and quickly bleeding to death. Additionally, the combination of both shots would have sped up the bleeding, causing Rob to die where he fell. If Rob Andrew's homicide was "heinous, atrocious, or cruel," then any murder in which the victim does not die instantly satisfies this factor.

Aplt. Br. at 21-22.

Pavatt's presentation of the claim to the OCCA

Pavatt first challenged the sufficiency of the evidence supporting the HAC aggravator in his direct appeal. The entirety of his argument was as follows:

> There was insufficient evidence to support the heinous, atrocious or cruel aggravating circumstance. *See Thomas v. Gibson*, 218 F.3d 1213 (10th Cir. 2000)(Evidence was insufficient to support heinous, atrocious or cruel aggravating circumstance); *Donaldson v. State*, 722 So.2d 177 (Fla. 1998); *Jones v.*

> *Gibson*, 206 F.3d 946, 953 (10th Cir. 2001)("We agree with petitioner and the federal district court that the record does not support the Oklahoma Court of Criminal Appeals' finding that the victim pleaded for his life").
>
> The evidence does not support the fact that the murder was "especially" heinous, atrocious or cruel. As defense counsel said during closing argument, "To some degree I suppose all homicides are heinous, atrocious or cruel. I think that's the reason why the legislature has inflicted the term especially to that phrase."
>
> Interestingly, the State attempts to prove the existence of the aggravating circumstance on the basis of the information provided by Brenda Andrew in her 911 call to the police. (Tr. 3763) The medical examiner's testimony was that either of the two wounds could have been fatal. Death occurred in a matter of minutes. The medical examiner could not tell how long Mr. Andrew was conscious. (Tr. 3764)

Direct Appeal Br. at 47.

The OCCA rejected this claim on the merits, stating as follows:

> In Propositions 14 and 15, Appellant challenges the sufficiency of the evidence to support the two aggravating circumstances alleged by

the State as warranting the death penalty. Such challenges are reviewed under the same standard as challenges to the evidence supporting a criminal conviction. We consider the evidence in a light most favorable to the State, and determine whether any rational juror could have found the existence of the challenged aggravating circumstance beyond a reasonable doubt. *DeRosa*, 2004 OK CR 19 at ¶ 85, 89 P.3d at 1153; *Lockett v. State*, 2002 OK CR 30, ¶ 39, 53 P.3d 418, 430.

In Proposition 14, Appellant claims the evidence was insufficient to support the jury's finding that the murder of Rob Andrew was "especially heinous, atrocious, or cruel." To establish this aggravator, the State must present evidence from which the jury could find that the victim's death was preceded by either serious physical abuse or torture. Evidence that the victim was conscious and aware of the attack supports a finding of torture. *Davis v. State*, 2004 OK CR 36, ¶ 39, 103 P.3d 70, 81; *Black v. State*, 2001 OK CR 5, ¶ 79, 21 P.3d 1047, 1074 (evidence that victim consciously suffered pain during and after stabbing was sufficient to support this aggravating circumstance); *Le*, 1997 OK CR 55 at ¶ 35, 947 P.2d at 550; *Romano v. State*, 1995 OK CR 74, ¶ 70, 909 P.2d 92, 118; *Berget v. State*, 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373. Our evaluation is not a mechanistic exercise. As we stated in *Robinson v. State*, 1995 OK CR 25, ¶ 36, 900 P.2d 389, 401:

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> As much as we would like to point to specific, uniform criteria, applicable to all murder cases, which would make the application of the "heinous, atrocious or cruel" aggravator a mechanical procedure, that is simply not possible. Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was proved.
>
> Unfortunately, no two cases present identical fact scenarios for our consideration, therefore the particulars of each case become the focus of our inquiry, as opposed to one case's similarity to another, in resolving a sufficiency of the evidence claim supporting the heinous, atrocious or cruel aggravator.

The evidence presented at trial showed that Rob Andrew suffered numerous wounds resulting from two shotgun blasts, which damaged his internal organs. The medical examiner testified that either wound would have caused sufficient blood loss to be independently fatal, but that death was not instantaneous. When emergency personnel arrived, Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggested that he either tried to ward off his attacker or

shield himself from being shot. Brenda Andrew called 911 twice after the shooting; together, the two calls spanned several minutes. During the second call, she claimed that her husband was still conscious and attempting to talk to her as he lay bleeding to death on the garage floor. All of these facts tend to show that Rob Andrew suffered serious physical abuse, and was conscious of the fatal attack for several minutes. *See Ledbetter v. State*, 1997 OK CR 5, ¶ 53, 933 P.2d 880, 896 (evidence that murder victim was likely aware that she was about to be assaulted because defendant had attempted to kill her one week earlier, that she tried to defend herself from the fatal attack, and that she attempted to communicate with a neighbor after the attack was sufficient to show that the murder was especially heinous, atrocious or cruel).

After finding that the murder was accompanied by torture or serious physical abuse, the jury may also consider the attitude of the killer and the pitiless nature of the crime. *Lott*, 2004 OK CR 27 at ¶ 172, 98 P.3d at 358; *Phillips v. State*, 1999 OK CR 38, ¶ 80, 989 P.2d 1017, 1039. That the victim was acquainted with his killers is a fact relevant to whether the murder was especially heinous, atrocious, or cruel. In finding the murder in *Boutwell v. State*, 1983 OK CR 17, ¶ 40, 659 P.2d 322, 329 to be especially heinous, atrocious, or cruel, this Court observed:

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> In this case the killing was merciless. The robbers planned well in advance to take the victim's life. Even more abhorrent and indicative of cold pitilessness is the fact that the appellant and the victim knew each other.

We find the situation in the present case even more pitiless. Rob Andrew correctly suspected his wife of having an affair with a man he trusted as his insurance agent. He correctly suspected his wife and her lover of trying to wrest control of his life insurance away from him. He correctly suspected his wife and her lover of attempting to kill him several weeks before by severing the brake lines on his car. He confided in others that he was in fear of his life. Having separated from his wife, Rob Andrew was murdered as he returned to the family home to pick up his children for the Thanksgiving holiday. From the evidence, a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he died. The evidence supported this aggravating circumstance, and this proposition is denied.

Pavatt v. State of Oklahoma (Pavatt I), 2007 OK CR 19, 159 P.3d 272, 294-95 (Okla. Crim. App. 2007) (internal paragraph numbers omitted).

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Standard of review

Because Pavatt's challenge to the sufficiency of evidence supporting the HAC aggravator was previously addressed and rejected on the merits by the OCCA, our scope of review is circumscribed by 28 U.S.C. § 2254(d). *See Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 740, 193 L. Ed. 2d 599 (2016) ("federal court[s] ha[ve] no inherent habeas corpus power, but only that which is conferred (and limited) by statute."); *Harrington v. Richter*, 562 U.S. 86, 92, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Section 2254(d) provides:

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

28 U.S.C. § 2254(d).

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Clearly established federal law applicable to the claim

In determining whether Pavatt is entitled to federal habeas relief under § 2254(d)(1), we must identify the "clearly established Federal law" that applies to Pavatt's claim. As the majority correctly notes, aggravating factors in a capital case, such as the HAC aggravator found by the jury in Pavatt's case, "operate as 'the functional equivalent of an element of a greater offense.'" *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Consequently, due process requires that the evidence presented at trial be sufficient to support an aggravator. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In assessing a sufficiency-of-evidence challenge to an aggravator, "the relevant question [therefore] is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original).

Merits of the claim

The majority opinion does not directly address this claim. It does, however, seem to concede that "a reasonable juror could have found" the State's evidence "to be sufficient evidence of conscious physical suffering." Maj. Op. at 24. With this I would agree. And, in any event, I conclude, for the reasons outlined below, that the OCCA's resolution of the claim was neither contrary to nor an unreasonable application of clearly established federal law.

In challenging the OCCA's decision, Pavatt begins by offering his own summary of the relevant evidence, arguing that the crime at issue resulted in "[a] shotgun death" that involved "no conscious suffering beyond what accompanies any murder." Aplt. Br. at 21. According to Pavatt, "[t]here was no gratuitous violence," "no torture," and "no anguish or suffering beyond that which necessarily accompanied the underlying killing." *Id.* Further, Pavatt argues that "[t]he two shotgun blasts were both independently fatal" and Rob Andrew "could not have remained conscious for more than a few moments, before going into shock and quickly bleeding to death." *Id.* at 21-22. In sum, Pavatt argues, "[i]f Rob Andrew's homicide was 'heinous, atrocious or cruel,' then any murder in which the victim does not die instantly satisfies this factor." *Id.* at 22.

The problem with Pavatt's description of the evidence is that it wholly ignores the standard of review mandated by the Supreme Court in *Jackson*. As we have noted, *Jackson* requires a reviewing court to "view[] the evidence in the light most favorable to the prosecution." 443 U.S. at 319. When that standard is applied to the evidence presented in Pavatt's case, it simply does not support his description of the relevant facts. Although it is true that each of the shotgun blasts were independently lethal, Pavatt is simply incorrect in asserting that Rob Andrew "could not have remained conscious for more than a few moments." Aplt. Br. at 21. Indeed, the medical examiner who testified on behalf of the prosecution conceded it was possible that Rob Andrew remained conscious for several minutes after sustaining the wounds. And that testimony, combined with Brenda Andrew's statements to the 911

operator regarding Rob Andrew's condition (which we will discuss in greater detail below), would have allowed the jury to reasonably find that he indeed remained conscious far longer than "a few moments."

Pavatt also argues that the OCCA "relied on irrelevant speculation about what Rob [Andrew] was feeling." Aplt. Br. at 24. In support, Pavatt examines and attempts to discredit each of the factors cited by the OCCA in support of its determination. To begin with, Pavatt asserts that "[t]he 'numerous wounds' referred to by the OCCA were caused by pellets from the same shotgun, shot at nearly the same time." *Id.* at 32. Although Pavatt is correct on this point, that does not prove the OCCA's determination to be wrong. Indeed, the medical examiner testified at trial that the two shotgun blasts damaged Rob Andrew's right lung, aorta, and liver. In addition, the photographs of Rob Andrew's body quite clearly indicate that the shotgun pellets caused numerous, separate entry and exit wounds on his body. And, although Pavatt asserts that these wounds "did not contribute to an inordinate amount of conscious pain prior to death," *id.* at 30, the medical examiner testified to the contrary, noting the wounds would, indeed, have been painful.

Pavatt in turn argues that, contrary to the OCCA's determination, "the quick loss of blood from both wounds resulted in shock and loss of consciousness within one minute." *Id.* But this argument ignores, and is ultimately contrary to, the testimony of the medical examiner. The medical examiner testified that, as a result of the blood loss associated with the wounds, Rob Andrew would have

lost consciousness before he actually died. The medical examiner declined on direct examination to give an exact amount of time that Rob Andrew remained conscious after sustaining the wounds. On cross-examination, the medical examiner agreed that it was possible that Rob Andrew died less than one minute after sustaining the wounds, but he also testified that Rob Andrew "probably" would have lost consciousness within five minutes. Tr. at 2462. And, on redirect, the medical examiner testified it was possible that Rob Andrew remained conscious for more than one minute after sustaining the wounds. Ultimately, the medical examiner's testimony, construed in the light most favorable to the prosecution, would have allowed the jury to find that Rob Andrew remained conscious for several minutes after sustaining the wounds.

Pavatt argues that the fact that Rob Andrew was found "clutching the plastic trash bag was meaningless in determining whether [he] consciously suffered and thus, it was unreasonable for the OCCA to speculate about why [he] may have been holding the bag." Aplt. Br. at 30. I disagree. It is unknown whether Rob Andrew was holding the trash bag prior to being ambushed, or whether, instead, he was able to pick up the bag and attempt to fend off his attacker after sustaining one or both shotgun blasts. Because the OCCA was obligated to view the evidence in the light most favorable to the prosecution, it was entirely reasonable for it to draw the latter inference. And that inference was relevant to the OCCA's assessment of the sufficiency of the evidence supporting the HAC aggravator because it would have supported a finding that Rob Andrew remained conscious, and indeed mobile, after one or both shotgun blasts.

Pavatt also complains that it was unreasonable for the OCCA "to conclude that Rob consciously suffered based on Brenda's statements in her 911 calls, when everything she said in those calls was determined to be false." *Id.* The fallacy of this argument, however, is the notion that all of Brenda's statements to the 911 operator were proven to be false. The fact of the matter is that at least some of Brenda's statements during the two 911 calls were obviously true. For example, it is undisputed that she was physically present with Rob Andrew after he suffered the two shotgun blasts and during at least the second 911 call. Further, her statements to the 911 operator that she and Rob Andrew had been shot were indisputably true. Likewise, some of her statements describing what she was witnessing, such as the arrival of police officers to her house, were also quite clearly true (indeed, officers' voices can be heard in the background during the second 911 call at the precise time that Brenda tells the 911 operator that the police have arrived on the scene). Thus, the jury, having listened to recordings of both 911 calls, was left to decide whether her statements to the 911 operator regarding Rob's condition, including her statement that he was conscious and attempting to talk to her, and her repeated statements that he was breathing, were credible or not. Although the jury was not bound to give credence to those statements, it was certainly within the jury's province to do so. *See Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 732, 181 L. Ed. 2d 694 (2012) (noting it is "the jury's task [to] assess[] witness credibility and reliability"). Consequently, I conclude it was in turn reasonable for the OCCA, applying the standard of review mandated by *Jackson*, to treat as

credible Brenda's statements regarding Rob Andrew's condition in assessing the sufficiency of the evidence to support the HAC aggravator.

Finally, Pavatt argues that no "deference [should be] afforded [the jury's verdict] under *Jackson*" because "[t]here were no conflicting facts about how Rob [Andrew] died." Aplt. Br. at 22. I disagree. *Jackson* provides, in relevant part, that "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." at 326. That is precisely the situation we have here. As we have already explained, the evidence presented at Pavatt's trial most certainly "supports conflicting inferences" regarding how long Rob Andrew remained conscious after sustaining the two shotgun blasts. We therefore presume that the jury in Pavatt's trial, having found the existence of the HAC aggravator, resolved these conflicts in favor of the prosecution. And, in turn, we, like the OCCA, must defer to that resolution.

In sum, I conclude that Pavatt has failed to establish that the OCCA's determination that the evidence was sufficient to support the HAC aggravator was contrary to, or involved an unreasonable application of, clearly established federal law. Thus, Pavatt is not entitled to federal habeas relief on this claim.

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D

In his third and final challenge, Pavatt argues that the HAC aggravating circumstance, as applied in his case, is unconstitutionally vague in violation of the Eighth Amendment. The majority agrees with Pavatt and indeed grants him federal habeas relief on the basis of this claim. In doing so, however, the majority ignores the fact that the claim is both procedurally barred and not properly before this court. Moreover, even ignoring these procedural problems, the majority's analysis ignores the fact that the jury's finding of the HAC aggravator in Pavatt's case is entirely consistent with the body of OCCA case law that has tailored and applied the HAC aggravating circumstance in a manner that avoids the arbitrary and capricious infliction of the death penalty. Consequently, Pavatt is not entitled to federal habeas relief on the basis of this claim.

Pavatt's failure to present the claim to the OCCA

In his second application for state post-conviction relief, Pavatt argued to the OCCA that the HAC aggravating circumstance was facially vague, in violation of the Eighth and Fourteenth Amendments (i.e., a facial challenge to the HAC aggravating circumstance). The OCCA declined to review the merits of that claim, noting that the claim could have been raised in Pavatt's first application for state post-conviction relief.

At no point has Pavatt ever argued to the OCCA that the HAC aggravating circumstance, as applied in his

case, is unconstitutionally vague in violation of the Eighth and Fourteenth Amendments (an as-applied challenge). Consequently, the OCCA has never had an opportunity to address that claim. And, were Pavatt to attempt to present the claim now to the OCCA, by way of a belated application for state post-conviction relief, the OCCA would presumably treat it as untimely and procedurally barred. Thus, the claim has been procedurally defaulted for purposes of federal habeas review. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) ("This rule [allowing a federal habeas court's consideration of fairly presented federal claims] does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas . . . ."); *Cole v. Trammell*, 755 F.3d 1142, 1169 (10th Cir. 2014) ("Cole has never presented this argument to the Oklahoma state courts and it is therefore unexhausted and subject to an anticipatory procedural bar.").

Pavatt's federal habeas petition

In his federal habeas petition, Pavatt reasserted his facial challenge to the HAC aggravating circumstance. More specifically, in Ground Thirteen of his petition, Pavatt argued that the Eighth and Fourteenth Amendments were violated by Oklahoma's continued use of what he described as "the facially vague aggravating circumstance that a murder is: especially heinous, atrocious, or cruel." Dist. Ct. Docket No. 42 at 172 (capitalization omitted).

And, for the first time ever, Pavatt hinted at the possibility of an as-applied challenge to the HAC aggravating circumstance, but did not directly assert that as an independent ground for federal habeas relief. In Ground Ten of his petition, Pavatt argued, as he had on direct appeal, that the evidence presented at trial was constitutionally insufficient to allow the jury to find the existence of the HAC aggravating circumstance. As part of his Ground Ten arguments, Pavatt asserted for the first time ever that his sentence "did not comport with the Eighth and Fourteenth Amendments," *id.* at 147, and he compared the facts of his case to other Oklahoma capital cases that purportedly involved victims who survived for a brief time after being injured. *Id.* at 150-51, 154-55.

The district court concluded that Ground Thirteen—Pavatt's facial challenge to the HAC aggravating circumstance—was "barred from federal review" because the OCCA had declined to review it due to Pavatt's failure to raise it in a timely fashion. Dist. Ct. Docket No. 91 at 90. As for Ground Ten, both the respondent and the district court understandably treated it as alleging only an insufficiency-of-evidence claim and not an as-applied vagueness challenge to the HAC aggravating circumstance. *See* Dist. Ct. Docket No. 69 at 128 ("In Ground Ten, Petitioner alleges that insufficient evidence was presented at trial to support the jury's finding of the especially heinous, atrocious or cruel aggravator."); Dist. Ct. Docket No. 91 at 80 ("In Ground Ten, Petitioner challenges the sufficiency of the evidence supporting the jury's finding that Rob's murder was especially heinous, atrocious, or cruel."). Because Pavatt had raised an

insufficiency-of-evidence challenge on direct appeal, the respondent conceded that the claim was "exhausted for purposes of federal habeas review," Dist. Ct. Docket No. 69 at 128, and the district court agreed. Dist. Ct. Docket No. 91 at 81-82. Ultimately, the district court rejected Pavatt's insufficiency-of-evidence claim, applying the deferential standard of review outlined in § 2254(d). *Id.* at 83-84 ("Based on the presented evidence, and with acute awareness of the double deference applied by the Court in the resolution of this claim, the Court finds that Petitioner has not shown that this decision by the OCCA is contrary to or an unreasonable application of Supreme Court law.").

Pavatt's appeal to this court

Although the district court denied Pavatt a COA, this court, in a November 24, 2014 case management order, granted Pavatt a COA as to four claims, including (1) the question of "[w]hether there was sufficient evidence to support the 'especially heinous, atrocious, or cruel' aggravator (raised in Ground 10 of [his] habeas petition)," and (2) "whether the trial court's failure to provide an adequate instruction to the jury that it must find 'conscious physical suffering' beyond a reasonable doubt before finding that the murder was 'especially heinous, atrocious, or cruel' violated . . . Pavatt's constitutional rights to a fair trial, a reliable sentencing determination, and due process (raised in Ground 11 of [his] habeas petition)." Case Mgmt. Order at 1-2. Notably, the case management order made no mention of Pavatt's as-applied or facial vagueness challenges to the HAC aggravating circumstance. Thus, those arguments are not properly before this court.

Nevertheless, Pavatt, in what amounts to either ignorance or defiance of the case management order, filed appellate pleadings inserting as-applied vagueness arguments into his discussion of his insufficiency-of-evidence claim.

The majority opinion

Remarkably, the majority opinion ignores all of these procedural problems and ultimately grants Pavatt federal habeas relief on the basis of his as-applied vagueness arguments. I disagree with this approach and would reject Pavatt's as-applied arguments as (1) not properly before this court because no COA was granted on those arguments, and (2) subject to an anticipatory procedural bar due to Pavatt's failure to present them to the OCCA.

The majority opinion also, curiously, purports to apply the deferential AEDPA standards to Pavatt's as-applied arguments, even though it is quite clear that those arguments were never presented to or addressed by the OCCA. Indeed, the majority opinion takes the OCCA to task for failing to "apply[] or even consider[] controlling Supreme Court precedent," and in turn concludes that the OCCA's "decision [was] contrary to clearly established federal law." Maj. Op. at 29. But that begs the question of what OCCA decision the majority opinion is referring to?

The merits of Pavatt's as-applied arguments

Even if I were to ignore the serious procedural defects described above and reach the merits of Pavatt's as-

applied challenge to the HAC aggravating circumstance, I would reach a different conclusion than the majority.

OCCA case law, which the majority all but ignores, identifies at least two categories of murders that the HAC aggravator does not apply to, and both are distinguishable from the murder committed by Pavatt. The first category of murders are those in which the victim dies instantaneously or nearly so. A perfect case in point is *Simpson v. State*, 2010 OK CR 6, 230 P.3d 888 (Okla. Crim. App. 2010). The defendant in that case shot and killed two victims who were traveling inside of a car. The first victim, who was driving the car at the time of the shooting, "was shot four times," including "a grazing gunshot wound to the right shoulder, two superficial gunshot wounds to the left side of his back, and an ultimately fatal gunshot wound to his chest." *Id.* at 902. "Although [this victim] was initially conscious after being shot, his breathing became labored and he made gurgling sounds as his chest filled with blood before he died." *Id.* at 902-03. "There was [also] testimony that immediately after he had been shot, [this victim] was able to speak, was aware that he had been shot and was fearful that the shooters would return." *Id.* at 903. "Reviewing th[is] evidence in the light most favorable to the State," the OCCA concluded "that the evidence support[ed]" the jury's "finding that [this victim's] death was preceded by physical suffering and mental cruelty." *Id.* "With regard to the murder of [the second victim, who was the front seat passenger], the evidence showed that his death was nearly immediate." *Id.* In particular, he "suffered numerous gunshot wounds including wounds to his head and chest" and "[t]he Medical Examiner testified

that [his] injuries were not survivable and he likely died within seconds after being shot." *Id.* Notably, the OCCA concluded that this "evidence d[id] not show, beyond a reasonable doubt and in a light most favorable to the State, that [the second victim's] death was preceded by torture or that he endured conscious physical suffering before dying." *Id.* In short, the OCCA in *Simpson* drew a distinction between murders in which the victim's death is instantaneous and murders in which the victim experiences conscious physical suffering for some period of time after being wounded.

Notably, *Simpson* is but one of many cases in which the OCCA has refused to allow application of the HAC aggravating circumstance where a murder victim's death was instantaneous or nearly so. Indeed, Pavatt cites to numerous such cases in his opening appellate brief (I cite these cases in the same order they are listed in that brief). *See Brown v. State*, 1988 OK CR 59, 753 P.2d 908, 912 (Okla. Crim. App. 1988) (victim was shot seven times, including once in the aorta and once in the heart; no evidence was presented indicating that victim was conscious after one or more of the shots); *Davis v. State*, 1995 OK CR 5, 888 P.2d 1018, 1021 (Okla. Crim. App. 1995) ("No testimony indicated that the victims who died were conscious or suffered pain at any time."); *Sellers v. State*, 1991 OK CR 41, 809 P.2d 676, 690 (Okla. Crim. App. 1991) (no evidence that any of the three victims were conscious or suffered after being shot by the defendant); *Booker v. State*, 1993 OK CR 16, 851 P.2d 544, 548 (Okla. Crim. App. 1991) (concluding that testimony of medical examiner, regarding victim who was shot in the chest with

a shotgun, was "as consistent with instantaneous death as any other possibility"); *Marquez v. State*, 1995 OK CR 17, 890 P.2d 980, 987 (Okla. Crim. App. 1995) (noting that the victim "was shot approximately three times while asleep," "[t]he injuries caused by two of the shots could have been fatal," and one of those shots "would have caused death nearly instantaneously."); *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 80 (Okla. Crim. App. 1995) (striking HAC aggravator where the shooting at issue lasted only seconds and some of the wounds would have rendered the victim immediately unconscious); *Myers v. State*, 2006 OK CR 12, 133 P.3d 312, 332 (Okla. Crim. App. 2006) ("The evidence does not prove [the victim] was conscious and aware of her attack or that she was conscious and alive suffering pain after the attack."); *Crawford v. State*, 1992 OK CR 62, 840 P.2d 627, 641 (Okla. Crim. App. 1992) ("No testimony was elicited by either the State or the defense as to the level of suffering by the decedent," and "no evidence was presented to show that the decedent did not die instantly as a result of the strangulation."); *Battenfield*, 816 P.2d at 565 (assistant medical examiner testified "that the type of blow to the victim's head would generally cause loss of consciousness immediately.").

The second, and undeniably more limited, category of murders that the OCCA has indicated do not warrant application of the HAC aggravator are those in which death is not instantaneous, but where the victim, though conscious for some period of time, does not experience severe physical suffering. This category is exemplified by *Cudjo v. State*, 1996 OK CR 43, 925 P.2d 895 (Okla. Crim. App. 1996). The murder victim in that case was shot a

single time in the back of the head. Although the victim "was aware he had been injured, he was not sure what type of wound he had received (i.e. gun shot wound or blow to the head)." *Id.* at 901. "Moreover, the gravity of [the victim's] injury was not apparent to others at the [crime] scene." *Id.* For example, one police officer testified that the victim "was coherent and making sense." *Id.* Another police officer testified that the victim indicated "he was all right." *Id.* At worst, the evidence indicated that the victim "experienced nausea, vomiting and shortness of breath and complained about his head hurting." *Id.* Ultimately, after being taken to a local hospital, the victim "became unresponsive and . . . later died." *Id.* The defendant in *Cudjo* argued on direct appeal that this evidence was insufficient to support the jury's finding of the HAC aggravating circumstance. The OCCA agreed, noting that while the victim "did experience some conscious physical or mental suffering prior to his death, the evidence fail[ed] to demonstrate that the murder was preceded by torture or serious physical abuse." *Id.*

Pavatt's case does not fit within, and is reasonably distinguishable from, these two categories of cases. Comparing Pavatt's case to *Simpson*, it is readily apparent that Rob Andrew's situation was most similar to that of the first victim in *Simpson*, who remained conscious after being shot and experienced severe physical suffering, and was distinguishable from that of the second victim in *Simpson*, who died almost instantaneously after being shot. Pavatt's case is also distinguishable from *Cudjo* for the simple reason that the evidence in Pavatt's case would have allowed the jury to find that Rob Andrew, unlike the

victim in *Cudjo*, experienced significant pain for a period of time before dying. Thus, contrary to what the majority may say, Pavatt's case can be distinguished in a "principled way" from numerous Oklahoma cases in which the OCCA has held that the HAC aggravating circumstance cannot be applied.

III

One final matter deserves mention. The majority opinion cryptically "reverse[s] the denial of [federal habeas] relief with respect to [Pavatt's] sentence and remand[s] to the district court for further proceedings." Maj. Op. at 2. The majority opinion also notes that "[t]he jury . . . found the remuneration aggravator" and that "[t]he parties have not presented arguments on what effect that has on the disposition of this case." *Id.* at 13 n.2. In my view, it is unclear what these statements are intended to mean for the district court and the parties. Moreover, I submit that the only remedy that the district court may impose in light of the Sixth Amendment is to order the State of Oklahoma to provide Pavatt with a new sentence proceeding within a reasonable time. *Cf. Hooks v. Workman*, 689 F.3d 1148, 1208 (10th Cir. 2012) ("We therefore grant the writ with respect to Mr. Hooks's sentence, *subject to the condition* that the State of Oklahoma resentence him within a reasonable time.").

Oklahoma law outlines three possible sentencing options for a person convicted of murder in the first degree: death, imprisonment for life without parole, or imprisonment for life. Okla. Stat. tit. 21, § 701.9(A).

Where, as here, the State seeks imposition of the death penalty, Oklahoma law requires the trial court to "conduct a separate sentencing proceeding" before a jury.[3] *Id.* § 701.10(A). At this separate sentencing proceeding, "evidence may be presented as to any mitigating circumstances or as to any of the [statutory] aggravating circumstances." *Id.* § 701.10(C). In order for the jury at the separate sentencing proceeding to recommend a sentence of death, Oklahoma law requires the jury to make two related findings of fact. First, the jury must unanimously find beyond a reasonable doubt the existence of one or more of the statutory aggravating circumstances. *Id.* § 701.11. Second, the jury must then unanimously find that any such aggravating circumstance(s) outweigh the mitigating circumstances alleged by the defendant. *Id.*

Oklahoma's capital sentencing scheme in turn requires the OCCA to review every sentence of death that is imposed and determine, in pertinent part, whether the evidence supports each of the statutory aggravating circumstances found by the jury. *Id.* § 701.13(C)(2). The OCCA is expressly authorized by statute to "[a]ffirm the sentence of death" or to "[s]et the sentence aside and remand the case for resentencing by the trial court." *Id.* § 701.13(E). The statute also appears to imply that the

3. The separate sentencing proceeding is typically held before the same jury that found the defendant guilty of murder in the first degree. Okla. Stat. tit. 21, § 701.10(A). But where error is determined to have occurred in the original capital sentencing proceeding, the state trial court is authorized "to impanel a new sentencing jury who shall determine the sentence of the defendant." *Id.* § 701.10a(1)(b).

OCCA can "correct[]" any errors in the sentence. *Id.* And, indeed, the OCCA has at times done just that by engaging in its own reweighing after invalidating an aggravating circumstance. *E.g.*, *Moore v. State*, 1991 OK CR 43, 809 P.2d 63, 65-66 (Okla. Crim. App. 1991).

Historically, the Supreme Court has allowed for such independent reweighing by state appellate courts. *See Richmond v. Lewis*, 506 U.S. 40, 49, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992) ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand."); *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) ("We see no reason to believe that careful appellate reweighing of aggravating against mitigating circumstances in cases such as this would not produce 'measured consistent application' of the death penalty or in any way be unfair to the defendant.").

But that precedent appears to be of questionable validity in light of the Supreme Court's recent decision in *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). At issue in *Hurst* was the constitutionality of Florida's capital sentencing scheme. Under that scheme, a capital defendant could be sentenced to death "only if an additional sentencing proceeding 'result[ed] in findings by the court that such person shall be punished by death.'" *Id.* at 617 (quoting Fla. Stat. § 775.082(1)). More specifically, the trial judge had to "independently find and weigh the aggravating and mitigating circumstances before

entering a sentence of life or death." *Id.* The Supreme Court "h[e]ld this sentencing scheme unconstitutional." *Id.* at 619. In doing so, the Court explained that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.*; *see also Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.").

To be sure, the Supreme Court has not yet revisited the issue of appellate reweighing since issuing *Hurst*. But the implications of *Hurst* seem clear. Appellate reweighing, at least under a capital sentencing scheme like the one at issue in Oklahoma, requires an appellate court to make a new and critical finding of fact, i.e., whether the remaining valid aggravating circumstances outweigh any mitigating circumstances alleged by the defendant. In light of *Hurst*, it appears clear that such a factual finding can be made only by a jury. All of which leaves only one option in this case: grant the writ subject to the State of Oklahoma affording Pavatt with a new sentencing proceeding.[4]

4. By determining that the evidence presented at Pavatt's sentencing proceeding was insufficient to support the jury's finding of the HAC aggravating circumstance, the majority's decision in this case necessarily invalidates not only that aggravating circumstance, but also the jury's ultimate, and inextricably intertwined finding that the aggravating circumstances that it found outweighed the mitigating circumstances alleged by Pavatt.

Appendix B

IV

Because I conclude that all of the issues asserted by Pavatt in this appeal lack merit, I would affirm the district court's denial of Pavatt's petition for writ of habeas corpus.

APPENDIX C — CASE MANAGEMENT ORDER AND CERTIFICATE OF APPEALABILITY OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED NOVEMBER 24, 2014

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6117

JAMES DWIGHT PAVATT,

Petitioner-Appellant,

v.

ANITA TRAMMELL, WARDEN, OKLAHOMA STATE PENITENTIARY,

Respondent-Appellee.

CASE MANAGEMENT ORDER

Before **MURPHY**, Circuit Judge.

In accordance with matters discussed and resolved at the case management conference held in this appeal, it is ORDERED:

1. The issues to be raised in the opening brief are:

> A. Whether there was sufficient evidence to support the "especially heinous, atrocious, or cruel" aggravator (raised in Ground 10 of Mr. Pavatt's habeas petition), and whether the trial court's failure to provide an adequate

instruction to the jury that it must find "conscious physical suffering" beyond a reasonable doubt before finding that the murder was "especially heinous, atrocious, or cruel" violated Mr. Pavatt's constitutional rights to a fair trial, a reliable sentencing determination, and due process (raised in Ground 11 of Mr. Pavatt's habeas petition);

B. Whether there was constitutionally ineffective assistance of trial counsel regarding the investigation of mitigating evidence or the presentation of a meaningful case for life imprisonment (raised in Ground 15, Claim I.I., of Mr. Pavatt's habeas petition), and whether appellate counsel was constitutionally ineffective in failing to raise a claim that trial counsel was ineffective in these regards; and

C. Whether trial counsel provided constitutionally ineffective assistance of counsel regarding the introduction of a camping video, live photographs of the victim, or testimony regarding the victim's good traits (raised in Ground 15, Claim I.E., of Mr. Pavatt's habeas petition), and whether appellate counsel was constitutionally ineffective in failing to raise a claim that trial counsel was ineffective in these regards;

2. Appellant's opening brief shall be filed by Monday, June 8, 2015, and shall consist of no more than 20,000 words;

3. Appellee's answer brief shall be filed by Monday, August 10, 2015, and shall consist of no more than 20,000 words;

4. Appellant's reply brief shall be filed by Friday, September 25, 2015, and shall consist of no more than 9,450 words;

5. The merits panel assigned to this appeal will determine the date and time for oral argument. The clerk's office will notify counsel through CM/ECF when the matter is calendared for oral argument;

6. A Certificate of Appealability is GRANTED on the issues set forth in paragraph 1. Any request for leave to grant additional issues in the Certificate of Appealability must be raised by written motion filed not later than fourteen days after the date of this order. Appellee may file a response to such a request not more than fourteen days after the request is filed. The Clerk shall submit motions for modification of the Certificate of Appealability to the merits panel for decision. Unless otherwise ordered by the merits panel, no issue shall be included in the briefs other than those set forth in paragraph 1 of this order.

Any objection to the contents of the scheduling order must be raised by written motion of not more than five pages filed not later than ten days after its date. Motions for extension of time or to alter the briefing limitations of this order are discouraged and will be considered only in the most crucial circumstances.

Appendix C

The Federal Public Defender for the Western District of Oklahoma is appointed as attorney of record to represent the appellant, JAMES DWIGHT PAVATT. 18 U.S.C. § 3006A(c).

Entered for the Court,
ELISABETH A. SHUMAKER,
Clerk of Court
/s/Elisabeth A. Shumaker
by: Chris Wolpert
Chief Deputy Clerk

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED MAY 1, 2014

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

Case No. CIV-08-470-R

JAMES DWIGHT PAVATT,

Petitioner,

vs.

ANITA TRAMMELL, WARDEN, OKLAHOMA STATE PENITENTIARY,

Respondent.[1]

May 1, 2014, Decided
May 1, 2014, Filed

MEMORANDUM OPINION

Petitioner, James Dwight Pavatt, a state court prisoner, has filed a Petition for a Writ of Habeas Corpus seeking relief pursuant to 28 U.S.C. § 2254. Doc. 49.[2]

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

2. Doc. 49 is actually the amended petition. The amended petition was filed to correct the original petition, Doc. 42, which was inadvertently filed without the signature of counsel.

Petitioner, who is represented by counsel, is challenging the convictions entered against him in Oklahoma County District Court Case No. CF-2001-6189. Tried by a jury in August and September of 2003, Petitioner was found guilty of Murder in the First Degree (Count 1) and Conspiracy to Commit a Felony (Count 2). Finding that the murder was committed for remuneration or the promise of remuneration and that it was also especially heinous, atrocious, or cruel, the jury sentenced Petitioner to death on Count 1. On Count 2, the jury set punishment at ten years imprisonment and a $5,000.00 fine (O.R. XI, 2045-46, 2062-63; O.R. XII, 2249-51).

Petitioner has presented fifteen grounds for relief. Doc. 49. Respondent has responded to the Petition and Petitioner has replied. Docs. 69 and 73. In addition to his Petition, Petitioner also filed motions for discovery and an evidentiary hearing, to which multiple responses, replies, and further supplemental pleadings have been filed. Docs. 43, 55, 70, 74, 78, 85, and 86. After a thorough review of the entire state court record (which Respondent has provided), the pleadings filed herein, and the applicable law, the Court finds that, for the reasons set forth below, Petitioner is not entitled to his requested relief.

I. Procedural History.

In Case No. D-2003-1186, Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). In a published opinion, *Pavatt v. State*, 2007 OK CR 19, 159 P.3d 272 (Okla. Crim. App. 2007), the OCCA affirmed. Petitioner

sought review of the OCCA's decision by the United States Supreme Court. His petition for writ of certiorari was denied on February 19, 2008. *Pavatt v. Oklahoma*, 552 U.S. 1181, 128 S. Ct. 1229, 170 L. Ed. 2d 62 (2008). Petitioner also filed two post-conviction applications, both of which the OCCA denied. *Pavatt v. State*, No. PCD-2009-777 (Okla. Crim. App. Feb. 2, 2010) (unpublished); *Pavatt v. State*, No. PCD-2004-25 (Okla. Crim. App. Apr. 11, 2008) (unpublished).

II. Facts.

On November 20, 2001, Rob Andrew was shot and killed in the garage of the Oklahoma City home he had once shared with his wife, Brenda Andrew. Rob and Brenda had been separated for a couple of months and divorce proceedings were underway. Rob had come to the marital home that Tuesday evening to pick up his kids[3] for the upcoming Thanksgiving holiday. According to Brenda, who also suffered a gun shot wound that evening, she and Rob were both shot by two masked assailants who confronted them in the garage and then fled. However, Brenda's unusual behavior and version of the event were immediate indicators to police that there was more to the story. Events, both before and after Rob's death, showed that Brenda wanted Rob dead so that she could collect his $800,000 life insurance policy and she enlisted Petitioner to help her carry out her plan. Petitioner was not only the Andrews' insurance agent but Brenda's lover.

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3. Rob and Brenda had a daughter, Tricity, age 10, and a son, Parker, age 7.

Petitioner and the Andrews attended the same church, and Petitioner and Brenda taught a 5th and 6th grade Sunday School class together. It is not surprising then that it was at church where relationship issues first came to light. Church members noticed Brenda dressing inappropriately and acting inappropriately with Petitioner, who was also married at the time.[4] As a result, on September 19, 2001, Petitioner and Brenda were asked by church leaders to step down from their teaching positions. Both Petitioner and Brenda were upset by this. Brenda was upset that Rob would not defend her and/or leave the church over it. Petitioner felt that Rob was involved behind the scenes. Right after it happened, Petitioner, referring to Rob, told a church member, "I hate the son of a bitch" (J. Tr. VI, 1538).

In late September 2001, Brenda kicked Rob out of the house and he moved into an apartment. The day after he moved out, Rob told a close friend that he was afraid that Brenda had finally found someone to kill him and that someone was Petitioner.[5] Shortly thereafter, Brenda filed for divorce. Even though it was apparent that Brenda was being unfaithful and Rob knew that she had been

4. Petitioner filed for divorce on August 21, 2001, and the divorce was granted September 6, 2001.

5. While this comment may have seemed outlandish, on September 1, 2001, a plumbing contractor working in the Andrew home overheard Brenda tell Rob that "she was going to have him fucking killed" (J. Tr. VII, 1831). In addition, Petitioner, who had served in the military, was often heard to brag about his involvement in top secret missions. Petitioner indicated that he was a sniper, an expert marksman, and that he used to kill people for a living.

unfaithful to him before,[6] Rob continued to express his love for Brenda and maintained the hope that they could reconcile. In the divorce, the two most troublesome issues were custody of the kids and Rob's $800,000 life insurance policy. Brenda was very possessive of the kids and did not want Rob to have any relationship with them. Regarding the life insurance policy, Brenda was adamant that she remain the designated beneficiary.

After Rob moved out and the divorce was underway, the relationship between Petitioner and Brenda was much more transparent. A next door neighbor recalled seeing Petitioner's truck at the Andrew residence with increased frequency. In fact, it was particularly common to see Petitioner's truck in the Andrew driveway shortly after Brenda had put the kids on the school bus. Petitioner, who had told his adult daughter, Janna Larson, that he was having a sexual relationship with Brenda, later told her of his plans to marry Brenda and have a child with her. Meanwhile, Brenda continued to relay her hatred for Rob. Mr. Higgins, one of Brenda's former paramours, testified that after the divorce was filed, Brenda told him that she wished Rob would just die so she could get the money and go on with her life.

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6. Norman Nunley and James Higgins, two men with whom Brenda had previously been involved, testified at trial about their prior sexual involvement with Brenda during her marriage to Rob. Mr. Nunley testified that his relationship with Brenda lasted for about three to six months in late 1997 and early 1998. Mr. Higgins testified that his relationship with Brenda lasted for over a year from about March 2000 to May 2001.

Appendix D

On October 26, 2001, someone cut the brake lines to Rob's car. Rob noticed a problem with the brakes when he first got into the car and he took it straight to the dealership. The dealership confirmed that his brake lines had in fact been cut. Rob called 911 from the dealership to report what he believed was attempted murder. That morning, Rob received three phone calls, one on his cell phone and two at work. In all three calls, he was told that he needed to get Norman Regional Hospital as soon as possible because Brenda and/or his family were there.[7] Petitioner's daughter, Janna, admitted to making two of the phone calls at the request of Petitioner. After listening to the third call, Janna told police that she believed it was her dad disguising his voice. Twice, once before Rob's death and once after, Petitioner told Janna to never tell anyone about making those phone calls to Rob. Also, Janna testified that around the same time as the brake incident, her father told her that "nuttier than a fruitcake" Brenda had asked him to murder Rob or have someone do it. Janna testified that they both laughed it off and joked about it. However, despite the nature of Brenda's request and Petitioner's assessment of her mental status, Janna noted that Petitioner continued in his relationship with Brenda.

The brake incident escalated Rob's fear that Petitioner and Brenda were trying to kill him and he immediately began efforts to remove Brenda as the beneficiary of his $800,000 life insurance policy. Rob wanted to make sure that if anything happened to him, the insurance proceeds

7. Detective Barry Niles expressed his belief that the timing and content of the calls made to Rob that morning were related to his brake lines being cut.

would go to his children. When Rob asked Petitioner about changing the beneficiary, Petitioner told him he could not change it because he was not the owner of the policy. When Rob went over Petitioner's head and asked Petitioner's boss whether he could change the beneficiary, Rob was told that as of October 26, 2001, he was the owner of the policy and that he could change the beneficiary. When Petitioner found out that Rob had called his boss, he was furious and told Rob, "[I]f you think you have problems with Brenda you haven't seen anything until you messed with me" (J. Tr. VII, 1859-60).

The $800,000 life insurance policy in question was sold to Rob by Petitioner, a Prudential agent, on March 25, 2000. As issued, Rob was the owner and the insured, Brenda was the primary beneficiary, and the Andrew children were the contingent beneficiaries. Although both Petitioner and Brenda asserted that the ownership of the policy had been changed to Brenda on a Prudential form dated March 22, 2001,[8] Prudential's corporate office never received the original form.[9] Although Rob ultimately

8. The State's evidence questioned the authenticity of the March 22, 2001, change of ownership form. First, the Contact History Log, a document maintained by Petitioner in his client file for Rob, not only appeared altered, but inconsistent with the date the alleged ownership change occurred. In addition, consistent with Brenda's belief that she could sign Rob's name better than he could, the State presented evidence that Rob's signature on the form was a forgery.

9. A faxed copy was sent by Petitioner to corporate on October 29, 2001. This was the first notice received by Prudential's corporate office about an alleged change of ownership. State's Exhibits 28 through 32 are tape recordings of conversations between Rob and

wanted to change the primary beneficiary to his brother as trustee of a trust for the benefit of his kids, the matter was at least temporarily resolved by a temporary order entered in the divorce case on November 1, 2001. Per court ruling, the kids were to be named the primary beneficiaries with Brenda as the designated trustee.[10]

On November 20, 2001, Rob was looking forward to picking up his kids and spending the long Thanksgiving holiday weekend with them. Although Rob had also hoped to do some quail hunting that weekend with his brother, his continued efforts to acquire his 16-gauge shotgun from Brenda were unsuccessful. At 6:00 that evening, Rob sat in the driveway of the marital residence talking on his cell phone to a friend while he waited for Brenda to get the kids ready to go. When the garage door began to rise, Rob told his friend that he had to go. Shortly thereafter, shots were fired.

Brenda's first call to 911 was at 6:20 p.m. In the first call, Brenda reported that she and Rob had been shot in the garage by assailants wearing black masks. In a second call, which ended at 6:26 p.m., Brenda added that Rob was

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Prudential corporate representatives, and Brenda and/or Petitioner with Prudential corporate representatives regarding the ownership of the policy. The conversations began with Rob's call after the brake incident on October 26th.

10. However, in the search of the Andrew residence after the murder, police found a letter dated November 2, 2001, to Brenda from Prudential which confirmed changes made to the policy. Per the change, as of November 2nd, Brenda was the owner and sole beneficiary. No contingent beneficiary was named.

bleeding a lot, but that he was conscious, breathing, and trying to talk. When police arrived, Rob's car was in the driveway, the garage door was up, Brenda's van was in the garage, Rob was lying on the garage floor in a pool of blood, and Brenda was sitting about three feet away from Rob in the doorway between the garage and the house. The Andrew children were found in the back bedroom, the room furthest from the garage. The bedroom door was shut and the TV was on, with the volume raised to a very uncomfortable level.

Brenda was taken out of the garage to the curb to be treated and questioned. Brenda told police at the scene that there were two armed assailants wearing black masks and black clothes. The assailants said six or seven words, but Brenda could not remember what they were. The assailants fled the seen on foot. Oklahoma City Police Officer Roger Frost, a 17-year patrolman who had responded to several hundred crime scenes and twenty to thirty homicides, was one of the first officers to arrive at the scene. He described Brenda's behavior that evening as strange. She was not hysterical, as is usually the case. Instead, Officer Frost testified that she was very calm and able to answer his questions straight on. Her crying appeared fake.

Brenda was taken by ambulance to the emergency room, where she was treated for her injury, a single gunshot wound to the back of her left arm. Officer Frost followed Brenda to the hospital, and Oklahoma City Police Officer Theresa Bunn met them there. At the hospital, Brenda remained very calm. Similar to Officer Frost's

assessment, Officer Bunn described Brenda's behavior as bizarre and fake. Officer Bunn thought Brenda's responses were more of a theatrical production. As questioning continued, Brenda's description of the event and the assailants remained fairly the same. Officer Frost thought it was strange that Brenda could not remember the particular words the assailants said. She had no specifics on the weapons they had either, even though her wound appeared to have been inflicted at close range. Brenda did add that Rob was in the garage lighting the pilot light to the heater because it had gone out, and she recalled the assailants grabbing Rob's pants. When asked what she did after the shots were fired, Brenda said she went into the kitchen to get the phone to call 911, checked on the kids in the bedroom, and then returned to the garage.[11]

Rob died from two shotgun wounds, one to the neck and one to the chest. One spent shotgun shell, a Winchester 16 gauge, was found on top of Brenda's van in the garage. A second spent Winchester 16 gauge shotgun shell was found in the Gigstad residence. The Gigstads lived next door to the Andrew residence. Brenda had a key to the Gigstad residence because she routinely watched their house when they went out of town. The Gigstads were out of town when Rob was killed. Although the murder weapon was never found,[12] the State presented expert testimony that the shell found in the Andrew garage had been fired from the same shotgun as the shell found in the Gigstad residence.

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11. The lack of a blood trail, or any blood in the house for that matter, was one of the indications that the crime had been staged.

12. Rob's 16-gauge shotgun was never found either.

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In the door leading from the garage into the house, police also found an embedded metal pellet projectile. Because it was mashed up, its caliber could not be determined at the scene; however, upon expert examination, it was determined to be a .22 caliber. Although the projectile was too damaged to conclusively determine the manufacturer, the State presented expert testimony that the projectile was consistent with four .22 caliber CCI live rounds collected in the course of the investigation. Three of these live rounds were found in the Gigstads' attic; the fourth was found in the passenger floorboard of Janna's car. Janna testified that Petitioner had her car on the day Rob was killed, and that the next time she drove the car, she saw the bullet in the floorboard. When she called Petitioner to ask him about it, he told her to throw the bullet away and not tell anyone about it. Less then a week before Rob's murder, Petitioner purchased a .22 caliber handgun. Given that Brenda was shot in the back of the arm, it was clear that her wound was not self-inflicted.

The day before Rob's funeral, Petitioner, Brenda, and the Andrew children fled to Mexico. Both Petitioner and Brenda told Janna that they were leaving because they anticipated being arrested for Rob's murder after the funeral. Over three months later, on February 28, 2002, Petitioner and Brenda were taken into custody at the Mexican border. On that same day, Brenda called Mr. Nunley, another one of her former paramours, from the county jail in Hidalgo, Texas. She told Mr. Nunley that she needed his help to get in contact with her attorney. She told Mr. Nunley that there was a confession letter

in her children's luggage that she needed to get into the proper hands.

State's Exhibit 222 is a confession letter written to Rob and Brenda's daughter, Tricity, and signed by Petitioner. The State presented expert testimony from a document examiner that the letter was actually written by Petitioner. In the letter, Petitioner takes full responsibility for the planning and implementation of Rob's murder. He describes how he planned the crime and how he enlisted a friend to help him. He states that after his friend shot Rob and he shot Brenda, they ran and hid in the house next door. Petitioner states he admitted his involvement in Rob's murder to Brenda while they were on their trip in Mexico. Petitioner notes that Brenda was shocked, angry, and hurt by his actions, and that she could not understand why he would do it.

Additional facts will be referenced herein as they relate to the individual grounds for relief raised by Petitioner.

III. Standard of Review.

A. Exhaustion as a Preliminary Consideration.

The exhaustion doctrine is a matter of comity. It provides that before a federal court can grant habeas relief to a state prisoner, it must first determine that he has exhausted all of his state court remedies. As acknowledged in *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), "in a federal

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

B. Procedural Bar.

Beyond the issue of exhaustion, a federal habeas court must also examine the state court's resolution of the presented claim. "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that 'is independent of the federal question and adequate to support the judgment.'" *Cone v. Bell*, 556 U.S. 449, 465, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009) (quoting *Coleman*). "The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30.

C. Merits.

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), the Court's authority to grant habeas corpus relief to state prisoners is limited. When a state prisoner presents a claim

to this Court, the merits of which have been addressed in state court proceedings, the Court cannot grant habeas corpus relief upon the claim unless it determines that the state court proceedings resulted in a decision (1) "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The focus of Section 2254(d) is on the reasonableness of the state court's decision. To obtain relief, a petitioner must show that the state court decision is "objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (O'Connor, J., concurring but delivering the opinion of the Court with respect to Part II). *See Cullen v. Pinholster*, 563 U.S. , 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011) (acknowledging that Section 2254(d) places a difficult burden of proof on the petitioner). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

"Under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior

decision of [the Supreme] Court." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011). Relief is warranted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Id.* The deference embodied in Section 2254(d) "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (citation omitted).

IV. Analysis.

A. Pretrial Publicity (Ground One).

In his first ground for relief, Petitioner asserts that he was denied due process and his right to an impartial jury due to pretrial publicity. Petitioner raised this claim on direct appeal and the OCCA denied it on the merits.[13] Respondent contends that Petitioner is not entitled to relief because he has failed to show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law.

On January 8, 2003, Petitioner filed a motion for a change of venue. In the motion, Petitioner adopted the arguments made in a separate motion filed by Brenda and requested an evidentiary hearing (O.R. IV, 800-01). In a two-day hearing, held on January 9 and 21, 2003,

13. In Ground Fifteen, Petitioner presents a related trial counsel ineffectiveness claim.

the defense presented four witnesses in support of their motions. Three of the witnesses addressed the Oklahoma City media market[14] and the media coverage of the murder. The fourth witness discussed the results of an opinion poll conducted by the University of Oklahoma at Brenda's request. The following evidence was presented:

- 1,527[15] stories aired on Oklahoma City's four major television stations[16] from the day of the murder, November 20, 2001, until January 4, 2003 (Defendant's Venue Exhibit 3);

- according to Nielsen Media Research, these 1,527 stories reached a cumulative audience of 81,997,314 (referred to as "gross impressions") (M. Tr. 1/9/03, 134; Defendant's Venue Exhibit 4);

- in a telephone poll of 303 Oklahoma County residents conducted in September and October of

14. The purpose of this evidence was to show the geographical span of the media coverage, and in turn, the counties outside of the coverage area which might serve as a suitable venue.

15. Throughout his pleadings, Petitioner's counsel incorrectly reports this number as 15,027.

16. This number includes the multiple times a story may have appeared on a single day or even in a single broadcast. For example, on November 27, 2001, a week after the murder, a total of twenty stories aired. KFOR ran two stories at 5 a.m., two at 6 a.m., one at noon, and one at 6 p.m.; KOCO ran two stories at 5 a.m., two at 6 a.m., one at noon, one at 5 p.m., one at 6 p.m., and one at 10 p.m.; KOKH ran one story at 9 p.m.; and KWTV ran one story at 5:30 a.m., two at 6 a.m., one at 7 a.m., and one at 5 p.m. (Defendant's Venue Exhibit 3).

2002, 264, or 87%, had heard of the murder and of these 264, 247, or 93%, had heard of the case through the media (M. Tr. 1/9/03, 237; Defendant's Venue Exhibit 7);[17]

- between November 21, 2001, the day after the murder, and October 29, 2002, seventy-four articles appeared in The Daily Oklahoman newspaper and forty of those articles were on the front page (M. Tr. 1/21/03, 26-66, 70);[18] and

- nationally, a story about the murder appeared in the October 2, 2002, edition of People Magazine, twice on America's Most Wanted, and twice on Primetime Thursday (M. Tr. 1/21/03, 75-78; Defendant's Venue Exhibit 17).[19]

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17. The majority of the questions asked related to Brenda and are therefore irrelevant here because Petitioner was tried separately.

18. Defendant's Venue Exhibit 16 was an admitted exhibit containing copies of all of the newspaper articles referenced in the hearing. It is not a part of the transmitted state court record, and according to Petitioner's counsel, the exhibit was transmitted to the OCCA for Petitioner's appeals but went missing at some point. Petition, p. 32 n.2. In his Petition, Petitioner has provided summaries for twenty-seven of the articles which were contained in the missing exhibit. Petition, pp. 32-38.

19. The People Magazine article was not admitted at the hearing because it was attached to Brenda's change of venue motion. However, it is not contained in the original record (O.R. IV, 783-90). Also, it is apparent from viewing Defendant's Venue Exhibit 17 that the reference to the 20/20 stories made by Brenda's counsel at the hearing is actually a reference to ABC's Primetime Thursday.

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In denying a change of venue, the trial court acknowledged the tremendous amount of media attention the case had received, but found that the defendants had not shown "that the minds of the inhabitants of the county . . . [were] so prejudiced against [them] that a fair and impartial trial [could not] be had . . ." (M. Tr. 1/21/03, 105) (referencing Okla. Stat. tit. 22, § 561). The trial court did not foreclose the possibility, however, that a change of venue might be necessary, but stated that voir dire would be the best opportunity to determine what effect the pretrial publicity had on the jury pool (M. Tr. 1/21/03, 104-08).

On the first day of trial, August 25, 2003, Petitioner filed a motion re-urging his request for a change of venue (O.R. X, 1933-35). In the motion, Petitioner asserted in part as follows:

> 2. Since the airing of an alleged confession letter purportedly written by [Petitioner] one week prior to the Trial set in June, 2003, and the current setting of this matter to begin on August 25, 2003 against [Petitioner], numerous news accounts of various documents and pleadings filed have been presented to the general public on television, on the radio, in print and via the internet, all to the detriment of [Petitioner].
>
> 3. In addition to the publishing of the above-described letter for the last three (3) months, recently a report of a counselor at the CARE

> Center has been published in its entirety which documents the interview she held with the children of Defendant Andrew concerning the homicide. This report was publicized on television, on radio, in print and via the internet. All of this pre-trial publicity has prejudiced [Petitioner] from receiving a fair trial in this venue.

(O.R. X, 1933-34). The motion was heard prior to the start of trial. Although defense counsel recounted the most recent publicity, the trial judge noted that she was "very mindful" of it.[20] Standing on its previous ruling, the trial court denied the motion, and the case proceeded to voir dire (J. Tr. I, 51-60, 73).

A review of voir dire reveals that although 100 potential jurors were called into the courtroom, it was necessary to question only sixty-four to seat a jury. Of the sixty-four questioned, eight had never heard about the case. Of the thirty-four that were excused for cause, eighteen were excused due to their inability to consider all three punishment options, six were excused for publicity reasons, and ten were excused for various other reasons.[21] With thirty jurors passed for cause, the State and the

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20. The transcript of a motion hearing held the prior month offers further support for the fact that the trial judge, a member of the community herself, was well-aware of the publicity surrounding the case (M. Tr. 7/24/03, 5).

21. To obtain two alternates, thirteen were questioned. Two of the thirteen had never heard about the case, and of the seven who were excused, none were excused for publicity reasons.

defense were each given nine peremptory challenges; however, each only exercised eight. The State waived its eighth peremptory challenge and the defense waived its final peremptory challenge. Three members of the jury had never heard about the case (J. Tr. I, 106, 193; J. Tr. III, 852; J. Tr. IV, 929-30, 958), and none of the jurors who had been exposed to the publicity had ever formed an opinion about the case and all affirmed that they could be impartial (J. Tr. I, 101-02, 114, 119-20, 123-24; J. Tr. II, 380-81, 426-27, 562-63, 595; J. Tr. III, 652, 805-06; J. Tr. IV, 970-71).[22]

On direct appeal review of Petitioner's claim, the OCCA found that it lacked merit. The OCCA held as follows:

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22. Jurors Chess and Cowns had not read, seen, or heard anything about the case since the arrest (J. Tr. I, 101-02; J. Tr. II, 595; J. Tr. III, 652). Juror Turner had not read, seen, or heard anything about the case for over a year or year and a half (J. Tr. I, 119). Juror Smyth had read, seen, or heard very little and it had been several months since she had (J. Tr. II, 426-27). Juror Weber had read, seen, or heard very little. In fact, she had actually heard more about the case during voir dire than anywhere else (J. Tr. IV, 970). Juror Dawson had last seen something about the case on the news the day before. She recalled hearing about it when it first happened, but only remembered something about Mexico and the border (J. Tr. I, 102; J. Tr. III, 805). Juror Porchay had last read, seen, or heard something about the case a couple of weeks before (J. Tr. I, 114). Juror Helms had last read, seen, or heard something about the case the night before. He stated that he had heard about the case on occasion, but that he did not know the details (J. Tr. I, 123; J. Tr. II, 562). Juror Lewis had last read, seen, or heard about the "gist" of the case about three months before (J. Tr. II, 380-81).

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We review the trial court's denial of [Petitioner's] motion for change of venue for an abuse of discretion. *DeRosa v. State*, 2004 OK CR 19, ¶ 21, 89 P.3d 1124, 1135-36. Pretrial publicity alone does not warrant a change of venue. *United States v. McVeigh*, 918 F.Supp. 1467, 1473 (W.D.Okl. 1996) ("Extensive publicity before trial does not, in itself, preclude fairness"). The influence of the news media must be shown to have actually pervaded the trial proceedings. *Hain v. State*, 1996 OK CR 26, ¶ 8, 919 P.2d 1130, 1136. We consider all relevant evidence to determine whether a fair trial was possible at that particular place and time, keeping in mind the ultimate issue: whether the trial court was in fact able to seat twelve qualified jurors who were not prejudiced against the accused. *DeRosa*, 2004 OK CR 19 at ¶ 19, 89 P.3d at 1135 ("if a trial court denies a defendant's change of venue motion and the defendant is then tried and convicted, the question is no longer about hypothetical and potential unfairness, but about what actually happened during the defendant's trial").

[Petitioner] cites several cases from other jurisdictions where a change of venue was granted, but he offers no analysis as to how those cases are relevant here. [FN4] He also relies on *Coates v. State*, 1989 OK CR 16, 773 P.2d 1281, where we found error in the trial court's denial of a motion for change of venue.

We see no parallels with *Coates*, however. The defendant in *Coates* was an elected public official, accused of embezzlement and other crimes directly related to the administration of her office. Therefore, all citizens of the county, and hence every juror, could have perceived themselves as "victims" of the alleged crimes. In fact, two prospective jurors in *Coates*—at least one of whom actually sat on the jury—had been directly affected by the case because checks they had written to the defendant's office had gone missing. *Id.* at ¶¶ 14-16, 773 P.2d at 1286-87. Likewise, cases from other jurisdictions have noted that a change of venue may be in order when the community from which the jurors would be drawn may perceive a personal stake in the proceedings. [FN5] [Petitioner] does not argue such facts here, and we find none.

> FN4. All but one of the cases [Petitioner] cites are procedurally distinguishable because they involve determinations made before voir dire was even attempted. *United States v. McVeigh*, 918 F.Supp. 1467, 1470 (W.D.Okl. 1996) (trial court order granting change of venue; prosecution did not dispute the need for a change of venue, and disagreement was only over the more appropriate venue); *United States v. Engleman*, 489

F.Supp. 48 (D.Mo. 1980) (trial court order granting change of venue); *State v. James*, 767 P.2d 549 (Utah 1989) (interlocutory appeal on change of venue). The posture of [Petitioner's] case is different. He is raising the issue in the context of a direct appeal after conviction; and because the ultimate concern is an impartial jury, he must demonstrate that the jury actually empaneled to try him was not impartial. *See McVeigh*, 918 F.Supp. at 1470 ("Ordinarily, the effects of pre-trial publicity on the pool from which jurors are drawn is determined by a careful and searching voir dire examination"). The fourth case [Petitioner] relies on is *State v. Stubbs*, 2004 UT App 3, 84 P.3d 837 (Utah App. 2004), where an appellate court found reversible error in the trial court's denial of a motion for change of venue. *Stubbs*, however, is factually distinguishable; the entire county had some 6000 residents, the alleged rape victim was from a locally prominent family, and *voir dire* actually demonstrated that acquaintance with members of the complainant's family and knowledge of the case was pervasive.

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> [Petitioner] also notes that his alleged confession was reported in the press, which also occurred in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). But the confession disseminated in *Irvin* was only one of many factors which worked to deny the defendant a fair trial in that case. These factors resulted in actual prejudice in *Irvin*, as several jurors admitted that they could not presume the defendant to be innocent of the crime. This record in this case presents no such evidence of prejudice.
>
> FN5. *See e.g. McVeigh*, 918 F.Supp. at 1470-72 (detailing how local citizenry was affected by bombing of the federal building in Oklahoma City); *James*, 767 P.2d at 554-55 (giving particular weight to the widespread community participation in the month-long search for the murder victim's body).

From the beginning, this case received more than considerable attention in the local media. That fact cannot be disputed. The case had all the necessary elements to make it ripe for media attention: sex, money, deception, and murder. [Petitioner] refers us generally to the record of the hearing on his change-of-venue motion, but he does not articulate how an air

of prejudice pervaded the trial proceedings themselves. Again, our chief concern is not how, or how often, the case played in the media, but whether, at the end of the day, the trial court was able to empanel twelve fair and impartial jurors.

The trial court is entitled to considerable discretion on issues involving jury selection, because it personally conducts *voir dire* and has the opportunity to observe the demeanor of the panelists—so much of which is lost in the transcription of the proceedings. *Harris v. State*, 2004 OK CR 1, ¶ 11, 84 P.3d 731, 741. The trial court excused a number of prospective jurors who admitted that pretrial publicity had affected their ability to be impartial. On the other hand, several panelists—including at least three who ultimately sat on the jury—said they had heard nothing about the case. Each person who actually sat on [Petitioner's] jury assured the court that he or she could fairly evaluate the evidence, and could consider all three punishment options if [Petitioner] were found guilty. Nowhere in his brief does [Petitioner] claim, much less demonstrate, that any juror actually seated was biased against him due to adverse pretrial publicity. Indeed, defense counsel waived his last peremptory challenge without comment, which we must interpret as satisfaction with the final makeup of the jury. The trial court did not abuse its

> discretion in denying a change of venue. This proposition is denied.

Pavatt, 159 P.3d at 279-80.

Arguing both presumed and actual prejudice, Petitioner asserts that he should have been granted a change of venue and he seeks de novo review of his claim. Petitioner likens his case to the cases in which the Supreme Court has found a presumption of prejudice, but he also argues the existence of actual prejudice. Although Petitioner acknowledges that voir dire supports a finding that the jurors who actually served could be fair and impartial, he argues that it cannot be relied upon because the trial court "pre-conditioned" the jurors to give "acceptable" answers.

First, the Court finds that AEDPA deference applies to this claim. In an effort to avoid the application of AEDPA deference to his claim, Petitioner advances two arguments. One, he contends that the OCCA did not address the presumed prejudice portion of his claim. "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*, 131 S. Ct. at 784-85. Petitioner has not overcome this presumption. The OCCA addressed the merits of Petitioner's claim head on, and although it did not parcel out the claim in terms of presumed prejudice and actual prejudice, its analysis, and the cases upon which it relied and discussed, show that the OCCA fully

understood and applied federal constitutional principles to the determination of Petitioner's allegation of error. Two, and with reference to both presumed and actual prejudice, Petitioner asserts that the OCCA's decision is not entitled to deference because it never reviewed the publicity which occurred between the change of venue hearing and trial and/or granted him an evidentiary hearing to present this additional publicity which was not presented to the trial court. This argument is clearly misplaced. On direct appeal, appellate counsel presented the change of venue claim as it was raised in the trial court, and the OCCA reviewed the claim as presented. Appellate counsel did not attempt to supplement the record on appeal, seek an evidentiary hearing, and/or argue a claim of trial counsel ineffectiveness with respect to the additional publicity which occurred in the seven months between the January venue hearing and Petitioner's August trial. Thus, contrary to Petitioner's argument, the OCCA did nothing on direct appeal to compromise the deference due its decision under the AEDPA.

It is axiomatic that the constitutional right to a jury includes the empanelment of impartial jurors. However, as the Supreme Court acknowledged in *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), impartiality does not require a juror to be "totally ignorant of the facts and issues involved."

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any

> of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722-23 (citations omitted).

Supreme Court precedent establishes two avenues of relief for pretrial publicity. The first is presumed prejudice. Presumed prejudice cases are rare, found in only three Supreme Court cases dating back to the 1960s. *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006). In those cases, prejudice was presumed because "the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). In *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963), prejudice was presumed because the pretrial publicity created such a "spectacle" that Rideau's subsequent trial was all "but a hollow formality." In *Estes v. Texas*, 381 U.S. 532, 550-52, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), the Court applied *Rideau* to find a due process violation in the televising and broadcasting of a defendant's trial. In *Estes*, the press

overran the courtroom imposing "a circus atmosphere." *Murphy*, 421 U.S. at 799; *Estes*, 381 U.S. at 535-38. Finally, in *Sheppard v. Maxwell*, 384 U.S. 333, 353-54, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), the "massive and pervasive" media attention greatly exceeded the circumstances in *Estes*. In addition to "extremely inflammatory publicity," the "courthouse was given over to accommodate the public appetite for carnival." *Murphy*, 421 U.S. at 799. "The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." *Sheppard*, 384 U.S. at 355. The Supreme Court found that these circumstances deprived Sheppard "of that 'judicial serenity and calm to which [he] was entitled.'" *Id* (quoting *Estes*, 381 U.S. at 536).

As the Supreme Court in *Murphy* explicitly acknowledged, *Rideau, Estes*, and *Sheppard* do not "stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy*, 421 U.S. at 799. Prejudice was presumed in *Rideau, Estes*, and *Sheppard* because "[t]he proceedings in [those] cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy*, 421 U.S. at 799. Accordingly, the Tenth Circuit, in applying this precedent, has "held that prejudice will only be presumed where publicity 'created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to

receive a fair trial.'" *Goss*, 439 F.3d at 628 (quoting *Hale v. Gibson*, 227 F.3d 1298, 1332 (10th Cir. 2000)).

> In order to demonstrate that prejudice should be presumed, the defendant must "establish that an irrepressibly hostile attitude pervaded the community." *Id.* at 1567. "Simply showing that all the potential jurors knew about the case and that there was extensive pretrial publicity will not suffice to demonstrate that an irrepressibly hostile attitude pervaded the community." *Id.* Presumed prejudice is "rarely invoked and only in extreme circumstances." *Id.*

Hale, 227 F.3d at 1332 (quoting *Stafford v. Saffle*, 34 F.3d 1557, 1567 (10th Cir. 1994)).

While Petitioner has shown that the pretrial publicity in his case was significant, he has not shown that his case is one of the rare and extreme cases where the media attention fostered "an irrepressibly hostile attitude." *Stafford*, 34 F.3d at 1567. Petitioner argues that "[p]rejudice should be presumed because of the frequency and nature of the publicity, and the demonstrated impact this publicity had upon the pool from which the jury was drawn, which ultimately sentenced [him] to death." Reply, p. 5. However, just as he failed to do on direct appeal, Petitioner has not made a connection between the publicity and the fairness of his trial. Supreme Court precedent requires a showing of more than mere exposure, even if that exposure is substantial. To find a presumption of prejudice, the media must have overwhelmingly influenced

the community to the point where it was simply impossible to receive a fair trial. Petitioner details the media content and then based on its "frequency and nature," he argues for a presumption of prejudice; however, his argument amounts to no more than an *assumption* of prejudice.[23] Petitioner also asserts that there was a "demonstrated impact" upon the jury pool, but he does not support this statement, and as shown herein, the impact on the jury pool was in fact surprisingly less than expected given that "[t]he case had all the necessary elements to make it ripe for media attention: sex, money, deception, and murder." *Pavatt*, 159 P.3d at 280.

In denying Petitioner's claim, the OCCA acknowledged that a change of venue is warranted when "[t]he influence of the news media [has been] shown to have actually pervaded the trial proceedings." *Pavatt*, 159 P.3d at 279. The OCCA denied relief, however, because Petitioner failed to "articulate how an air of prejudice pervaded the trial proceedings themselves." *Id.* at 280. For the reasons set forth above, the Court finds that the OCCA's decision is in accord with Supreme Court precedent on presumed prejudice. Petitioner is therefore not entitled to relief on this portion of his claim because he has failed to show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law.

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23. Petitioner does not claim that the publicity was inaccurate, but acknowledges that it relayed the events as they unfolded and was "identical" to much of the State's evidence. Petition, pp. 38, 43, and 47 n.3

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Beyond presumed prejudice, the Supreme Court has held that a defendant may obtain relief when pretrial publicity causes actual prejudice. *Irvin* is an actual prejudice case. In *Irvin*, voir dire spanned four weeks. *Irvin*, 366 U.S. at 720. From the panel consisting of 430 potential jurors, 370 expressed an opinion about Irvin's guilt, and 268 of the 370 were excused for cause because their opinions were fixed. Of the twelve jurors who actually sat on the jury, eight believed Irvin was guilty before trial even began. *Id.* at 727. In these circumstances, the Supreme Court held as follows:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards.

Id. at 727-28 (citation omitted). The Court continued:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted

> prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.' With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.

Id. at 728 (citations omitted).

Petitioner's case is far removed from the circumstances found in *Irvin*. As previously set forth above, of the 100 potential jurors summoned to the courtroom, it was necessary to question only sixty-four of them to seat a jury. Voir dire was conducted by the trial court, the prosecution, and defense counsel, and of the sixty-four questioned, eight had never even heard about the case, and of the thirty-four that were excused for cause, most (eighteen) were excused due to their inability to consider all three punishment options. Only six were excused for publicity reasons. Thirty jurors were passed for cause, and neither the State nor the defense exercised all of their peremptory challenges. Of the twelve jurors ultimately selected to serve: (1) three had *never* heard about the case; (2) *none* who had been exposed to the publicity had *ever* formed an opinion about the case; and (3) *all* affirmed that they could be impartial. It is for these very reasons that the OCCA denied Petitioner relief. *Pavatt*, 159 P.3d at 280.

In light of the foregoing circumstances, which in effect undercut Petitioner's claim for actual prejudice, Petitioner is constrained to acknowledge that he "cannot point to a statement by a juror that served that he or she could not be fair and impartial." Reply, p. 11. However, Petitioner blames the trial court for the lack of evidence supporting his claim by asserting that the trial court "pre-conditioned" the jurors to give "acceptable" answers. Having thoroughly reviewed the voir dire proceedings, the Court cannot agree with Petitioner's characterization. The record reflects that the trial court conducted a thoughtful voir dire in an open and relaxing atmosphere, and there is no indication that potential jurors in any way altered their responses to appease the trial court. The trial court had no reason to seat a partial jury, and the comments which Petitioner draws out from voir dire are more indicative of the positive rapport the trial court developed with the potential jurors than an attempt to solicit less-than-honest responses.

In conclusion, the Court finds that Petitioner is not entitled to relief on his Ground One. Because Petitioner has not demonstrated that the OCCA's ruling on the issue of pretrial publicity is contrary to or an unreasonable application of Supreme Court law, Petitioner's Ground One is hereby denied.

B. Ineffective Assistance of Counsel: Hearsay (Ground Two).

In Ground Two, Petitioner asserts that his constitutional rights were violated by the admission

of hearsay. In support of his claim, Petitioner details thirty-five statements originally made by Rob, Brenda, and Janna as relayed through the testimony of seventeen witnesses. Petitioner also claims that his trial counsel was ineffective for failing to object to all of these statements and that his appellate counsel was ineffective for failing to raise the issue on direct appeal. Respondent asserts that the majority of Petitioner's claim is unexhausted. As to the exhausted portion of the claim, Respondent asserts that Petitioner has failed to show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law. In his Reply, Petitioner (1) re-labels his claim as one of ineffective assistance of counsel only (to be differentiated from a direct evidentiary challenge to the admission of hearsay with appended ineffectiveness claims); and (2) asserts that the claim was fully presented to the OCCA in his first post-conviction application, while acknowledging his filing of a second post-conviction application "[i]n order to make every effort to exhaust meritorious claims." Reply, p. 22.

No aspect of Petitioner's Ground Two was presented to the OCCA on direct appeal. In his first post-conviction application, Petitioner did claim that his appellate counsel was ineffective for failing to raise the issue of inadmissible hearsay.[24] In that application, Petitioner asserted that his

24. In the Reply, Petitioner concedes that the issue presented in his first post-conviction application did not include a trial counsel ineffectiveness claim based on trial counsel's failure to object. Reply, p. 21 ("Thus, it would be fair to say that the ineffective assistance of trial counsel issue based upon failure to object to the hearsay is unexhausted.").

trial was "replete with inadmissible hearsay"; however, he complained only about statements made by Rob and listed as examples only two statements, one Rob made to his friend, Ronald Stump, and another Rob made to his pastor/counselor, Bobby McDaniel.[25] Original Application for Post-Conviction Relief, No. PCD-2004-25, pp. 61-64. In denying relief on this claim, the OCCA applied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and disposed of the claim on the merits. Bypassing the deficient performance prong of *Strickland*, the OCCA found that Petitioner was not entitled to relief due to the absence of prejudice. *Pavatt*, No. PCD-2004-25, slip op. at 3, 7 & n.8. While the present action was pending, Petitioner returned to state court and filed a second post-conviction application. In that application, Petitioner presented the OCCA with a hearsay claim that basically mirrored the expanded claim raised in his federal habeas petition. Second Application for Post-Conviction Relief, No. PCD-2009-777, pp. 1-11. Finding that the claim was simply a "new slant" on the claim presented in his first post-conviction application, the OCCA declined to entertain the merits of the claim in accordance with Okla. Stat. tit. 22, § 1089(D)(8). *Pavatt*, No. PCD-2009-777, slip op. at 3.

In light of the foregoing procedural history, the Court finds that the only portion of Petitioner's Ground Two that is subject to a merits review is that which was presented to the OCCA in Petitioner's first post-conviction

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25. These are listed in his Petition as numbers 10 and 28. Petition, pp. 59, 63.

application. The Court finds that the issue presented there was whether appellate counsel was ineffective for failing to raise an evidentiary issue regarding hearsay statements made by Rob, and specifically those two statements made by Rob to Mr. Stump and Mr. McDaniel as identified by post-conviction counsel therein.[26] While Petitioner argues that the few examples he gave were sufficient to alert the OCCA to the entirety of his claim as presented in his Ground Two, the Court disagrees and finds that the claim Petitioner presented to the OCCA in his first post-conviction application does not encompass any of the following: an ineffective assistance of trial counsel claim; an additional twenty-one statements made by Rob; statements made by Brenda and Janna; or a claim based on *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). It is axiomatic that exhaustion requires fair presentation of a claim to the state courts, and "[t]he rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." *Picard v. Connor*, 404 U.S. 270, 275-76, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). Accordingly, the Court will first address whether the OCCA's denial of relief under *Strickland* to Petitioner's claim that his appellate counsel was ineffective for failing

26. In addition to identifying these two statements, post-conviction counsel also presented argument and authority as to why each constituted inadmissible hearsay. The Court notes that elsewhere within the subproposition, post-conviction counsel did make two more record citations; however, these citations were cited only to show trial counsel's record objections to hearsay. As neither were supported with argument or authority, the Court finds they were not fairly presented.

to raise an evidentiary issue regarding hearsay statements made by Rob, and specifically those two statements made by Rob to Mr. Stump and Mr. McDaniel, is contrary to or an unreasonable application of *Strickland*.

Claims regarding the effectiveness of appellate counsel are governed by *Strickland*. *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003). Thus, in accordance with *Strickland*, a petitioner alleging appellate counsel ineffectiveness must show (1) that his appellate counsel's actions on appeal were objectively unreasonable and (2) that, but for counsel's unreasonable actions, he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); *Miller v. Mullin*, 354 F.3d 1288, 1297 (10th Cir. 2004). It is clear that the OCCA applied this standard to Petitioner's claim. It is also clear that the OCCA's disposal of Petitioner's claim on the prejudice prong is a sound application of *Strickland*. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed."). The final question then is whether the OCCA's determination fell within the AEDPA's range of reasonableness. The Court easily concludes that it does.

In disposing of Petitioner's claim, the OCCA cited its decision in Brenda's case. *Pavatt*, No. PCD-2004-25, slip op. 7 n.8. On appeal, Brenda unsuccessfully challenged the admission of many of Rob's statements that were introduced at her trial, including the two statements that Petitioner asserts his appellate counsel should have raised. Regarding Rob's statement to Mr. Stump, the OCCA found

that it was clearly admissible as a statement reflecting his current state of mind. *Andrew v. State*, 2007 OK CR 23, 164 P.3d 176, 188 (Okla. Crim. App. 2007). As to Rob's statement to Mr. McDaniel, the OCCA also found that Petitioner's threats toward Rob were properly admitted. *Id.* at 189. Having denied relief in Brenda's case, the OCCA reasonably determined that even if Petitioner's appellate counsel had raised the hearsay issue, Petitioner would not have prevailed on appeal. This conclusion is reasonable, and thus, Petitioner is not entitled to relief on this portion of his claim.

The remaining issues in Petitioner's Ground Two were presented to the OCCA in a second application for post-conviction relief. As previously mentioned, the OCCA declined to entertain the merits of these new issues because, although they were readily available from the trial transcript, they were not presented along with the related claim raised in his initial post-conviction relief application. *Pavatt*, No. PCD-2009-777, slip op. at 3. The Tenth Circuit has repeatedly recognized the application of a procedural bar to claims which could have been raised in an initial post-conviction application but were not. *See Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006); *Medlock v. Ward*, 200 F.3d 1314, 1323 (10th Cir. 2000); *Smallwood v. Gibson*, 191 F.3d 1257, 1267 (10th Cir. 1999); *Moore v. Reynolds*, 153 F.3d 1086, 1096-97 (10th Cir. 1998).

Petitioner asserts, however, that this Court should not recognize the procedural bar applied by the OCCA

because it is neither adequate nor independent.[27] Petitioner references *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703 (Okla. Crim. App. 2002), and cases in which the OCCA applied it to excuse the application of a procedural bar to claims presented in subsequent applications. However, recent cases from the Tenth Circuit expressly reject Petitioner's arguments. In *Black v. Workman*, 682 F.3d 880, 914-19, 485 Fed. Appx. 917 (10th Cir. 2012), and *Black v. Tramwell [sic]*, 485 F. App'x 335 (10th Cir. 2012) (unpublished), *cert. denied*, __ U.S. __, 134 S. Ct. 73, 187 L. Ed. 2d 60 (2013), the Tenth Circuit found that, despite *Valdez* and the cases applying it, the OCCA's procedural bar to claims presented in a subsequent post-conviction application is both adequate and independent. In addition to *Black*, two additional cases, *Banks v. Workman*, 692 F.3d 1133, 1144-47 (10th Cir. 2012), *cert. denied*, __U.S. __, 133 S. Ct. 2397, 185 L. Ed. 2d 1110 (2013), and *Thacker v. Workman*, 678 F.3d 820, 834-36 (10th Cir. 2012), *cert. denied*, __U.S. __, 133 S. Ct. 878, 184 L. Ed. 2d 688 (2013), reached similar conclusions. *See also Spears v. Mullin*, 343 F.3d 1215, 1254-55 (10th Cir. 2003). In light of this authority, Petitioner's *Valdez*-based attack on the OCCA's application of a procedural bar to his Ground Two issues fails — the OCCA's procedural bar here is adequate and independent.

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27. Petitioner's argument is generally asserted in his Preliminary Statement Concerning Procedural Default. Petition, p. 214 & n.11. It is more specifically discussed in his reply and in supplemental pleadings filed thereafter. Reply, pp. 22-26; Docs. 80 and 90.

Having found that the procedural bar applied by the OCCA is both adequate and independent, the Court cannot consider the merits of the remaining issues in Petitioner's Ground Two unless he can satisfy an exception. The first exception, cause and prejudice, requires a petitioner to demonstrate that some external objective factor, unattributable to him, prevented his compliance with the procedural rule in question. *Spears*, 343 F.3d at 1255. A petitioner must also show that the failure resulted in actual prejudice. *Thornburg v. Mullin*, 422 F.3d 1113, 1141 (10th Cir. 2005). Petitioner has not made any showing of cause and prejudice to excuse his default of these claims.

The second exception can be met by showing that a fundamental miscarriage of justice will occur if the claim is not heard. The fundamental miscarriage of justice exception addresses those rare instances "where the State has convicted the wrong person of the crime." *Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). Thus, to meet the exception, a petitioner must make "a colorable showing of factual innocence." *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000). This requires Petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). "In the specific context of a sentencing challenge, the Supreme Court has held actual innocence requires the petitioner to show 'by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [state] law.'" *Brecheen v. Reynolds*, 41 F.3d 1343, 1357 (10th Cir. 1994) (quoting *Sawyer*, 505

U.S. at 348). *See also Black*, 682 F.3d at 915-16. Although Petitioner has made a general assertion that he is innocent of both the murder and his death sentence, it falls woefully short of satisfying this rare exception to the application of a procedural bar, especially in light of the evidence presented against him at trial. Petition, p. 215 & n.12.

In conclusion, Petitioner is not entitled to relief on his Ground Two. Because Petitioner has failed to show that the OCCA's decision denying his appellate counsel claim is contrary to or an unreasonable application of *Strickland* and because the remaining portion of Petitioner's Ground Two is procedurally barred, relief is unjustified and Ground Two is therefore denied.

C. Sufficiency of the Evidence (Ground Three).

In Ground Three, Petitioner challenges the sufficiency of the evidence supporting his murder conviction. Petitioner raised this claim on direct appeal and the OCCA denied relief. Respondent aptly contends that Petitioner has failed to show that the OCCA's determination is contrary to or an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Jackson sets forth the familiar standard of review for sufficiency of the evidence claims: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. As the *Jackson* Court noted,

> [t]his familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Id. (footnotes omitted).

Judicial review, therefore, is "'sharply limited'" and a reviewing court "must accept the jury's determination as long as it is within the bounds of reason." *Boltz v. Mullin*, 415 F.3d 1215, 1232 (10th Cir. 2005) (citations omitted). "[T]he *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit." *Herrera v. Collins*, 506 U.S. 390, 402, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). *See also Jackson*, 443 U.S. at 318-19 (the question is not whether the reviewing court itself believes that the evidence is sufficient to establish a defendant's guilt beyond a reasonable doubt). Thus, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the

record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326.

In addition to the deference afforded a jury's verdict by *Jackson*, the AEDPA adds another layer of deference to the Court's review of a sufficiency claim. As acknowledged by the Supreme Court in *Cavazos v. Smith*, 565 U.S. __, 132 S. Ct. 2, 3, 181 L. Ed. 2d 311 (2011) (per curiam),

> The opinion of the Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), makes clear that it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. What is more, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was "objectively unreasonable." *Renico v. Lett*, 559 U.S. [766], [773], 130 S. Ct. 1855, 1862, 176 L.Ed.2d 678 (2010) (internal quotation marks omitted).

See also Parker v. Matthews, 567 U.S. __, 132 S. Ct. 2148, 2152, 183 L. Ed. 2d 32 (2012) (referring to habeas review of sufficiency claims as a "twice-deferential standard");

Coleman v. Johnson, 566 U.S. __, 132 S. Ct. 2060, 2062, 182 L. Ed. 2d 978 (2012) (per curiam) (noting that *Jackson* claims "are subject to two layers of judicial deference").

In finding that both of Petitioner's convictions [28] were supported by constitutionally sufficient evidence, the OCCA applied *Jackson* and held as follows:

> [Petitioner] claims there is no "physical evidence" or "forensic evidence" linking him to the crimes. He misapprehends the nature of evidence long held to be admissible and credible in a court of law. A fingerprint at a crime scene may be considered "physical" or "forensic" evidence, though it is not direct evidence of a crime; rather, it is circumstantial evidence from which a jury can infer (in light of other circumstances) that the person with that fingerprint was present and participated in the crime. The same is true of DNA evidence. Both are circumstantial in nature, requiring an inference unnecessary for "direct" evidence, such as a witness's personal observation of a crime. That both fingerprints and DNA can be so compelling as evidence of guilt (or exoneration) attests to the powerful effect circumstantial evidence can have. In fact, classic sources of "direct" evidence—a confession, an eyewitness identification, the

28. Petitioner notes that any challenge to his conspiracy conviction would be moot because he has already discharged the ten-year sentence he received for that crime. Reply, p. 30 n.2.

testimony of an informant or accomplice—are themselves the subject of special cautionary instructions and corroboration rules. In the end, the law makes no distinction between direct and circumstantial evidence; either, or any combination of the two, may be sufficient to support a conviction. The jury may consider all competent evidence, along with rules of law and basic common sense, in reaching a verdict.

Although Brenda Andrew was an eyewitness to her husband's murder, the State obviously did not believe that her account of two masked assailants was true. The State thus relied on evidence that [Petitioner] and Brenda Andrew had several motives to murder Rob Andrew (money, dissolution of the Andrew marriage, control over the Andrew children), all related to the illicit affair that [Petitioner] never disputed having with Brenda.

But the State's evidence demonstrated much more than motive. There was, in fact, a considerable amount of physical evidence, including bullets, shotgun shells, and forged documents, which linked [Petitioner] to the murder and a pre-existing plan to get away with it. The testimony of Janna Larson, [Petitioner's] daughter, helped to show that [Petitioner] and Brenda had planned to harm Rob Andrew for some time, and that the failure of their first attempt (by cutting the brake lines on his car) only emboldened them. Larson also related

a number of incriminating statements from both [Petitioner] and Brenda. Larson may not have been an eyewitness to the murder itself, but she was certainly an eyewitness to many overt acts of the two conspirators, and to their preparations for flight after the murder. The State also presented the letter written by [Petitioner] from jail,[29] wherein he admitted complicity in the murder but attempted to exculpate Brenda. Both parties rejected the letter as an accurate version of what happened, although obviously for different reasons. While the letter may have borne some relevance to show [Petitioner's] complicity, it was perhaps more relevant to show how jealousy and greed can disfigure the human mind. Add to this the numerous other witnesses who spoke with and observed Rob Andrew, Brenda Andrew, and [Petitioner], as their relationships with one another evolved. In short, the evidence against [Petitioner] was largely circumstantial, but that is not unusual in any kind of criminal case. What may be unusual was how large a quantity of circumstantial evidence the State was able to present.

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29. The evidence did not show that the letter was written by Petitioner in jail. Based on a conversation Brenda had with Mr. Nunley after crossing back into the United States from Mexico, Brenda was in possession of the letter at that time (J. Tr. V, 1385-86). Although the OCCA misstated the evidence on this point, this minor misstatement does not show, as Petitioner alleges, that the OCCA failed to give "meaningful consideration" to Petitioner's claim. Petition, p. 77 n.7.

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> All of the evidence presented at trial, when considered together, formed an intricate web of proof, from which any rational juror could find [Petitioner] guilty of conspiring to murder Rob Andrew and consummating the murderous plan. The evidence was sufficient to support both of [Petitioner's] convictions.

Pavatt, 159 P.3d at 284-85 (citations omitted) (footnote omitted).

In claiming that the evidence supporting his conviction is lacking, Petitioner argues that his conviction is the result of prejudicial jurors (Ground One), inadmissible hearsay (Ground Two, presented through a claim of ineffective assistance of appellate counsel), inadmissible ultimate opinion testimony (Ground Seven, presented through a claim of prosecutorial misconduct), and evidence erroneously excluded (Ground Four). In addition to this "cumulative error" argument, Petitioner notes the lack of forensic physical evidence connecting him to the murder, and he argues that even if the evidence showed that he wrote the confession letter, he was manipulated by Brenda to write it.

Petitioner's arguments fail to meet the high standard needed to obtain relief on this claim. Based on all of the presented evidence, the OCCA's finding of sufficient evidence is a reasonable application of *Jackson. Jackson* does not favor one particular type of evidence over another, and so the fact that Petitioner was not linked to the murder by forensic evidence is of no particular consequence. As the OCCA found, the evidence was not only largely

circumstantial, but substantially circumstantial. The evidence clearly showed more than just an affair. Petitioner may have been blinded by love and/or persuaded, enticed, and/or manipulated by Brenda to assist her in the murder of her husband, but that does not diminish Petitioner's criminal liability for his actions. Because the presented evidence supports the jury's determination and the OCCA's finding, Petitioner's Ground Three is denied. If Petitioner's constitutional rights were otherwise infringed by the additional allegations made by Petitioner regarding the composition of his jury and certain evidentiary rulings, they have been addressed herein as presented and on their own individual merit as these arguments fall outside of the inquiry mandated by *Jackson*.

D. Exclusion of Evidence That Someone Else Committed the Murder (Ground Four).

In Ground Four, Petitioner contends that his right to present a defense was infringed by the trial court's exclusion of evidence that someone else (other than Brenda) committed the murder.[30] Petitioner raised this

30. Petitioner also claims that his Eighth Amendment right was infringed by the exclusion of this evidence. Although Petitioner did not raise this aspect of his claim on direct appeal, the Court finds that this unexhausted aspect of his claim is without merit. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). Relying on *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), and *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), Petitioner asserts that "[t]he inability to present evidence of other perpetrators in

claim on direct appeal. In denying relief, the OCCA found that the trial court did not abuse its discretion in excluding

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a capital case is particularly egregious." Petition, p. 88. Relative to the second stage, Petitioner's contention is that Zjaiton Wood's confession could have lessened his culpability.

> [T]he petitioner's argument is that the excluded evidence may have permitted [the] jury to conclude Mr. Pavatt was involved in Rob Andrew's murder, but that he did not directly participate, and that Zjaiton Wood and Brenda Andrew were directly responsible. If the jury viewed the evidence in this way it would not prevent the jury from finding Mr. Pavatt guilty of first degree murder, but it might well have prevented them from giving him the death penalty.

Reply, p. 42.

Couching his claim in the Eighth Amendment does not strengthen his argument. The issue remains whether Oklahoma's limitations on the admission of this evidence constituted an arbitrary denial of Petitioner's right to present a defense. Although the Supreme Court in *Green* found that third-party guilt evidence (an admission by Green's co-defendant that Green was not even present when the co-defendant shot and killed the victim they had abducted together) should have been admitted in the second stage of a capital proceeding, it additionally found that the omitted testimony was "highly relevant to a critical issue in the punishment phase of the trial . . . . and substantial reasons existed to assume its reliability." *Green*, 442 U.S. at 97. Regarding the reliability of the statement, the Court noted that not only was the statement against penal interest spontaneously made to a close friend, but it was supported by "ample" corroborating evidence. *Id.* As discussed herein, because Mr. Wood's confession lack reliability, the CCA did not unreasonably conclude, in light of *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), that there was no constitutional error in its exclusion.

the evidence pursuant to Okla. Stat. tit. 12, § 2804(B)(3), and that application of this evidentiary rule in Petitioner's case did not run afoul of the Supreme Court's decision in *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Not surprisingly, Petitioner and Respondent disagree as to whether the OCCA's decision is contrary to or an unreasonable application of *Holmes*.

Holmes was decided while Petitioner's direct appeal was pending. In *Holmes*, the defendant was charged with beating, raping, and robbing an elderly woman in her home, and the State's evidence against him was predominately forensic. *Holmes*, 547 U.S. at 321-22. As in Petitioner's case, the issue in *Holmes* was the exclusion of third-party guilt evidence. In affirming the trial court's ruling excluding evidence which the defendant sought to introduce, the South Carolina Supreme Court articulated the evidentiary standard as follows: "'where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.'" Accordingly, it found that the trial court did not err in excluding the third-party guilt evidence because the defendant "could not 'overcome the forensic evidence against him to raise a reasonable inference of his own innocence.'" *Holmes*, 547 U.S. at 324 (quoting *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19, 24 (S.C. 2004)).

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In *Holmes*, the Supreme Court discussed the constitutional balance between the wide latitude given to States in constructing evidentiary rules in criminal trials and a defendant's meaningful opportunity to present a complete defense. The Supreme Court stated the precedential standard as follows: a defendant's "right [to present a complete defense] is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes*, 547 U.S. at 324-25 (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)) (internal quotation marks omitted). The Court then discussed the cases in which it had previously found certain state evidentiary rules to be arbitrary and thus unconstitutional. *Id.* at 325-26 (discussing *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); and *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)). Nevertheless, the Court maintained that

> [w]hile the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Id. at 326.

One such well-established rule governs the admission of evidence that someone else committed the crime for which the defendant is charged. Widely-accepted evidentiary rules exclude this type of evidence without running afoul of a defendant's constitutional right to present a defense when the tendered evidence is remote, speculative, lacking a connection to the crime, and/or does not tend to prove (or disprove) a material fact at issue. *Id*. at 327 & n.* (quoting Corpus Juris Secundum and American Jurisprudence and listing multiple jurisdictions which employ some variation of the rule). Until 2001, South Carolina applied an acceptable variation of this constitutionally permissible rule. The rule required more than a "'bare suspicion'" or "'conjectural inference'" that someone else committed the crime. Admission was permitted only when there is "'proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.'" *Id.* at 328 (quoting *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532, 534-35 (S.C. 1941)).

In *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (S.C. 2001), however, and in *Holmes* as well, the South Carolina Supreme Court applied a "radically" altered standard which shifted the focus from an evaluation of the relevance and reliability of the proffered evidence to an assessment of the State's evidence of guilt. *Holmes*, 547 U.S. at 328-29.

> Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry

> concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Id. at 329. Although the defendant in *Holmes* had challenged the reliability of the State's forensic evidence (*i.e.,* fabrication, contamination, handling, and collecting), the court did not even consider these challenges before labeling the State's evidence as "strong."

> Interpreted in this way, the rule applied by the State Supreme Court does not rationally serve the end that the *Gregory* rule and its analogues in other jurisdictions were designed to promote, *i.e.,* to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues. The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited,*

> would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.

Id. at 330. "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Thus, the Supreme Court found application of this evidentiary rule to be arbitrary and unconstitutional. *Id.* at 331.

The evidence which was excluded in Petitioner's case is a confession by Zjaiton Wood. Mr. Wood was in the county jail, along with Petitioner and Brenda, awaiting his own capital murder trial when he allegedly wrote letters to the trial court and to defense counsel in which he admitted to killing Rob. In virtually identical letters, Mr. Wood describes how Rob was a random victim. Mr. Wood states that he followed Rob to the Shaftsbury residence, and before exiting his own vehicle, he loaded his 16-gauge shotgun and put a ski mask and extra ammunition in his pocket. Mr. Wood continues as follows:

> As I was on my way to the intended target I noticed that the garage door was coming open, that's when I saw a woman standing inside of it. I waited for a while to make sure everything was clear and I noticed that the intended target was on his way down like he was bending. I took my ski mask and put it on and put the pistol I had in my pocket. I made my way slowly in the

> back of the house so I wouldn't be spotted. As I approached the house where the target was I came to the side of the house I noticed the target (Robert Andrews) bent down working on a heater or air condition unit. At that time I came from the spot I was and fired my first shot without any word my target fell at once to the garage floor and befor I fired my second shot I remembered the woman (Ms. Andrews) standing there like she was in shock. I fired one more round into my victim and noticed that the female was about to run. I dropped my discarded shotgun and grabbed the woman. I pulled the pistol out of my pocket and fired one shot at her hitting her in an unknown spot in the upper body and pushed her to the ground. Once the lady was on the ground I proceeded to pat my dead victims pocket's for his bill fold but couldn't find nothing so I fled to a hidding post until I seen that every thing was clear. I climbed through a window next door and hid in the attic. As I fled an returned to my dwelling I realized I had missed one of my shell's to my shotgun at the victims house. I also noticed that I left some of my shotgun and pistol shell's in the attic I was hidding in.

(Court's Exhibit 3) (errors in original).

On September 9th, defense counsel filed a motion to endorse Mr. Wood, as well as three detention officers, and the letter he received from Mr. Wood, as well as any

jail reports regarding the letter, if any existed (O.R. X, 1941-43). Two in camera hearings were held on the motion. The primary issue at the first hearing, held on Friday, September 12th, was whether Mr. Wood could be compelled to testify. Mr. Wood's attorney was present at the hearing, and she not only strenuously objected to him testifying, but she did not even want him brought to the courtroom. Based on her knowledge of the case from media reports, Mr. Wood's attorney argued that the letters appeared inconsistent with the evidence and she asked that Petitioner's counsel first be required to put forth evidence demonstrating the letters' credibility and trustworthiness (M. Tr. 9/12/03, 8-18). The prosecutor agreed with Mr. Wood's attorney that admission of Mr. Wood's confession required a showing of reliability and she also argued that his confession was inconsistent with the physical evidence (M. Tr. 9/12/03, 18-21). In response, defense counsel argued that the indicia of reliability was shown because Mr. Wood wrote the letter and signed it (at least defense counsel's copy was signed). Defense counsel also argued that the inconsistencies between the confession and Brenda's version of events was of no consequence because no one believed her story (M. Tr. 9/12/03, 21-23). The trial court ruled that Mr. Wood would not be required to testify and that the letter would not be admitted due to absence of evidence showing its reliability. Defense counsel was permitted to re-urge the issue with respect to the endorsement of the three detention officers (M. Tr. 9/12/03, 23-31).

After a weekend recess, a second in camera hearing was held on Monday, September 15th. At this hearing,

defense counsel, noting that Mr. Wood had been deemed an unavailable witness, argued that the three detention officers should be allowed to testify regarding their belief that Mr. Wood wrote the letters and as to oral statements against penal interest Mr. Wood made to them (M. Tr. 9/15/03, 4-7). In response, the prosecutor referenced the requirements of Title 12, § 2804(B)(3), which provides in pertinent part that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The prosecutor argued, as she had previously, that Mr. Wood's confession had not been shown to be reliable (M. Tr. 9/15/03, 7-10). Defense counsel unsuccessfully argued that corroboration existed because Mr. Wood had repeatedly confessed. Next, he re-asserted (as he did at the prior hearing) that the confession should not be excluded because it was inconsistent with Brenda's version of events. Finally, he claimed that the reliability could be shown by the officers testifying as to their familiarity with Mr. Wood's handwriting (M. Tr. 9/15/03, 10-12). After the trial court overruled the motion, defense counsel made an offer of proof that (1) had Mr. Wood been allowed to testify, he would have admitted that he killed Rob and he "would have provided additional details as set out in his letter," and (2) had the detention officers been allowed to testify, they would have testified as to oral statements made by Mr. Wood which were consistent with statements made in his confession; that the confession letters appeared to be in Mr. Wood's handwriting; that Mr. Wood gave the letters to one of them for mailing; and that Mr. Wood had told at least one of the detention

officers that he was acquainted with Brenda prior to their incarceration in the Oklahoma County Jail. Defense counsel argued "that this evidence taken together would have provided a reasonable alternative theory of how this crime was committed, that the appropriate nexus was in fact Mr. Wood's statements" (M. Tr. 9/15/03, 12, 15-17).

In denying Petitioner relief on this claim, the OCCA acknowledged the applicability of § 2804(B)(3) and the evidentiary support a defendant must offer to justify admission of a statement which inculpates the maker and exculpates the defendant.

> There is no question that the letters in question contained statements against the author's penal interest. The putative author of the letters (Wood) was unavailable because he could not be compelled to testify. Even assuming that [Petitioner] could establish authorship of the letters, he was still required to establish (1) that a reasonable person in the author's position would not have made the statements if they were not true, and (2) corroborating circumstances which "clearly" indicate the trustworthiness of the letters. The trial court is not limited to gauging the credibility of an exculpatory statement by reference to the evidence supporting the State's theory. The court may, and indeed should, consider any relevant evidence—even evidence the State discounts—in determining whether the statement is trustworthy enough to be admissible.

Pavatt, 159 P.3d at 287 (citations omitted). The OCCA then noted the facts before the trial court which weighed into its determination that the letters were not trustworthy.

> As noted, Zjaiton Wood was himself awaiting trial on an unrelated charge of first-degree capital murder. He just happened to be housed in the same "pod" of the county jail as [Petitioner]. The letters were handwritten but practically identical; that is, it appeared that one had been copied verbatim from the other, or that they had both been copied from another source. While the letters were detailed, they were perhaps *too* detailed, appearing to parrot certain key features of the State's case. The letters were mailed shortly after [Petitioner's] trial began—after the State had publicly outlined the salient features of its case. The trial court was also presented with information that Brenda Andrew had allegedly threatened a female witness who was to testify at one of the criminal proceedings against Wood, and that Wood had allegedly attempted to "confess" to other local murders besides this one. The trial court was entitled to consider all of this information in deciding whether the letters were presumptively credible enough to be admitted under § 2804.
>
> In addition, the contents of the letters were inconsistent with other evidence, including some facts beyond the State's theory of the

> case. For example, while the letters claimed that the 16—gauge shotgun used to kill Andrew was left at the scene, no such weapon (or any weapon for that matter) was found in the vicinity. In fact, the 16—gauge shotgun used to kill Rob Andrew—which was the same unusual gauge of shotgun that Rob Andrew owned and had left in the home when he moved out—was never found. The letters claim that Wood acted alone in the murder, and this is inconsistent with both Brenda Andrew's own claim that *two* assailants attacked her husband, and the letter, written by [Petitioner], claiming that he enlisted another man to help him kill Rob Andrew. While the State obviously did not believe either account, the discrepancies between the letters purportedly written by Wood, and the defendants' respective versions of events, was something the trial court was entitled to consider in gauging the reliability of the letters.

Id. at 287-88 (citations omitted) (footnote omitted).

The OCCA even expressly discussed *Holmes*, finding that § 2804(B)(3) "is nothing like the rule invalidated in *Holmes*." *Id.* at 288-89.

> [Section 2804(B)(3)] permits the reliability of the hearsay statement to be judged by any relevant evidence, presented to the court on the preliminary question of admissibility. . . .The

> letters purportedly written by Wood were not inadmissible merely because they were inconsistent with the State's theory; they were inadmissible because there simply was nothing offered to corroborate them.
>
> A confession tends to be more trustworthy if it provides hitherto-unknown facts which are not only verifiable, but also consistent with known facts. The letters at issue fail both parts of this test. As explained in our discussion of Proposition 5, a substantial amount of evidence, both direct and circumstantial, from a variety of witnesses and other sources, coalesced into a web of proof strongly implicating [Petitioner] in a murderous conspiracy to kill Rob Andrew. We fail to see how a jury could possibly have discounted all of this evidence in favor of a theory that Zjaiton Wood—with no known connection to anyone in this case—happened to drive up and murder Rob Andrew for his wallet, in his garage, using the same unusual gauge of shotgun that used to be in the Andrews' home but which is now nowhere to be found. Under these circumstances, the trial court did not abuse its discretion in either refusing to compel Wood to affirm or deny authorship of the letters, or in excluding the letters from the trial, pursuant to 12 O.S. § 2804(B)(3), as uncorroborated and unreliable. This proposition is denied.

Id. at 289 (footnote omitted).

Appendix D

Petitioner asserts that the OCCA's decision is in conflict with *Holmes* for two reasons. First, Petitioner contends that the OCCA's decision is based on an unreasonable determination of the facts. Here, Petitioner faults the trial court for not receiving any testimonial evidence at the hearings held on the matter, and he argues that the trial court's reliability determination was based more on assumption than evidence.[31] Because the OCCA relied on the findings made by the trial court, Petitioner contends that the OCCA's decision is an unreasonable determination of the facts. Petitioner's arguments, however, ignore the fact that it was his responsibility to present corroborating evidence. As the OCCA noted in its opinion, "*[e]ven assuming that [Petitioner] could establish authorship of the letters,* he was still required to establish . . . corroborating circumstances which 'clearly' indicate the trustworthiness of the letters." *Id.* at 287 (emphasis added). At the hearings, Petitioner sought to present Mr. Wood and three detention officers to establish that Mr. Wood wrote the letters and that Mr. Wood made other verbal statements against his penal interest. Establishing that Mr. Wood was the author of letters and the maker

31. Petitioner takes issue with the following information which was made known during the hearing: (1) that Petitioner was housed in the same pod with Mr. Wood; (2) that Mr. Wood had confessed to other murders; and (3) that Brenda intimidated a witness in Mr. Wood's trial. Petitioner also faults the trial judge for using her experience and common sense to support her belief that Mr. Wood did not write the letter or if he did, that the words were not his own. Despite Petitioner's challenge to these findings, the fact remains, as discussed herein, that Petitioner nevertheless failed to come forth with evidence demonstrating the trustworthiness of Mr. Wood's confession.

of statements that he killed Rob falls short of meeting the evidentiary burden for admission of the evidence. Petitioner has continually argued that the confession speaks for itself, i.e., because it was made, and made repeatedly, it is reliable and trustworthy. It is clear that Oklahoma law, and particularly § 2804(B)(3), require more, and, as more fully discussed below, Petitioner has not shown that this evidentiary hurdle is an arbitrary intrusion on his right to present a defense.

Petitioner's second argument is that the OCCA's decision is contrary to or an unreasonable application of *Holmes*. Here, Petitioner asserts that Oklahoma's § 2804(B)(3) "is almost identical" to the evidentiary standard found unconstitutional in *Holmes*. In support, Petitioner references the OCCA's concluding paragraph, set forth above, and argues that the OCCA excluded Mr. Wood's confession because "it did not fit with the State's case." Reply, pp. 39-40. As fully discussed above, the Supreme Court in *Holmes* acknowledged the well-established restrictions placed upon the admission of third-party perpetrator evidence in numerous jurisdictions. Such evidentiary rules are constitutional when applied "to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Holmes*, 547 U.S. at 330. In *Holmes*, however, South Carolina ran afoul of constitutionally permissible restrictions when it failed to assess the reliability of the offered evidence but looked *only* to the strength of the State's evidence in determining whether the defendant's evidence could come in. *Id.* at 331. The Supreme Court found that restricting the admission

of third-party perpetrator evidence in this manner "is 'arbitrary' in the sense that it does not rationally serve the end that . . . third-party guilt rules were designed to further." *Id.*

Contrary to Petitioner's contention, the rule applied by Oklahoma to exclude Mr. Wood's confession is not identical to the one applied by South Carolina in *Holmes*. What the Supreme Court found to be arbitrary in *Holmes* is a rule which excludes a defendant's evidence without assessing its own evidentiary merit. *Holmes*, 547 U.S. at 329 ("If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues."). In Petitioner's case, the OCCA referenced the presented evidence, but Mr. Wood's confession was not excluded solely because it failed to sync with the State's evidence. As the OCCA noted, "[a] confession tends to be more trustworthy if it provides hitherto-unknown facts which are not only verifiable, but also consistent with known facts." *Pavatt*, 159 P.3d at 289. Even if one were to assume that Petitioner and/or Brenda had no influential contact with Mr. Wood in the drafting of his confession, Mr. Wood's letters provide no "hitherto-unknown facts." In fact, Mr. Wood's confession could have easily been compiled from the media reports. Moreover, the confession actually contradicts the known facts. As examples, (1) Mr. Wood states that the 16-gauge shotgun he used to kill Rob was "discarded" after he shot Rob a second time but before he shot Brenda; however, the murder weapon was never recovered (J. Tr. XI, 2751);

(2) Mr. Wood states that he patted down Rob's pockets for a billfold but could not find anything; however, Rob's wallet was in his front pants pocket and it contained $60 in cash and several credit cards (J. Tr. IX, 2258-59, 2307-08; State's Exhibits 46 and 69); and (3) Mr. Wood states that he entered the Gigstad residence through a window and hid in the attic; however, Mr. Gigstad's testimony was that the house was secure when he left it (J. Tr. X, 2589-90). Finally, it is simply beyond rational comprehension that Brenda just got lucky and in the midst of her overwhelming desire to see her husband killed (and enlisting Petitioner's to help her do so), Mr. Wood, a complete stranger, randomly selected Rob as his victim at the very moment he was coming to a residence where he had ceased living some two months before to pick up his kids for a long holiday weekend that Brenda did not want to happen. *See Pavatt*, 159 P.3d at 289 ("We fail to see how a jury could possibly have discounted all of this evidence in favor of a theory that Zjaiton Wood—with no known connection to anyone in this case—happened to drive up and murder Rob Andrew for his wallet, in his garage, using the same unusual gauge of shotgun that used to be in the Andrews' home but which is not nowhere to be found."). Clearly, Mr. Wood's confession lacked reliability and trustworthiness, and the OCCA did not unreasonably apply *Holmes* in so finding.

For the foregoing reasons, Petitioner has failed to show that the OCCA's decision upholding the trial court's exclusion of the evidence pursuant to § 2804(B)(3) is contrary to or an unreasonable application of Supreme Court law or an unreasonable determination of the facts. Relief on Petitioner's Ground Four is therefore denied.

Appendix D

E. Ineffective Assistance of Appellate Counsel: Handwriting Expert (Ground Five).

In Ground Five, Petitioner asserts that his appellate counsel was ineffective for failing to raise claims on direct appeal regarding the State's handwriting expert. Petitioner asserts that appellate counsel should have challenged the trial court's denial of his request for a *Daubert/Kumho* [32] hearing on the admissibility of handwriting analysis. Petitioner additionally asserts that appellate counsel should have argued that the expert's testimony was in any event improper because it included his ultimate opinion that Petitioner wrote the confession letter (State's Exhibit 222).[33] Petitioner presented this ground for relief to the OCCA in his first post-conviction application and the OCCA denied relief on the merits. Respondent asserts that Petitioner has failed to show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law.

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32. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Oklahoma applies the standards set forth in *Daubert* and *Kumho* to determine the admissibility of novel expert testimony. *Harris v. State*, 2004 OK CR 1, 84 P.3d 731, 745 (Okla. Crim. App. 2004).

33. Petitioner notes that the handwriting expert also testified that Rob did not sign the form submitted to Prudential to change the ownership of his $800,000 life insurance policy (State's Exhibit 24); however, in his argument to the OCCA on post-conviction and in the argument to this Court, Petitioner does not challenge this testimony, but focuses solely on the expert's testimony regarding the confession letter.

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As previously noted in the analysis of Petitioner's Ground Two, *supra*, claims regarding the effectiveness of appellate counsel are governed by *Strickland*. Thus, to obtain relief, a petitioner must show that appellate counsel's actions were objectively unreasonable and that but for counsel's unreasonable actions, his appeal would have been successful. Here again, the OCCA elected to dispose of Petitioner's claim on the prejudice prong. The OCCA found that even if appellate counsel had raised the claim on direct appeal, he would not have prevailed on appeal. *Pavatt*, No. PCD-2004-25, slip op. at 7 n.8.

Petitioner has not demonstrated that the OCCA's decision on this claim is contrary to or an unreasonable application of *Strickland*. The OCCA found that the claim lacked merit because Petitioner failed to cite controlling authority which required the trial court to hold a *Daubert/Kumho* hearing before permitting the testimony of the State's handwriting expert. Petitioner's argument to the OCCA on post-conviction was that his appellate counsel should have raised the issue because "[t]he issue of handwriting uniqueness has been questioned in other courts in this country." Petitioner then cited federal district court cases which either excluded the evidence or prevented the expert from giving his ultimate opinion. Original Application for Post-Conviction Relief, No. PCD-2004-25, pp. 67-68. Given the absence of controlling Oklahoma law, it was reasonable for the OCCA to find that had appellate counsel raised the issue, Petitioner would not have prevailed on appeal.

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As to the expert's opinion that Petitioner wrote the confession letter, Petitioner relies on the OCCA's decision in *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215 (Okla. Crim. App. 1988), to assert that the expert's opinion in his case went beyond what is deemed permissible. *See* Okla. Stat. tit. 12, § 2704 (permitting an expert to give his opinion even if "it embraces an ultimate issue to be decided by the trier of fact"). In *McCarty*, the OCCA faulted an expert who, while acknowledging during her testimony "that forensic science techniques had not advanced to the point where a person could be positively identified through blood types, secretor status, or hair examination," thereafter testified that the defendant was in fact physically present when the victim was assaulted. The OCCA found the expert's testimony regarding the defendant's presence at the crime scene was improper "because it was beyond the present state of the art of forensic science, and certainly beyond [the expert's] personal knowledge." *McCarty*, 765 P.2d at 1218, 1219.

Unlike the expert in *McCarty*, the handwriting expert in Petitioner's case did not testify beyond his expertise. The handwriting expert (a/k/a "question document examiner"), David Parrett, testified extensively about his training and experience, about the principles of handwriting identification, and about how handwriting examinations and comparisons are conducted (J. Tr. XII, 3222-32), and he detailed for the jury his examination and comparison of Petitioner's known writing samples to the confession letter (J. Tr. XII, 3244-65; State's Exhibits 224-26). From noted characteristics in the writings, Mr. Parrett expressed his opinion as follows:

> After comparing the known samples of handwriting of Mr. Pavatt, looking at the individual characteristics in his handwriting and the known samples that I had and the class characteristics in looking at the individual characteristics and the class characteristics in the question letter I noted like characteristics and found no significant differences. It was therefore my opinion that the person who prepared the known standards that I looked at, Mr. Pavatt did indeed prepare the letter which was the questioned item, State's Exhibit 222.

(J. Tr. XII, 3244). Having compared the expert testimony in the present case to the testimony found improper in *McCarty*, the Court cannot find that the OCCA unreasonably denied relief to Petitioner based on appellate counsel's failure to raise the issue.

In conclusion, the Court finds that Petitioner has not shown that the OCCA unreasonably applied *Strickland* to the determination of this allegation of error against his appellate counsel. Ground Five is therefore denied.

F. Ineffective Assistance of Appellate Counsel: Accessory After the Fact Instruction (Ground Six).

In Ground Six, Petitioner claims once again that his appellate counsel was ineffective. Petitioner's argument here is that his appellate counsel should have raised a claim on direct appeal asserting a violation of his Eighth Amendment rights due to the trial court's failure to

instruct the jury on accessory after the fact as a lessor included offense. Petitioner raised this claim to the OCCA in his first post-conviction application. Denying the claim on the merits, the OCCA found that Petitioner had failed to demonstrate prejudice as required by *Strickland*. *See* Ground Two, *supra* (discussing the application of *Strickland* to claims of ineffective assistance of appellate counsel). Respondent asserts that the OCCA's decision is entitled to AEDPA deference and that Petitioner has failed to show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law.

The Eighth Amendment claim that Petitioner faults his appellate counsel for not raising is founded on *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). In *Beck*, the Supreme Court addressed the constitutional ramifications of lesser-included instructions for a capital crime. Prior to *Beck*, the Supreme Court had "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process." *Beck*, 447 U.S. at 637. In *Beck*, however, the Supreme Court carved out an exception for those high stake cases where the death penalty is a possible punishment.

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments. . . .

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

The problem with Petitioner's reliance on *Beck*, however, is that in Oklahoma the crime of accessory after the fact is not a lesser included offense of first degree murder. *Cummings v. State*, 1998 OK CR 45, 968 P.2d 821, 834 (Okla. Crim. App. 1998); *Van Woundenberg v. State*, 1986 OK CR 81, 720 P.2d 328, 335 (Okla. Crim. App. 1986). As Respondent points out as well, the Supreme Court in the later case of *Hopkins v. Reeves*, 524 U.S. 88, 96-97, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998), emphasized that *Beck* applies only to lesser included offenses, not lesser related offenses. Therefore, had appellate counsel challenged the trial court's failure to instruct the jury on the crime of accessory after the fact under *Beck*, it is clear that Petitioner would not have prevailed on this claim. Accordingly, Petitioner has failed to demonstrate that the OCCA's denial of his claim on *Beck* grounds is unreasonable.

In his Reply, Petitioner argues that because Oklahoma law requires instructions on both lesser included offenses and lesser related offenses, his Eighth Amendment claim

under *Beck* and *Hopkins* is nevertheless viable. *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597, 603-04 (Okla. Crim. App. 2001). In light of the clear pronouncements in *Beck* and *Hopkins*, the Court does not agree. However, that does not preclude Petitioner from arguing that his state law rights have been infringed by the trial court's refusal to instruct on the crime of accessory after the fact as a lesser related offense. *See Arizona v. Evans*, 514 U.S. 1, 8, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."). But even if Petitioner's claim is evaluated from a state law perspective, the Court still cannot conclude that the OCCA acted unreasonably in finding that the claim would have been unsuccessful on appeal. As referenced in the Committee Comments to Oklahoma's uniform instructions on accessory after the fact, "[a]n individual becomes an accessory under Oklahoma statutory provisions only when that individual becomes associated with the offender and his fate subsequent to the commission of the original offense. One who participates either prior to or during the commission of the offense is liable as a principal." OUJI-CR (2d) 2-4 (citing *Wilson v. State*, 1976 OK CR 167, 552 P.2d 1404 (Okla. Crim. App.1976), and *Vann v. State*, 21 Okla. Crim. 298, 207 P. 102 (Okla. Crim. App. 1922)). In the present case, there was a wealth of evidence showing that Petitioner was involved in the murder prior to its commission. In light of this evidence, the OCCA could reasonably find the absence of prejudice under *Strickland* resulting from appellate counsel's failure to raise this issue on direct appeal.

For the foregoing reasons, the Court finds that Petitioner's Ground Six is without merit. It is hereby denied.

G. Prosecutorial Misconduct (Ground Seven).

In Ground Seven, Petitioner details eight claims of prosecutorial misconduct. Some of these claims were presented to the OCCA in Petitioner's direct appeal and some were raised on post-conviction. One has never been presented to the OCCA. Due to the varying presentation of these claims to the OCCA, some are subject to AEDPA review on the merits and others are procedurally barred.

1. Claims Raised on Direct Appeal.

Petitioner raised four of his eight claims on direct appeal. Because these claims were denied on the merits by the OCCA, they are reviewed here under the AEDPA standard. Petitioner will therefore only be entitled to relief upon a showing that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law.

Allegations of prosecutorial misconduct are given due process review. *Stouffer v. Trammell*, 738 F.3d 1205, 1221 (10th Cir. 2013). The question is whether the prosecutor's actions or remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). A fundamental fairness inquiry "requires examination of the entire proceedings, including the strength of the evidence

against the petitioner, both as to guilt at that stage of the trial and as to moral culpability at the sentencing phase." *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002). "The ultimate question is whether the jury was able to fairly judge the evidence in light of the prosecutors' conduct." *Bland*, 459 F.3d at 1024.

Petitioner's third claim of prosecutorial misconduct concerns the testimony of Kurt Stoner, an FBI agent and State's witness. Petitioner faults the prosecutor for eliciting improper opinion testimony from Agent Stoner.[34] At the end of direct examination, the prosecutor asked Agent Stoner if he had formed an opinion about Petitioner's involvement in Rob's murder. Before defense counsel could object, Agent Stoner replied, "That he's directly involved" (J. Tr. XII, 3059-60). After a lengthy discussion at the bench, the trial court admonished the

34. On direct appeal, Petitioner argued that Agent Stoner's opinion testimony was improper and that the admonishment was not sufficient to cure the error. Although Petitioner cast aspersions on the prosecutor ("After attempting to interject hearsay evidence, the prosecutor moved in for the kill. . . ."), Petitioner did not directly challenge the prosecutor's conduct in his claim for relief. Brief of Appellant, No. D-2003-1086, pp. 23-26. Nevertheless, Respondent has argued that the OCCA addressed the merits of the prosecutorial claim raised here, and she urges AEDPA review. Response, p. 103. In his Reply, Petitioner agrees with Respondent that the prosecutorial misconduct claim was raised on direct appeal, but he argues that the OCCA failed to address it. Consequently, Petitioner argues for de novo review of his claim. Reply, pp. 62-66. The Court finds it unnecessary to resolve this presentation issue because even under a de novo review, the Court finds itself in agreement with the OCCA's resolution of the issue.

jury to disregard Agent Stoner's answer. The jury was also admonished the jury to disregard opinion testimony given by Petitioner's daughter, Janna, regarding her opinion that Petitioner was not involved (J. Tr. XI, 2942; J. Tr. XII, 2997, 3031, 3060-65).

The OCCA detailed the circumstances leading up to Agent Stoner's testimony and addressed Petitioner's claim as follows:

> In Proposition 3, [Petitioner] claims error when a State's witness was allowed to interject hearsay and give his personal opinion of [Petitioner's] guilt. Defense counsel timely objected to this testimony, so the issue was preserved for appellate review. We review the trial court's evidentiary rulings for an abuse of discretion.
>
> Janna Larson, [Petitioner's] daughter, testified in the State's case in chief about her conversations with her father before and after Andrew's murder, and about her observations of her father's conduct. [Petitioner] made incriminating statements to Larson, told her of his affair with Brenda Andrew, and enlisted her help at various times in his efforts to perpetrate the murder and avoid detection. After [Petitioner] and Brenda left for Mexico, Larson contacted an attorney, and soon agreed to cooperate with the authorities. One officer that she worked closely with was Agent Kurt

Stoner of the Federal Bureau of Investigation. Larson was understandably not happy about having to testify against her father at trial. She implied that she cooperated with authorities out of fear that she might be implicated in the murder if she did not. While not an entirely hostile witness for the State, Larson was led by defense counsel, in cross-examination, to opine several times that she did not believe her father was actually complicit in Rob Andrew's murder.

After Larson testified, the State called Agent Stoner to the stand. Stoner offered his version of Larson's cooperation in the investigation. Stoner described Larson as angry with her father and eager to cooperate with the authorities; he denied that Larson was ever threatened with prosecution if she did not cooperate. The prosecutor then attempted, several times, to impeach parts of Larson's testimony on this point by asking Stoner what Larson had told him about her father's involvement in the murders. Each time, defense counsel objected, and the trial court sustained the objection. We need not decide whether this would have been proper impeachment because the testimony was never adduced; [Petitioner's] hearsay claim is unfounded.

The prosecutor then asked Stoner if, based on his law enforcement experience and involvement in this case, he had an opinion about [Petitioner's]

guilt. Defense counsel promptly objected, but before the court could rule on the objection, Stoner said he believed [Petitioner] was "directly involved" in the murder. The trial court denied defense counsel's request for a mistrial. The record shows that the parties had discussed with the court, *in limine,* the possibility of one party opening the door to such evidence, and the prosecutor pointed out that the defense had just elicited the very same type of opinion testimony from Larson. The trial court admonished the jury to disregard any opinions about [Petitioner's] guilt, whether from Larson or Stoner.

We have often held that an admonition to disregard inadmissible testimony is presumed to cure any possible error. But given the situation presented in this case, we also find that any possible error was invited by the defense. Just before Agent Stoner took the stand, defense counsel elicited Larson's opinion as to her father's innocence several times. Stoner was used to impeach several aspects of Larson's testimony, not just her opinion of her father's guilt. We do not condone counsel for either party gratuitously soliciting witness opinions as to what result the jury should reach. However, we do not believe the opinions of either Larson or Stoner—each of whom had a potential bias—left a serious impression on the jurors, particularly after the trial court

> admonished them to disregard both. This proposition is denied.

Pavatt, 159 P.3d at 290-91 (citations omitted).

Petitioner argues, as he did on direct appeal, that the admonishment given to the jury was insufficient to overcome the prejudicial nature of the statement. Petitioner bolsters this argument by asserting that the prejudice was attenuated by the weak evidence presented against him. The Court is unpersuaded by Petitioner's arguments. Claims of prosecutorial misconduct are not viewed in a vacuum, but in the context of the trial as a whole. The OCCA denied Petitioner relief on this claim because it found that Agent Stoner's testimony was no different than that elicited by the defense in the questioning of Petitioner's daughter, and that in any event, the jury was instructed to disregard the improper testimony from both witnesses. This conclusion is reasonable. *See Wilson v. Sirmons*, 536 F.3d 1064, 1119 (10th Cir. 2008) ("Even if the prosecutor's comments were improper, however, the trial court's admonition to the jury cured any error."); *Battenfield v. Gibson*, 236 F.3d 1215, 1225 (10th Cir. 2001) ("In light of the general presumption that a jury follows a trial court's instructions, *see Weeks v. Angelone*, 528 U.S. 225, 120 S. Ct. 727, 733, 145 L.Ed.2d 727 (2000), we are persuaded that the trial court's admonition was sufficient to cure any error arising out of the prosecutor's comment."). In addition, the record reflects that while defense counsel objected to Agent Stoner's testimony, defense counsel stated that he did not believe that the prosecutor had acted inappropriately in

posing the question which elicited Agent Stoner's response (J. Tr. XII, 3064-65) ("Judge, if I can just make clear for the record, I was not in any way suggesting that the improper action was on the part of Mr. Gieger in asking the question."). Finally, while the evidence against Petitioner may have been largely circumstantial, it was not weak. *See* Ground Three, *supra*. Accordingly, the Court finds that Petitioner was not denied a fundamentally fair trial by Agent Stoner's testimony and that Petitioner has failed to show that the OCCA's likewise determination is contrary to or an unreasonable application of Supreme Court law.

In his sixth, seventh, and eighth claims, Petitioner complains about statements made by the prosecutor during the second stage. Petitioner claims that the prosecutor inappropriately stated her personal opinion that Petitioner should receive the death penalty (J. Tr. XV, 3670-71, 3757, 3791-92), made calculated arguments to inflame the jury (J. Tr. XV, 3790-91), and made a statement undermining the jury's consideration of mitigating evidence (J. Tr. XV, 3775).[35]

35. In his eighth claim, Petitioner additionally asserts that the prosecutor misstated the test regarding the jury's consideration of mitigating evidence (J. Tr. XV, 3745, 3776). However, this argument was not substantively raised on direct appeal, but on post-conviction and with respect to a claim regarding the ineffectiveness of Petitioner's appellate counsel. Original Application for Post-Conviction Relief, No. PCD-2004-25, p. 40. While the parties dispute the treatment this Court should afford the OCCA's post-conviction ruling on the issue, the Court finds that even under a de novo standard of review, appellate counsel was not ineffective for failing to cite these additional references concerning the jury's consideration of mitigating evidence. It is evident that these additional comments did not deny Petitioner a fundamentally fair trial. *Donnelly*, 416 U.S. at 643.

Appendix D

In denying Petitioner relief on these claims, the OCCA held as follows:

> First, [Petitioner] complains of various comments that he describes as the personal opinions of the prosecutor. [Petitioner] refers to the prosecutor's comments that this was a "proper case for the death penalty"; that "there are no extenuating circumstances which mitigate the murder of Rob Andrew"; that this particular murder was "heinous, atrocious, or cruel"; that the jurors were "the only ones who can see that justice is done"; and, finally, that a death sentence was "the justice [Petitioner] deserves."
>
> Counsel enjoy significant latitude in arguing their respective positions, so long as the arguments are based on evidence the jury has received. *Washington*, 1999 OK CR 22 at ¶ 42, 989 P.2d at 974. A prosecutor's comments do not amount to improper "personal opinion" merely because she asks the jury to impose the death penalty. *See Bernay v. State*, 1999 OK CR 37, ¶ 65, 989 P.2d 998, 1014 ("A prosecutor may comment on the punishment to be given"). The prosecutor's arguments in this case as to why [Petitioner] "deserved" the death penalty were based on her assessments of the evidence presented in court, and were entirely proper. *See Toles v. State*, 1997 OK CR 45, ¶ 65, 947 P.2d 180, 193 ("The prosecutor did not give

his personal opinion of the death penalty; he argued why the death penalty was appropriate in this case").

[Petitioner] also claims that the prosecutor improperly engaged in speculation and evoked sympathy for the victim in the following passage:

> When Rob Andrew lay dying on that garage floor, James Pavatt and Brenda Andrew looking at the sight that you see in those pictures, what do you believe his last words were? What do you believe he was trying to say when he was laying there on the floor looking up at Brenda Andrew's face? He was probably trying to say I love you, Brenda, because that's the kind of man he was.

Considering the evidence presented from the crime scene, and about Rob Andrew's feelings for his wife, this was actually a fair comment on the evidence. The prosecutor never suggested that the inference was based on anything the jury had not heard. *See Alverson v. State*, 1999 OK CR 21, ¶ 45, 983 P.2d 498, 514 (prosecutor's reference to murder victim as an "innocent man, trying to make a living for his wife and two baby boys," was a proper comment on the evidence).

> To the extent this comment may have evoked sympathy for the victim, we do not find it so outrageous as to have denied [Petitioner] a fair sentencing proceeding. As the State had alleged that the murder of Rob Andrew was especially heinous, atrocious, or cruel, it was entitled to present evidence that Rob Andrew suffered extreme mental cruelty in conjunction with his death. *DeRosa*, 2004 OK CR 19 at ¶ 96, 89 P.3d at 1156. The evidence reasonably led to the conclusion that the last images Rob Andrew saw were of his wife and her lover working together to end his life. The prosecutor was entitled to suggest reasonable inferences about what Rob Andrew's last thoughts might have been, in order to establish the "heinous, atrocious, or cruel" aggravator. *See Alverson*, 1999 OK CR 21 at ¶ 46, 983 P.2d at 514 (prosecutor's asking the jury to imagine the feeling of a metal baseball bat hitting one's head was a permissible comment on the pain the victim may have felt prior to death); *Hooper*, 1997 OK CR 64 at ¶ 53, 947 P.2d at 1110 (prosecutor's statement that the murder victim "was immersed in a child's worst nightmare of being chased by an evil monster trying to kill her," and request that the jurors imagine what she went through, were based on the evidence presented and on the State's theory of how the victim died). We find no plain error in these statements.

Pavatt, 159 P.3d at 291-92.

Although it is apparent that Petitioner is dissatisfied with the OCCA's decision, he has not shown that the OCCA unreasonably determined the facts or denied him relief in a manner which is contrary to or unreasonable application of Supreme Court law. "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Moreover, "[a]s a condition for obtaining habeas corpus from a federal court, 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." *Richter*, 131 S. Ct. at 786-87. Because the OCCA's decision is well within the accepted range of reasonableness, Petitioner is not entitled to relief on his sixth, seventh, and eighth claims of prosecutorial misconduct.

2. Claims Raised on Post-Conviction.

Petitioner's first, second, and fifth claims of prosecutorial misconduct were raised for the first time in Petitioner's second application for post-conviction relief. The OCCA declined to review the merits of these claims because "all of them could have been raised in prior proceedings." *Pavatt*, No. PCD-2009-777, slip op. at 3-4 (footnote omitted) (citing Okla. Stat. tit. 22, § 1089(D)(8)). For the reasons discussed in Ground Two, *supra*, the

Court finds that these claims are barred from federal review.

3. Unexhausted Claim.

Petitioner's fourth claim of prosecutorial misconduct is unexhausted. Having twice pursued post-conviction relief, it is clear that if Petitioner were to return to state court with this claim, the OCCA would decline to entertain its merits. Therefore, the Court finds that like his first, second, and fifth claims of prosecutorial misconduct, this claim is procedurally barred as well. *Lott v. Trammell*, 705 F.3d 1167, 1179 (10th Cir. 2013) (*citing Anderson v. Sirmons*, 476 F.3d 1131, 1139-40 n.7 (10th Cir. 2007), and applying an anticipatory procedural bar to an unexhausted claim), *cert. denied*, U.S. , 134 S. Ct. 176, 187 L. Ed. 2d 120 (2013).

4. Conclusion.

For the foregoing reasons, the Court finds that Petitioner is not entitled to relief on his Ground Seven. Relief is therefore denied.

H. Jury Instructions on Life and Life Without Parole (Ground Eight).

In Ground Eight, Petitioner asserts that the jury was not adequately instructed on the sentencing options of life and life without parole. The sum of Petitioner's argument is that the "jury should have been instructed that life without parole means that the defendant will remain

incarcerated for his natural life and that life means that the defendant will serve at a minimum 85% of a 45 year sentence - or 38.25 years." Reply, p. 78. Petitioner asserts that these instructions were required under Supreme Court precedent and the OCCA's decision in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 (Okla. Crim. App. 2006). Respondent contends that Petitioner's Ground Eight is unexhausted. Respondent argues that while a state law version of Petitioner's Ground Eight was raised in Petitioner's first post-conviction application, the substance of the federal claim he now presents was not. Respondent urges the application of an anticipatory procedural bar, while alternatively asserting that the claim can be denied on the merits. The Court finds that disposal of Petitioner's claim on the merits is the easier course. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Snow v. Sirmons*, 474 F.3d 693, 717 (10th Cir. 2007) ("We can avoid deciding procedural bar questions where claims can readily be dismissed on the merits.").

As noted above, it is Petitioner's contention that his jury should have been given more information on the sentencing options of life and life without parole. Petitioner notes that in the written instructions given to the jury, these options were defined only as imprisonment for life with the possibility of parole and imprisonment for life without the possibility of parole (O.R. XI, 2048, 2050, 2054, 2058). Petitioner asserts that more was needed due to "confusion and inaccurate information" developed

during voir dire, Petition, p. 128, and the OCCA's decision in *Anderson*.

In support of his claim, Petitioner cites several Supreme Court decisions.[36] Asserting a due process violation, Petitioner cites *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994), as well as related cases, *Shafer v. South Carolina*, 532 U.S. 36, 121 S. Ct. 1263, 149 L. Ed. 2d 178 (2001), and *Kelly v. South Carolina*, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002).[37] In *Simmons*, a plurality opinion, the Supreme Court held that "where the 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." *Simmons*, 512 U.S. at 156. Because the jury in *Simmons* may have reasonably believed that Simmons could be paroled if given a life sentence, the Court found that an unacceptable "misunderstanding pervaded the jury's deliberations" — one which "had

36. The Court construes Petitioner's primary claim to be one of due process; however, the Court acknowledges Petitioner's general argument and authority regarding his entitlement under the Eighth Amendment to an accurate and reliable sentencing determination. Petition, p. 130. For the same reasons more fully set out herein, the Court finds that Petitioner's Eighth Amendment claim lacks merit as well.

37. In *Shafer*, a majority of the Court, addressing a new South Carolina sentencing scheme, reaffirmed the *Simmons* holding. *Shafer*, 532 U.S. at 51. In *Kelly*, a majority of the Court once again acknowledged *Simmons* as controlling authority, applying it a second time to a South Carolina case. *Kelly*, 534 U.S. at 248.

the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id.* at 161. The Court reasoned that

> if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Id. at 168-69 (citation omitted).

Despite his reliance on *Simmons*, however, Petitioner acknowledges that the Tenth Circuit has found that Oklahoma's sentencing scheme, which includes two clearly delineated life imprisonment options, does not on its face run afoul of *Simmons*. Petition, p. 132 (citing *Mayes v. Gibson*, 210 F.3d 1284, 1294 (10th Cir. 2000)). In an effort to circumvent this authority, Petitioner argues that the Tenth Circuit should revisit the applicability of *Simmons* to Oklahoma's sentencing scheme given the OCCA's decision in *Littlejohn v. State*, 2004 OK CR 6, 85 P.3d 287 (Okla. Crim. App. 2004). In *Littlejohn*, the OCCA, while acknowledging that its sentencing scheme

is *Simmons* compliant, additionally acknowledged that Oklahoma juries are nevertheless often confused about the traditional life sentence and the life sentence without parole, and it offered the following guidance to trial courts as they responded to questions about life sentencing options:

> Therefore, in future cases where the jury during deliberations asks, in some form or fashion, whether an offender who is sentenced to life imprisonment without the possibility of parole is parole eligible, the trial court should either [1] refer the jury back to the instructions, [2] tell the jury that the punishment options are self explanatory, or [3] advise the jury that the punishment options are to be understood in their plain and literal sense and that the defendant will not be eligible for parole if sentenced to life imprisonment without the possibility of parole. While arguably the latter response is nothing more than another way of referring the jury back to the instructions, it does force the jury to accept the plain meaning of the sentencing options and impose the sentence it deems appropriate under the law and facts of the case. We recognize trial courts are in the best position to decide which answer is best suited to the situation as the questions posed by juries come in a myriad of forms on this issue. However, we believe the latter explanation may alleviate some obvious concerns of jurors more effectively than simply

> telling the jury it has all the law and evidence necessary to reach a decision.

Littlejohn, 85 P.3d at 292-94 (citations omitted). Petitioner asserts that in light of *Littlejohn*, even the OCCA acknowledges that more information should be given.

Petitioner's reliance on the OCCA's decision in *Littlejohn* does not cause this Court to question the application of *Simmons* to his case. As the Tenth Circuit found in the adjudication of Littlejohn's *Simmons* claim on appeal, the OCCA's *Littlejohn* decision may relay an accurate picture of the average juror's understanding, but it does overcome the precedential application of *Simmons, Shafer*, and *Kelly* which dictates the denial of relief. *Littlejohn v. Trammell*, 704 F.3d 817, 831 (10th Cir. 2013). *Simmons* and its progeny protect against the "false choice." Its holding requires jury notification of a capital defendant's parole ineligibility when the State has alleged that he is a continuing threat. This notification prevents "a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Simmons*, 512 U.S. at 161. *See Ramdass v. Angelone*, 530 U.S. 156, 166, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (2000) (noting that "*Simmons* created a workable [and limited] rule."). In Petitioner's case, the jury was not faced with this false choice, but was given three sentencing options: life, life without parole, and death. This in and of itself is *Simmons* compliant.

In addition, this is not a situation where a false choice was created by the trial court. As acknowledged

in *Littlejohn*, 704 F.3d at 827-28, the Tenth Circuit has found that even though Oklahoma's self-explanatory sentencing options are *Simmons* compliant, a due process violation may nevertheless be found where the trial court's responses to sentencing questions by the jury "engender jury confusion" and create the false choice. In Petitioner's case, there were no questions from the jury regarding the sentencing options, and thus no improper trial court responses. In addition, while Petitioner paints voir dire as a "backdrop of confusion and inaccurate information," Petition, p. 128, the Court finds nothing in the referenced passages which would lend support to a finding that the trial court created a false choice.

Petitioner's claim of *Anderson* error lacks merit as well. In his first post-conviction application, Petitioner did present this state law claim. In denying relief, the OCCA held as follows:

> Finally, Petitioner asks this Court to apply the new rule announced in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, to his case. Oklahoma law provides that for certain enumerated crimes, a defendant must serve at least 85% of any sentence imposed before becoming eligible for any type of early release. In *Anderson*, this Court held that when a defendant is tried for a crime subject to the 85% Rule, the jury must be given that information. The rule in *Anderson* applied prospectively, and to any case pending on direct appeal at the time *Anderson* was announced. *Carter v. State*, 2006 OK CR 42,

> ¶ 4, 147 P.3d 243, 244. Petitioner's case was pending on direct appeal at the time *Anderson* was decided. However, we have made it clear that failure to instruct on the 85% Rule is not automatic grounds for reversal in every case. *Eizember v. State*, 2007 OK CR 29, ¶ 73, 164 P.3d 208. 229. As to Count 1, the jury in Petitioner's case had three punishment options — life with the possibility of parole, life without the possibility of parole, and death. It chose the most severe option, to which the notion of parole is irrelevant. We can confidently conclude that, had the jury been instructed on the 85% Rule, that information would not have affected the verdict. *See Cole v. State*, 2007 OK CR 27, ¶ 65, 164 P.3d 1089, 1102. Proposition I is denied.

Pavatt, No. PCD-2004-25, slip op. at 5-6 (footnote omitted).

Beyond the limited circumstances of *Simmons*, the Supreme Court has not mandated that a jury be told about a defendant's parole eligibility. In fact, the Supreme Court has specifically acknowledged that the States have discretion in this area. *Simmons*, 512 U.S. at 168 (*citing California v. Ramos*, 463 U.S. 992, 1014, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983), "for the broad proposition that [the Supreme Court] generally will defer to a State's determination as to what a jury should and should not be told about sentencing."). *See also Ramdass*, 530 U.S. at 165 (acknowledging that *O'Dell v. Netherland*, 521 U.S. 151, 166, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997), "reaffirmed that the States have some discretion in

determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case, subject to the rule of *Simmons*."); *O'Dell*, 521 U.S. at 166 (noting that *Simmons* "carved out an exception to the general rule described in *Ramos* . . . for the first time ever"). Under these circumstances, Petitioner's claim is nothing more than a state law claim, and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). *See also Parker v. Sirmons*, 384 F. App'x 750, 752 (10th Cir. 2010) (unpublished) (finding no due process violation for *Anderson* error); *Gardner v. Jones*, 315 F. App'x 87, 91-92 (10th Cir. 2009) (unpublished) (acknowledging the limited holding of *Simmons* and finding that a petitioner was not denied a fundamentally fair trial "in a constitutional sense" by the trial court's failure to instruct the jury on the 85% Rule); *Taylor v. Parker*, 276 F. App'x 772, 775-76 (10th Cir. 2008) (unpublished) (failure to instruct on the 85% Rule did result in a fundamentally unfair trial).

For the foregoing reasons, the Court finds that Petitioner's Ground Eight lacks merit. Ground Eight is hereby denied.

I. Admission of Photographs and a Video (Ground Nine).

In Ground Nine, Petitioner presents various challenges to the admission of photographs and a video. Much like his prosecutorial misconduct claim in Ground Seven, *supra*,

the Court's review of this ground for relief is dependent upon how each particular claim alleged herein was presented to the OCCA. Due to the varying presentation of these claims to the OCCA, they are either subject to AEDPA review on the merits or are procedurally barred from a merits review.

1. Gruesome Photos.

On direct appeal, Petitioner asserted that he had been denied a fair trial by the admission of gruesome photographs. Without singling out any particular photograph, Petitioner requested the OCCA to review all of the photographs of Rob and find that they "were gruesome and had no place in the trial" because "[t]he State had plenty of evidence that [Rob] was dead." Petitioner requested that he be granted a new trial and/or a new sentencing proceeding. Brief of Appellant, No. D-2003-1086, pp. 35-36. In denying relief, the OCCA held as follows:

> In Proposition 8, [Petitioner] claims error when the trial court admitted several photographs of the murder victim at the crime scene. At trial, defense counsel objected generally to the "multitude of bloody photographs" from the crime scene that the State offered to introduce. These photographs depicted Rob Andrew's body on the floor of the garage. He bled to death after being shot twice at close range with a shotgun. The photographs showed the body from various angles. [Petitioner's] objection

> at trial appears to focus more on the number of photographs rather than their gruesome nature. The trial court admitted many of the photos but did sustain the defense objection to several others.
>
> On appeal, [Petitioner] does not claim the photographs were needlessly cumulative, only that they were gruesome, and therefore "had no place in the trial." We review the trial court's decision to admit crime-scene photographs for an abuse of discretion. *DeRosa*, 2004 OK CR 19 at ¶ 73, 89 P.3d at 1150. This Court has many times noted that gruesome crimes make for gruesome crime-scene photographs; the issue is whether the probative value of the evidence is substantially outweighed by its prejudicial effect. 12 O.S.2001, §§ 2401-03; *Dodd*, 2004 OK CR 31 at ¶ 66, 100 P.3d at 1038; *Le v. State*, 1997 OK CR 55, ¶ 25, 947 P.2d 535, 548. The State was entitled to corroborate and illustrate the testimony of its witnesses about what the crime scene looked like and the manner of death. The record shows that the trial court carefully considered each photograph before admitting it. We find no abuse of discretion here, and this proposition is denied.

Pavatt, 159 P.3d at 289-90.

To the extent Petitioner challenges this determination by the OCCA on direct appeal, Petitioner has not shown

that it is contrary to or an unreasonable application of Supreme Court law.[38]

> "Federal habeas review is not available to correct state law evidentiary errors; rather, it is limited to violations of constitutional rights." *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir.1999) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)). When the habeas petitioner argues that evidence violated the Constitution, we consider "whether the admission of evidence . . . so infected the sentencing proceeding with

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38. As Respondent asserts, to the extent Petitioner expounds upon his gruesome photographs claim to argue "that the crime scene photographs, combined with the prosecutor's argument, misled the jury into finding [the] existence of the heinous, atrocious or cruel aggravator," Response, p. 120, this claim extends beyond the claim Petitioner exhausted on direct appeal. Because Petitioner returned to state court and presented this additional claim in his second post-conviction application, it appears that Petitioner does in fact intend it to be an additional claim for relief. In denying Petitioner relief on this additional claim, the OCCA held as follows:

> Finally, Petitioner claims the prosecutor improperly used the post-mortem photographs as evidence that the murder was especially heinous, atrocious, or cruel. This argument, based entirely on the trial record, could have been raised in prior proceedings but was not. It cannot be considered at this time. 22 O.S.Supp.2006, §1089(D)(8).

Pavatt, No. PCD-2009-777, slip op. at 5. For the reasons discussed in Ground Two, *supra*, the Court finds that this additional claim is barred from federal review.

> unfairness as to render the jury's imposition of the death penalty a denial of due process." *Romano v. Oklahoma*, 512 U.S. 1, 12, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). The "Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (citing *Darden v. Wainwright*, 477 U.S. 168, 179-83, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).

Wilson, 536 F.3d at 1114. Having reviewed the particular photographs Petitioner has singled out for purposes of habeas review (State's Exhibits 58, 63-66, 69, and 73-77) and applying the deference afforded to the OCCA's merits denial, the Court finds that Petitioner is not entitled to relief upon a claim that gruesome photographs denied him a fundamentally fair trial.

2. State's Exhibit 219 (Live Photograph of Rob).

State's Exhibit 219 is a live photograph of Rob which was admitted at trial without objection pursuant to Okla. Stat. tit. 12, § 2403 (J. Tr. IX, 2150). Section 2403 provides in pertinent part that "in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive." Despite Oklahoma's evidentiary rule permitting its admission, Petitioner

asserts that the admission of this photograph was highly prejudicial and denied him a fundamentally fair trial, and he faults his appellate counsel for failing to raise the issue on appeal.

In his first post-conviction application, Petitioner raised a claim concerning appellate counsel's failure to challenge the admission of State's Exhibit 219. Petitioner asserted that appellate counsel should have challenged its admission on due process grounds and the constitutionality of Section 2403. Original Application for Post-Conviction Relief, No. PCD-2004-25, pp. 50-54. In denying relief, the OCCA made two holdings. One, the claim was barred by res judicata,[39] and two, the claim was without merit given its holding in *Marquez-Burrola v. State*, 2007 OK CR 14, 157 P.3d 749 (Okla. Crim. App. 2007). *Pavatt*, No. PCD-2004-25, slip op. at 6 & n.6. Respondent does not argue for the application of a procedural bar, but instead asserts that the claim should be given AEDPA deference and denied on the merits. Response, p. 127. In his Reply, Petitioner does not take issue with Respondent's position, but argues that the admission of State's Exhibit 219 was a violation of his constitutional rights. Reply, pp. 79-80.

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39. The OCCA noted that Petitioner's claim against his appellate counsel was the "scope of counsel's argument concerning admission of a 'live' photograph of the victim." *Pavatt*, No. PCD-2004-25, slip op. at 6 n.6. While not entirely clear, it is likely that the OCCA was referring to appellate counsel's challenge to the admission of gruesome photographs. In that proposition, appellate counsel requested that the OCCA "specifically review the photographs of Rob Andrew." Brief of Appellant, No. D-2003-1186, p. 35.

The Court finds that Petitioner has not shown that the decision of the OCCA denying him relief for this allegation of ineffective assistance of appellate counsel is contrary to or an unreasonable application of *Strickland. See* Ground Two, *supra* (discussing the application of *Strickland* to claims of ineffective assistance of appellate counsel). Although Petitioner asserts that his appellate counsel should have challenged the admission of State's Exhibit 219 pursuant to Section 2403, it is clear that based on the case cited by the OCCA in its denial of Petitioner's claim, *Marquez-Burrola*, 157 P.3d at 759-61, as well as other cases decided by the OCCA prior to Petitioner's appeal, *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143, 156-57 (Okla. Crim. App. 2007), and *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437, 452-53 (Okla. Crim. App. 2006), that Petitioner would not have prevailed on appeal had the claim been raised. *Robbins*, 528 U.S. at 285-86.

3. Remaining Evidentiary Challenges (State's Exhibits 46, 118, 184, and 205).

The balance of the evidentiary challenges raised in Petitioner's Ground Nine were not presented to the OCCA until Petitioner's second post-conviction application. Reply, pp. 79-80; Second Application for Post-Conviction Relief, No. PCD-2009-777, pp. 20-27. The OCCA declined to review the merits of these claims but held as follows:

> In Proposition 3, Petitioner claims he was denied a fair trial by the combined effect of gruesome photos of the murder victim, and a photo and video evidence showing the victim

before his demise. Petitioner concedes that on direct appeal, we rejected his claim that the post-mortem photographs of the victim were not unfairly gruesome. Nevertheless, he claims we have not considered whether the same photos were "unnecessarily cumulative and repetitive." (Petitioner's Application at 20) Petitioner also concedes that pre-mortem visual images of the victim, introduced at trial, were complained about in his previous post-conviction application. The current arguments merely modify or expand claims made, and rejected, in prior proceedings, and are therefore barred by the doctrine of *res judicata.*[FN4] *Turrentine v. State*, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989.

> FN4. Petitioner's complaint about the post-mortem photographs is something of a moving target. As we noted on direct appeal, Petitioner's concern at trial was more about the number of photographs than their nature. On direct appeal, Petitioner shifted focus, complaining about the gruesome nature of the photos individually, not about any cumulative adverse effect. We noted that the trial court did exclude some of the proffered photos at defense counsel's request, and concluded that the remaining photos were not unfairly prejudicial. *Pavatt*, 2007 OK CR 19, at ¶¶ 54-55, 159 P.3d at 289-90.

Pavatt, No. PCD-2009-777, slip op. at 4-5. For the reasons discussed in Ground Two, *supra*, the Court finds that these claims are barred from federal review.

4. Conclusion.

For the foregoing reasons, the Court finds that Petitioner is not entitled to relief on his Ground Nine. Relief is therefore denied.

J. Aggravating Circumstances (Grounds Ten through Fourteen).

In Grounds Ten through Fourteen, Petitioner raises various challenges to the aggravating circumstances supporting his death sentence. In Oklahoma, a jury's finding of at least one aggravating circumstance makes a defendant eligible for a death sentence; however, before imposing a death sentence, the jury must additionally find that the aggravating circumstances outweigh the mitigating circumstances. Okla. Stat. tit. 21, § 701.11 ("Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed."). In Petitioner's case, the jury found two aggravating circumstances: (1) that Petitioner "committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration," Okla. Stat. tit. 21, § 701.12(3); and (2) that "[t]he murder was especially

heinous, atrocious, or cruel," Okla. Stat. tit. 21, § 701.12(4) (O.R. XI, 2063). For the reasons set forth below, the Court finds that none of these grounds warrant habeas relief to Petitioner's sentence.

1. Insufficient Evidence (Grounds Ten and Twelve).

When reviewing the sufficiency of evidence supporting an aggravating circumstance, the OCCA applies the standard of review set forth in *Jackson*, 443 U.S. at 319. Thus, the OCCA "consider[s] the evidence in a light most favorable to the State, and determine[s] whether any rational juror could have found the existence of the challenged aggravating circumstance beyond a reasonable doubt." *Pavatt*, 159 P.3d at 294.

Jackson applies on habeas review as well. *Lewis v. Jeffers*, 497 U.S. 764, 781, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). "Like findings of fact, state court findings of aggravating circumstances often require a sentencer to 'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* at 782 (quoting *Jackson*, 443 U.S. at 319). Thus, the Court "'must accept the jury's determination as long as it is within the bounds of reason.'" *Lockett v. Trammel [sic]*, 711 F.3d 1218, 1243 (10th Cir. 2013) (quoting *Boltz*, 415 F.3d at 1232), *cert. denied*, U.S. , 134 S. Ct. 924, 187 L. Ed. 2d 799 (2014). As noted in Ground Three, *supra*, in addition to the deference afforded a jury's verdict, the AEDPA adds another layer of deference to the Court's review of a sufficiency claim. *See Hooks v.*

Workman, 689 F.3d 1148, 1166 (10th Cir. 2012) ("We call this standard of review 'deference squared.'") (citation omitted). When reviewing the evidentiary sufficiency of an aggravating circumstance under *Jackson*, the Court looks to Oklahoma substantive law to determine its defined application. *Hamilton v. Mullin*, 436 F.3d 1181, 1194 (10th Cir. 2006).

In Ground Ten, Petitioner challenges the sufficiency of the evidence supporting the jury's finding that Rob's murder was especially heinous, atrocious, or cruel. Petitioner contends that the aggravator is not supported by sufficient evidence because Rob's death occurred too quickly and because Brenda's statements to the 911 operator that Rob was conscious, breathing, and trying to talk are simply unbelievable. Petitioner also argues that because the OCCA found otherwise, it is evident that the OCCA applied the incorrect standard of review.

In denying Petitioner relief on direct appeal, the OCCA held as follows:

> In Propositions 14 and 15, [Petitioner] challenges the sufficiency of the evidence to support the two aggravating circumstances alleged by the State as warranting the death penalty. Such challenges are reviewed under the same standard as challenges to the evidence supporting a criminal conviction. We consider the evidence in a light most favorable to the State, and determine whether any rational juror could have found the existence of the

challenged aggravating circumstance beyond a reasonable doubt. *DeRosa*, 2004 OK CR 19 at ¶ 85, 89 P.3d at 1153; *Lockett v. State*, 2002 OK CR 30, ¶ 39, 53 P.3d 418, 430.

In Proposition 14, [Petitioner] claims the evidence was insufficient to support the jury's finding that the murder of Rob Andrew was "especially heinous, atrocious, or cruel." To establish this aggravator, the State must present evidence from which the jury could find that the victim's death was preceded by either serious physical abuse or torture. Evidence that the victim was conscious and aware of the attack supports a finding of torture. *Davis v. State*, 2004 OK CR 36, ¶ 39, 103 P.3d 70, 81; *Black v. State*, 2001 OK CR 5, ¶ 79, 21 P.3d 1047, 1074 (evidence that victim consciously suffered pain during and after stabbing was sufficient to support this aggravating circumstance); *Le*, 1997 OK CR 55 at ¶ 35, 947 P.2d at 550; *Romano v. State*, 1995 OK CR 74, ¶ 70, 909 P.2d 92, 118; *Berget v. State*, 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373. Our evaluation is not a mechanistic exercise. As we stated in *Robinson v. State*, 1995 OK CR 25, ¶ 36, 900 P.2d 389, 401:

> As much as we would like to point to specific, uniform criteria, applicable to all murder cases, which would make the application of the "heinous, atrocious or cruel" aggravator a

> mechanical procedure, that is simply not possible. Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was proved. Unfortunately, no two cases present identical fact scenarios for our consideration, therefore the particulars of each case become the focus of our inquiry, as opposed to one case's similarity to another, in resolving a sufficiency of the evidence claim supporting the heinous, atrocious or cruel aggravator.

The evidence presented at trial showed that Rob Andrew suffered numerous wounds resulting from two shotgun blasts, which damaged his internal organs. The medical examiner testified that either wound would have caused sufficient blood loss to be independently fatal, but that death was not instantaneous. When emergency personnel arrived, Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggested that he either tried to ward off his attacker or shield himself from being shot. Brenda Andrew called 911 twice after the shooting; together, the two calls spanned several minutes. During the second call, she claimed that her husband was still conscious and attempting to talk to her as he lay bleeding to death on the garage floor. All of these facts tend to show that Rob Andrew suffered serious

physical abuse, and was conscious of the fatal attack for several minutes. *See Ledbetter v. State*, 1997 OK CR 5, ¶ 53, 933 P.2d 880, 896 (evidence that murder victim was likely aware that she was about to be assaulted because defendant had attempted to kill her one week earlier, that she tried to defend herself from the fatal attack, and that she attempted to communicate with a neighbor after the attack was sufficient to show that the murder was especially heinous, atrocious or cruel).

After finding that the murder was accompanied by torture or serious physical abuse, the jury may also consider the attitude of the killer and the pitiless nature of the crime. *Lott*, 2004 OK CR 27 at ¶ 172, 98 P.3d at 358; *Phillips v. State*, 1999 OK CR 38, ¶ 80, 989 P.2d 1017, 1039. That the victim was acquainted with his killers is a fact relevant to whether the murder was especially heinous, atrocious, or cruel. In finding the murder in *Boutwell v. State*, 1983 OK CR 17, ¶ 40, 659 P.2d 322, 329 to be especially heinous, atrocious, or cruel, this Court observed:

> In this case the killing was merciless. The robbers planned well in advance to take the victim's life. Even more abhorrent and indicative of cold pitilessness is the fact that the appellant and the victim knew each other.

> We find the situation in the present case even more pitiless. Rob Andrew correctly suspected his wife of having an affair with a man he trusted as his insurance agent. He correctly suspected his wife and her lover of trying to wrest control of his life insurance away from him. He correctly suspected his wife and her lover of attempting to kill him several weeks before by severing the brake lines on his car. He confided in others that he was in fear of his life. Having separated from his wife, Rob Andrew was murdered as he returned to the family home to pick up his children for the Thanksgiving holiday. From the evidence, a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he died. The evidence supported this aggravating circumstance, and this proposition is denied.

Pavatt, 159 P.3d at 294-95.

First, there is no merit to Petitioner's claim that the OCCA applied an incorrect standard of review. As detailed above, it is clear that the OCCA applied *Jackson* and that it was the correct (and constitutional) standard to be applied.[40] Petitioner's arguments to the contrary

40. In asserting that the OCCA should have applied the reasonable hypothesis test instead of *Jackson*, Petitioner cites Instruction Number 8 given to the jury regarding its consideration of circumstantial evidence. However, Petitioner fails to note is that this instruction was given with respect to the continuing threat

have recently been reviewed and rejected by the Tenth Circuit in *Cole v. Trammell*, 755 F.3d 1142, 2014 U.S. App. LEXIS 3325, 2014 WL 595768, at *20-25 (10th Cir. Feb. 18, 2014). Second, as found by the OCCA, there was evidence from which the jury could conclude that the aggravator was satisfied. The medical examiner testified that Rob did not die instantaneously, that his injuries would have been painful, and that although Rob would have lost consciousness at some point due to blood loss, he could have suffered for several minutes. The medical examiner even acknowledged the consistency between his opinion and Brenda's statements in the second 911 call (J. Tr. X, 2457-58, 2463-64). As previously noted, in the second 911 call, which ended some six minutes after the first 911 call was made, Brenda said that Rob was bleeding a lot, but that he was conscious, breathing, and trying to talk (J. Tr. IX, 2148-49; State's Exhibit 34). Although Petitioner discounts Brenda's statements as unbelievable, characterizing her 911 calls as "simply poor acting," Petition, p. 149, Respondent correctly points out that whether to believe Brenda's statements or not was for the jury to decide. Moreover, pursuant to *Jackson*, it is axiomatic that the presented evidence is to be viewed "in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. Based on the presented evidence, and with acute awareness of the double deference applied by the Court in the resolution of this claim, the Court finds that Petitioner has not shown that this decision by the OCCA is contrary to or an unreasonable application of Supreme Court law.

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aggravator only (O.R. XI, 2055). *See* OUJI-CR (2d) 4-77 (directing that the applicable aggravating circumstance(s) be inserted).

Appendix D

In Ground Twelve, Petitioner challenges the sufficiency of the evidence supporting the jury's finding that Rob's murder was committed for remuneration or the promise of remuneration. Petitioner argues that the aggravator is not supported by sufficient evidence because there was no evidence that he would reap financial gain from Rob's death. He contends that even if Brenda was motivated to kill Rob for the insurance money, her motive cannot support the finding of the aggravator in his case. Petitioner additionally claims that Oklahoma's remuneration aggravator is unconstitutionally vague, and as with his challenge to the especially heinous, atrocious, or cruel aggravator, Petitioner also argues that the OCCA applied the incorrect standard of review to deny him relief.[41]

Like Petitioner's challenge to the sufficiency of the evidence supporting the especially heinous, atrocious, or cruel aggravator, the OCCA applied the *Jackson* standard of review to deny Petitioner relief on this challenge as well. *Pavatt*, 159 P.3d at 294. Applying *Jackson*, the OCCA held as follows:

> In Proposition 15, [Petitioner] contends the evidence is insufficient to support the jury's finding that the murder was motivated by "remuneration or the promise of remuneration,"

41. Respondent asserts that Petitioner has not fully exhausted his Ground Twelve. Response, p. 140. Nevertheless, Respondent has addressed all aspects of Petitioner's Ground Twelve and urged denial on the merits. Despite exhaustion issues, the Court believes that disposal of Petitioner's claim on the merits is the easier course. *See* 28 U.S.C. § 2254(b)(2).

as defined by 21 O.S.2001, § 701.12(3).[FN19] Relying on *Boutwell*, 1983 OK CR 17 at ¶¶ 30-38, 659 P.2d at 328-29, and *Johnson v. State*, 1982 OK CR 37, ¶¶ 38-41, 665 P.2d 815, 824, [Petitioner] claims that this aggravating circumstance should not apply to every situation where a murder was accompanied by some sort of financial gain, but rather, only where the murder was "primarily" motivated by the hope of financial gain.[FN20]

> FN19. This statute defines the aggravating circumstance as follows: "The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration."
>
> FN20. [Petitioner] relies on this passage from *Johnson*: "Murder for remuneration has also been applied to killings motivated primarily to obtain proceeds from an insurance policy, murder of a testator in order to secure a devise or legacy, and killings which occur in a kidnapping-extortion situation." *Johnson*, 1982 OK CR 37 at ¶ 40, 665 P.2d at 824.

Both *Boutwell* and *Johnson* involved murder during the commission of an armed robbery.

In each case, we held that the "murder for remuneration" aggravator should not be read so broadly as to apply to every situation where a person was killed during a pursuit for money or property, such as an armed robbery. However, we have held that the aggravator is squarely applicable where the killing was motivated by the hope of receiving life insurance proceeds. *See e.g. Stemple*, 2000 OK CR 4 at ¶¶ 2-10, 65, 994 P.2d at 65-66, 73 (evidence that defendant, who was having an extramarital affair, arranged to have his wife killed and hoped to collect life insurance proceeds held sufficient to establish this aggravating circumstance); *see also Plantz*, 1994 OK CR 33 at ¶¶ 41-42, 876 P.2d at 281 and *Bryson v. State*, 1994 OK CR 32, ¶ 50, 876 P.2d 240, 258-59 (evidence sufficient to support "murder for remuneration" aggravator, where wife (Plantz) and her boyfriend (Bryson) conspired and actually carried out plan to kill husband with the hope of obtaining insurance proceeds). The reason seems obvious to us and clearly within the letter and spirit of § 701.12(3). [FN21]

> FN21. Other jurisdictions have reached similar conclusions based on their own capital sentencing schemes. *Cf. People v. Michaels*, 28 Cal.4th 486, 122 Cal.Rptr.2d 285, 49 P.3d 1032, 1052 (2002) ("A killing for the purpose of obtaining life insurance benefits,

> as contrasted with a killing during a burglary or robbery, falls squarely within the scope of the financial gain special circumstance"); *Fitts v. State*, 982 S.W.2d 175, 188 (Tex. App.1998) (capital sentencing factor involving motive of "remuneration" or "promise of remuneration" is "not limited to murder-for-hire situations," but encompasses "a broad range of situations, including compensation for loss or suffering and the idea of a reward given or received because of some act"); *see also State v. Chew*, 150 N.J. 30, 695 A.2d 1301, 1312 (1997) ("[A]lmost every jurisdiction that has considered a broadly-worded pecuniary gain [capital sentencing] factor has applied the factor to killings to collect insurance proceeds").

[Petitioner] reads a passage in *Johnson* as requiring that the State to prove that financial gain was the "primary" motive for the murder. We disagree. Section 701.12(3) does not require the State to prove a financial motive to the exclusion or diminution of other possible motives. When read in context, the word "primarily" as used in *Johnson* distinguishes cases where the murder was merely incidental to a robbery or similar attempt to obtain property, as was the case in *Johnson* and *Boutwell*. We find the

situation in the companion cases of *Bryson* and *Plantz* more analogous, and language from *Plantz* readily applicable here:

> Evidence in the present case showed that the crime was motivated by financial gain. It was committed after the opportunity of weeks of reflection. It was not a crime of passion, nor was the murder committed as an afterthought while Appellant was in the course of committing another felony offense, such as robbery or burglary. The fact that Appellant was apprehended before she could actually collect the money does not obviate this aggravating circumstance.

Plantz, 1994 OK CR 33 at ¶ 42, 876 P.2d at 281 (emphasis added).

As in *Plantz*, the evidence in this case supports a finding that the murder of Rob Andrew was motivated by a desire to remove the third side of a love triangle, and reap financial gain from insurance proceeds in the process. The life insurance proceeds were no afterthought in this case. [Petitioner] was not only having an affair with the victim's wife; he was the victim's life insurance agent as well. As such, he was particularly well-positioned to try to transfer ownership of Rob Andrew's life insurance policy to Brenda in the months before the murder.

> [Petitioner] claims that as a mere paramour, he had no standing to benefit directly from any proceeds Brenda might receive. We find no merit to this argument either. The evidence showed that [Petitioner] hoped to enjoy a life with Brenda Andrew and her children without Rob Andrew's interference. [Petitioner] clearly hoped to partake of the insurance proceeds, even if he was not a contractual beneficiary. *See Bryson*, 1994 OK CR 32 at ¶ 50, 876 P.2d at 259. A rational juror could easily have found that the murder was committed with the hope of remuneration. *DeRosa*, 2004 OK CR 19 at ¶ 85, 89 P.3d at 1153. This proposition is denied.

Pavatt, 159 P.3d at 295-96.

As to the claim Petitioner raised on direct appeal, Petitioner's argument that there is simply insufficient evidence to support the remuneration aggravator, the Court finds that Petitioner has not shown that the OCCA's resolution of the claim is contrary to or an unreasonable application of *Jackson*. In the first stage, the jury found Petitioner guilty of conspiring with Brenda to kill Rob. As even Petitioner acknowledged on direct appeal, "the evidence of a conspiracy between himself and Brenda Andrew was an important part of the State's claim, in the *capital sentencing phase* of the trial, that the murder was committed for remuneration." *Pavatt*, 159 P.3d at 281. The evidence showed that Petitioner conspired with Brenda to make her the owner of Rob's $800,000 life insurance policy so that she could remain the primary beneficiary

of the policy upon Rob's death. The evidence also showed that Petitioner was a participant in a prior attempt to take Rob's life a month before the actual murder. Both Brenda and Petitioner expressed their hatred for Rob, and it was clear that they both wanted Rob dead so that they could move on with their lives together. Because Brenda was appalled at the suggestion of even having to take on a part time job (J. Tr. VI, 1468-69) and Petitioner was burdened with a substantial amount of credit card debt (J. Tr. VI, 1672-73; J. Tr. XI, 2763-67), neither had the financial means to live in the manner Brenda was accustomed to living.[42] Brenda wished that Rob "would just die so she could get the money and go on with her life" (J. Tr. VI, 1469-70), and according to Petitioner, life after Rob included Petitioner and Brenda getting married and having a child together (J. Tr. XI, 2835-36). Given all of this evidence, the Court finds that the OCCA's decision upholding the jury's determination that Petitioner killed Rob for remuneration or the promise of remuneration is a reasonable one. Given the deference afforded to the jury by *Jackson* as well as the AEDPA deference afforded to the OCCA's decision, Petitioner has not shown that he has been subjected to an "'extreme malfunction[]'" for which the great writ exists. *Richter*, 131 S. Ct. at 786.

Beyond his direct appeal claim, Petitioner makes additional arguments which are unmeritorious as well. First, as in his Ground Ten, Petitioner argues that the OCCA applied the wrong standard of review to his claim.

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42. Brenda admitted that she only stayed with Rob over the years because of the money. She did not want to lose her house and have to get a job (J. Tr. VI, 1468-69).

Petitioner asserts that the OCCA should have applied the reasonable hypothesis test instead of *Jackson's* rational juror test. For reasons previously noted in the denial of this same argument raised in Petitioner's Ground Ten, the Court finds no merit to the argument here. Second, Petitioner argues that Oklahoma's remuneration aggravator is unconstitutionally vague. However, vagueness review is very deferential, and "[a] s long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster." *Jones v. United States*, 527 U.S. 373, 400, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999) (citing *Tuilaepa v. California*, 512 U.S. 967, 973, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994)). Although Petitioner argues that the jury should have received an additional defining instruction on the remuneration aggravator, the Court finds that the jury was capable of understanding the remuneration aggravator by its plain language (O.R. XI, 2051). Finally, Petitioner argues that the OCCA incorrectly applied an accomplice theory of liability to find sufficient evidence supporting the remuneration aggravator in his case. Petition, p. 167. However, there is no indication in the OCCA's opinion that it did so, and in any event, the Court finds that Petitioner has not shown that any such application would be improper.[43]

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43. In support of his position, Petitioner cites only to a footnote contained in *Hawkins v. State*, 1994 OK CR 83, 891 P.2d 586 (Okla. Crim. App. 1994). In *Hawkins*, the OCCA did not find serious physical abuse, one of the prerequisites to finding the especially heinous, atrocious, or cruel aggravator, based on actions committed by Hawkins' co-defendant. The OCCA explained as follows: "We do not consider the multiple rapes of the victim while she was held

For the foregoing reasons, the Court finds that Petitioner has not established his right to relief on his Grounds Ten and Twelve. Accordingly, relief on these grounds is denied.

2. Challenges to the Especially Heinous, Atrocious, or Cruel Aggravator (Grounds Eleven and Thirteen).

In Ground Eleven, Petitioner complains about the instruction given to the jury regarding its consideration and application of the especially heinous, atrocious, or cruel aggravator (O.R. XI, 2052). Petitioner asserts error because the instruction failed to inform the jury that prior to finding the especially heinous, atrocious, or cruel aggravator, it was required to find the existence of conscious physical suffering beyond a reasonable doubt. In Ground Thirteen, Petitioner challenges Oklahoma's especially heinous, atrocious, or cruel aggravator on the ground that it is unconstitutionally vague on its

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captive in the barn, for the appellant did not commit them, and the record contains no evidence to connect him to them in any way." *Hawkins*, 891 P.2d at 597 n.3. Contrary to Petitioner's assertion, this footnote does not foreclose the application of accomplice liability for an aggravating circumstance. *Hawkins* does, however, stand for the proposition that a defendant cannot be held liable for an aggravating circumstance when the evidence fails to connect him in any way to the acts committed by his co-defendant. In Petitioner's case, there is no doubt that Petitioner was connected to the acts committed by Brenda as they conspired to kill Rob for the insurance proceeds. In addition, the Court notes Respondent's citation to authority that the OCCA has applied accomplice liability in other cases to find the satisfaction of an aggravating circumstance. Response, p. 147.

face. Both of these claims, however, were not presented to the OCCA until Petitioner's second post-conviction application. Reply, pp. 90, 103 n.20; Second Application for Post-Conviction Relief, No. PCD-2009-777, pp. 27-32. The OCCA declined to review the merits of these claims because each could have been raised in Petitioner's first post-conviction application. *Pavatt*, No. PCD-2009-777, slip op. at 5-6 (citing Title 22, Section 1089(D)(8)). For the reasons discussed in Ground Two, *supra*, the Court finds that these claims are barred from federal review.

Nevertheless, the Court additionally finds that neither ground has merit. With respect to Ground Eleven, the Court notes that in addition to applying a procedural bar to Petitioner's claim, the OCCA also noted the lack of merit to the claim as follows:

> In any event, we have rejected the same argument several times in the past. Petitioner essentially asks this Court to retroactively require an instruction that we promulgated — after Petitioner's conviction — in *DeRosa v. State*, 2004 OK CR 19, ¶¶ 91-97, 89 P.3d 1124, 1154-57. That instruction elaborates on the meaning of "heinous, atrocious, or cruel," and the relevant Uniform Jury Instruction already in existence (No. 4-73) was amended a year later. *DeRosa* was handed down several months after Petitioner's trial. *DeRosa* does not hold that the Uniform Jury Instruction on this issue, being used at the time of DeRosa's and Petitioner's trials, was materially deficient.

> *DeRosa*, 2004 OK CR 19, ¶ 97, 89 P.3d at 1156 ("This opinion should not be interpreted as a ruling that the former uniform instruction was legally inaccurate or inadequate"). This same attack on the *pre-DeRosa* version of OUJI-CR (2nd) No. 4-73 has been rejected several times by this Court. *Jackson v. State*, 2006 OK CR 45, ¶¶ 36-38, 146 P.3d 1149, 1161-63; *Browning v. State*, 2006 OK CR 8, ¶¶ 52-56, 134 P.3d 816, 843-45; *Rojem v. State*, 2006 OK CR 7, ¶¶ 68-73, 130 P.3d 287, 300-01.

Pavatt, No. PCD-2009-777, slip op. at 5 n.5. With respect to Ground Thirteen, the OCCA likewise noted that it had "rejected the same argument many times in the past." *Id.* at 6 n.6 (citing *Cole v. State*, 2007 OK CR 27, ¶ 37, 164 P.3d 1089, 1098)).

In order to satisfy the Eighth Amendment, an aggravating circumstance must meet two requirements: (1) it may not apply to every defendant convicted of murder; and (2) it may not be unconstitutionally vague. *Tuilaepa*, 512 U.S. at 972. As Petitioner duly notes, in 1987, the Tenth Circuit found that Oklahoma's especially heinous, atrocious, or cruel aggravator as then applied violated both of these requirements, *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987), and the Supreme Court agreed, *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). However, even before the Supreme Court issued its decision, Oklahoma narrowed its application. In *Stouffer v. State*, 1987 OK CR 166, 742 P.2d 562, 563 (Okla. Crim. App. 1987), Oklahoma "restrict[ed]

its application to those murders in which torture or serious physical abuse is present." Consistent with this change, the jury in Petitioner's case was specifically instructed that the aggravator was applicable "where the death of the victim was preceded by torture of the victim or serious physical abuse" (O.R. XI, 2052). *See Maynard*, 486 U.S. at 365 (acknowledging that limiting the heinous, atrocious, or cruel aggravator to cases involving some kind of torture or serious physical abuse would be constitutionally acceptable). As Respondent aptly notes, Response, p. 139 n. 15, since Oklahoma's imposition of a more narrow construction, the Tenth Circuit has repeatedly approved of the same, including the very instruction administered in this case. *Wilson*, 536 F.3d at 1108; *Workman v. Mullin*, 342 F.3d 1100, 1115-16 (10th Cir. 2003); *Hooks v. Ward*, 184 F.3d 1206, 1239-40 (10th Cir. 1999). *See also Miller*, 354 F.3d at 1300 (acknowledging and listing cases in which the Tenth Circuit has upheld Oklahoma's heinous, atrocious, or cruel aggravator since *Maynard*); *Medlock*, 200 F.3d at 1321 ("We have held that the 'heinous, atrocious, or cruel' aggravating circumstance as narrowed by the Oklahoma courts after *Maynard* to require torture or serious physical abuse characterized by conscious suffering can provide a principled narrowing of the class of those eligible for death."). While Petitioner has argued otherwise, he has not presented any valid argument to overcome this abundant and controlling authority.

3. Appellate Counsel Ineffectiveness (Ground Fourteen).

In Ground Fourteen, Petitioner argues that Supreme Court authority [44] requires Oklahoma capital juries to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and he faults his appellate counsel for not raising this claim on direct appeal. Petitioner presented this claim to the OCCA in his first application for post-conviction relief. Original Application for Post-Conviction Relief, No. PCD-2004-25, pp. 70-76. Because the OCCA denied relief upon a merits application of *Strickland*, Respondent asserts that Petitioner has failed to show that the OCCA's decision is contrary to or an unreasonable application of *Strickland*.

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44. Petitioner cites to *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In *Jones*, the Supreme Court interpreted the federal carjacking statute as setting forth three separate offenses, "each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones*, 526 U.S. at 252. In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Ring*, the Court applied *Apprendi* to capital defendants. "Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589.

Appendix D

In denying Petitioner relief on his claim, the OCCA found that appellate counsel was not deficient in failing to raise this claim because the claim had no merit. The OCCA referenced its decision in *Wood v. State*, 2007 OK CR 17, 158 P.3d 467, 475 (Okla. Crim. App. 2007), wherein it rejected the very argument Petitioner contends his appellate counsel should have made. *Pavatt*, No. PCD-2004-25, slip op. at 7 n.7. In *Wood*, 158 P.3d at 475, the OCCA not only noted the lack of merit to the claim, but it also noted its repeated rejection of the claim in at least four other published cases.

In addition to the ample OCCA authority on the issue, the Tenth Circuit has also addressed the issue and specifically rejected it as well in both *Lockett*, 711 F.3d at 1252-55, and *Matthews v. Workman*, 577 F.3d 1175, 1195 (10th Cir. 2009). While acknowledging this contrary authority, Petitioner's position is simply that both courts are wrong because their decisions are contrary to *Ring*. Reply, p. 109. The Court disagrees.

In *Ring*, the Supreme Court addressed a capital defendant's right to a jury trial. The Court reviewed an Arizona procedure which allowed the trial judge, alone and after a jury verdict finding a defendant guilty of first degree murder, to determine the appropriate sentence. Under Arizona law, a death sentence could not be imposed unless at least one aggravating circumstance was found beyond a reasonable doubt. *Ring*, 536 U.S. at 588, 597. At the sentencing hearing, to be conducted by the same judge who tried the case, the judge was directed to evaluate both the aggravating and mitigating circumstances. The judge

was then authorized to impose a sentence of death "only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.* at 593 (citation omitted). The judge found two aggravating circumstances and one mitigating circumstance. Finding that the mitigating circumstance did not warrant leniency, the judge sentenced Ring to death. *Id.* at 594-95.

The Supreme Court found that Arizona's capital procedure violated the Sixth Amendment. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." *Id.* at 602. Because Arizona law provides that a death sentence is unauthorized in the absence of at least one aggravating circumstance, the Court found that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'. . . [and therefore] the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (quoting *Apprendi*) (citation omitted).

Ring's focus is on death eligibility, not the ultimate, highly discretionary sentencing decision. The issue in *Ring* was the judicial determination of the prerequisite for the death penalty — that particular finding which allowed the defendant's sentence to be enhanced. While the judge in *Ring* not only made this finding but weighed the aggravators and mitigators as well, the Supreme Court did not address this additional consideration or in any way imply that the weighing process was subject to its holding.

In addition, Supreme Court precedent establishes "that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." *Kansas v. Marsh*, 548 U.S. 163, 174, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). The Supreme Court has "'never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'" *Id.* at 175 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988)). In the present case, the jury found beyond a reasonable doubt two aggravators which supported the imposition of a death sentence (O.R. XI, 2063). Supreme Court precedent requires nothing more.

The Tenth Circuit reached this same conclusion in *Matthews*. In *Matthews*, an Oklahoma capital habeas petitioner, relying on both *Apprendi* and *Ring*, argued that his jury should have been instructed to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Without this determination, Matthews argued his death sentence was invalid. Relying on its decision in *United States v. Barrett*, 496 F.3d 1079, 1107 (10th Cir. 2007), the Tenth Circuit found no merit to the claim. In particular, the Court found that the jury's weighing of the factors in aggravation and mitigation "is not a finding of fact subject to *Apprendi* but a 'highly subjective, largely moral judgment regarding the punishment that a particular person deserves.'" *Matthews*, 577 F.3d at 1195 (quoting *Barrett*). In *Lockett*, 711 F.3d at 1252-55, the Tenth Circuit reaffirmed its position on this issue.

In light of the foregoing authority, the Court finds that Petitioner has not shown that the decision of the OCCA denying him relief for this allegation of ineffective assistance of appellate counsel is contrary to or an unreasonable application of *Strickland*. *See* Ground Two, *supra* (discussing the application of *Strickland* to claims of ineffective assistance of appellate counsel). Because the underlying claim which Petitioner faults his appellate counsel for not raising is without merit under both OCCA and Tenth Circuit precedent, it is abundantly clear that the OCCA reasonably concluded that appellate counsel had not been deficient in failing to raise this claim on direct appeal. *See Freeman v. Att'y Gen.*, 536 F.3d 1225, 1233 (11th Cir. 2008) ("A lawyer cannot be deficient for failing to raise a meritless claim. . . ."); *Snow*, 474 F.3d at 724-25 (trial counsel was not ineffective for failing to object to certain evidence which the OCCA found admissible); *Spears*, 343 F.3d at 1249 (trial counsel was not ineffective for failing to object to the giving of a flight instruction where the OCCA found that sufficient evidence supported the giving of the instruction).

4. Conclusion.

For the foregoing reasons, the Court denies relief to Petitioner on his Grounds Ten, Eleven, Twelve, Thirteen, and Fourteen. Having found that none of Petitioner's challenges to the aggravating circumstances supporting his death sentence warrant habeas relief, Petitioner's request to be relieved of his death sentence is hereby denied.

K. Ineffective Assistance of Trial and Appellate Counsel (Ground Fifteen).

In Ground Fifteen, Petitioner alleges nine instances of trial counsel ineffectiveness and nineteen instances of appellate counsel ineffectiveness. For the reasons set forth below, the Court finds that none of these grounds warrant habeas relief.

1. Trial Counsel Ineffectiveness.[45]

Three of Petitioner's nine allegations of trial counsel ineffectiveness are clearly procedurally barred from habeas review because Petitioner did not present them

45. Throughout the pleadings, the parties have debated whether Petitioner had the same counsel at trial and on appeal and how that determination affects the Court's consideration of various claims. The parties' obvious concern is the application of the Tenth Circuit's decision in *English v. Cody*, 146 F.3d 1257 (10th Cir. 1998). In *English*, the Tenth Circuit found that "[t]he Oklahoma requirement that a claim of ineffective assistance of trial counsel be raised on direct appeal is an adequate ground for procedural default if (1) the defendant's counsel on direct appeal is different from trial counsel and (2) the claims can be resolved on the trial record alone." *Welch v. Workman*, 639 F.3d 980, 1012 (10th Cir. 2011) (citing *English*, 146 F.3d at 1263). The Court need not decide whether Petitioner had the same counsel at trial and on appeal because *English* is simply not applicable here. *English* addresses the adequacy of a procedural bar to ineffective assistance of trial counsel claims not raised on direct appeal, and the Court has not barred any of Petitioner's trial counsel claims for this reason. Many of Petitioner's trial counsel ineffectiveness claims have been barred due to Petitioner's failure to present them in his first post-conviction application. *English* does not prevent the application of this procedural default.

to the OCCA until his second post-conviction application. As even Petitioner himself acknowledges, Petitioner's first, second, and eighth instances concerning trial counsel's (1) failure to adequately challenge Petitioner's confession letter (State's Exhibit 222) (Petitioner's "B"), (2) failure to adequately challenge the State's forensic bullet evidence (Petitioner's "C"), and (3) failure to conduct a meaningful mitigation investigation and present a meaningful mitigation case (Petitioner's "I") had not been presented to the OCCA at the time he filed his Petition but were thereafter presented in a second post-conviction application filed in 2009. Reply, pp. 120, 124, 132-33; Second Application for Post-Conviction Relief, No. PCD-2009-777, pp. 34-37, 39-48. The OCCA denied relief on these claims because all were capable of being presented in his original application for post-conviction relief. *Pavatt*, No. PCD-2009-777, slip op. at 6-7 (citing § 1089(D)(8)). For the reasons discussed in Ground Two, *supra*, the Court finds that these claims are barred from federal review.

Petitioner's third through seventh instances require more discussion due to their relation to other claims raised in the Petition. In his third instance (Petitioner's "D"), Petitioner asserts that his trial counsel was ineffective for failing to object to all of the hearsay evidence admitted against him. In support of this claim, Petitioner refers to his second ground for relief. In Ground Two, Petitioner, with reference to thirty-five hearsay statements detailed therein, claims that his trial counsel was ineffective for failing to object to the admission of this testimony. Petition, pp. 70-72. However, in adjudication of Ground Two, *supra*, the Court found that Petitioner did not raise

a claim regarding his trial counsel's ineffectiveness with relation to the hearsay evidence until his second post-conviction application. Thus, for the reasons fully set out therein, the Court has already determined this instance of trial counsel ineffectiveness to be procedurally barred.

In his fourth instance (Petitioner's "E"), Petitioner asserts that his trial counsel was ineffective for failing to object to the admission of live photographs of Rob. In Ground Nine, Petitioner raises an evidentiary challenge to the admission of this evidence. Respondent correctly points out that although Petitioner raised an *appellate counsel* claim with respect to *one* of these photos (State's Exhibit 219), *see* Ground Nine, *supra*, he did not allege that his trial counsel was ineffective in any way with respect to these photographs until his second post-conviction relief application. Second Application for Post-Conviction Relief, No. PCD-2009-777, pp. 37-38. The OCCA denied relief on this claim because it was capable of being presented in his original application for post-conviction relief. *Pavatt*, No. PCD-2009-777, slip op. at 6-7 (citing § 1089(D)(8)). Therefore, for the reasons discussed in Ground Two, *supra*, the Court finds that this claim is barred from federal review as well.

In his fifth instance of trial counsel ineffectiveness (Petitioner's "F"), and with relation to Ground One, Petitioner asserts that although trial counsel renewed his request for a change of venue at the start of the trial, he failed to provide the trial court with "evidence of the extensive and continuing media coverage that occurred after the change of venue hearing, but before the jury was seated." Petition, p. 197. Respondent asserts that this claim,

along with a claim of appellate counsel ineffectiveness as well, was presented to the OCCA in Petitioner's original application for post-conviction relief. Original Application for Post-Conviction Relief, No. PCD-2004-25, pp. 29-32. In denying relief, the OCCA made two holdings. One, the claim was barred by res judicata, and two, the claim was without merit because "the record shows that those who actually served on Petitioner's jury could be fair and impartial. . . ." *Pavatt*, No. PCD-2004-25, slip op. at 6 & n.6 (citing *Pavatt*, 159 P.3d at 280). Respondent does not argue for the application of a procedural bar, but instead asserts that the claim should be given AEDPA deference and denied on the merits. Response, pp.159-60. In his Reply, Petitioner asserts that the OCCA's determination of this claim is unclear and therefore no deference should be applied. Reply, pp. 117-18.

Regardless of the deference applied to this claim, however, the Court finds itself in agreement with the OCCA's ultimate conclusion. As previously noted in Ground One, *supra*, despite extensive pretrial publicity, an examination of the voir dire proceedings clearly shows that the impact on the jury pool was surprisingly less than what would have been expected, and because the trial court was able to seat an impartial jury, the Court cannot conclude that trial counsel's failure to provide the trial court with evidence of the intervening pretrial publicity was either deficient or prejudicial.[46] Relief on this fifth instance is therefore denied.

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46. As noted in Ground One, the trial judge, as a member of the community herself, was very mindful of the media attention the case was receiving (M. Tr. 7/24/03, 5; J. Tr. I, 58). Therefore, while presentation of additional evidence of the pretrial publicity may have

In his sixth instance of trial counsel ineffectiveness (Petitioner's "G"), and with relation to Ground Eight, Petitioner faults his trial counsel for not following through with requests for jury instructions which would have further defined for the jury the meanings of life and life without parole. Respondent asserts that this claim is unexhausted because it was not presented on direct appeal or in Petitioner's original application for post-conviction relief. Response, p. 161. In his Reply, Petitioner does not address the matter of exhaustion, and unlike other claims, Petitioner does assert that this claim was presented in his second post-conviction application. Reply, pp. 129-30. Because it is clear that Petitioner has never presented this claim to the OCCA and because presentation of the claim now in a third post-conviction application would be undoubtedly barred, the Court finds that this claim is subject to an anticipatory procedural bar. *Lott*, 705 F.3d at 1179.

In his seventh instance of trial counsel ineffectiveness (Petitioner's "H"), and with relation to Ground Seven, Petitioner asserts that his trial counsel was ineffective in failing to object to the claims of prosecutorial misconduct set forth in his Ground Seven. In Ground Seven, Petitioner details eight claims of prosecutorial misconduct. A review of these claims reveals that (1) trial counsel objected to the third claim regarding the testimony of Agent Stoner; (2) Petitioner raised on direct appeal the issue of trial

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been optimal, it was not ultimately detrimental to the trial court's decision to proceed to voir dire (or in the case of appellate counsel's ineffectiveness, the absence of this evidence on appeal did not affect the outcome of Petitioner's appeal).

counsel ineffectiveness with respect to the sixth, seventh, and eighth claims; (3) Petitioner raised in his second post-conviction application the issue of trial counsel ineffectiveness with respect to his first, second, and fifth claims; and (4) Petitioner has never raised the fourth claim, substantively or through a claim of trial counsel ineffectiveness. Accordingly, the Court finds as follows: (1) because trial counsel objected to Agent Stoner's testimony, there is no related claim of trial counsel ineffectiveness to address; (2) Petitioner has not shown that the OCCA was unreasonable in its application of *Strickland* to Petitioner's claim that trial counsel was ineffective for failing to object to his sixth, seventh, and eighth claims of prosecutorial misconduct;[47] (3) because Petitioner did not

47. In denying Petitioner relief, the OCCA held as follows:

> [Petitioner's] ineffective-counsel claim fails as well. To prevail on this claim, [Petitioner] must demonstrate that (1) counsel acted in a professionally unreasonable manner by failing to object to the prosecutor's comments, and (2) a reasonable possibility exists that a different sentencing outcome would have resulted if counsel had objected. *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S. Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984); *Dodd*, 2004 OK CR 31 at ¶ 112, 100 P.3d at 1049. As we have found that the prosecutor's comments were not improper, any defense objection to them would have been properly overruled and the ultimate outcome unchanged. Defense counsel was not ineffective for failing to object to comments which were not objectionable. *Short v. State*, 1999 OK CR 15, ¶ 85, 980 P.2d 1081, 1106-07. These propositions are denied.

Pavatt, 159 P.3d at 292 (footnote omitted).

challenge trial counsel's ineffectiveness with respect to his first, second, and fifth claims of prosecutorial misconduct until his second post-conviction application, this claim is procedurally barred;[48] and (4) because Petitioner has never challenged trial counsel's actions with respect to his fourth claim of prosecutorial misconduct, it is subject to an anticipatory procedural bar, *Lott*, 705 F.3d at 1179.

In his final instance of trial counsel ineffectiveness (Petitioner's "J"), Petitioner alleges that his trial counsel was ineffective for a comment made during second stage argument.[49] Petitioner also contends that his trial counsel was ineffective with respect to a comment made by a second stage mitigation witness.

The ineffectiveness issue regarding trial counsel's comment was raised on direct appeal and denied by the OCCA on the merits as follows:

> In Proposition 13, [Petitioner] claims trial counsel rendered deficient performance through a single comment made in punishment-stage opening statement:

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48. The OCCA denied relief on this claim because it was capable of being presented in his original application for post-conviction relief. *Pavatt*, No. PCD-2009-777, slip op. at 6-7 (citing § 1089(D)(8)).

49. The multiple references to the comment being made as a part of trial counsel's opening statement are inaccurate. The comment was made during second stage closing argument (J. Tr. XV, 3758).

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> May it please the Court, Counsel, ladies and gentlemen of the jury. I think this task is probably one of the hardest for a defense attorney to do because it puts you in a position of talking to a jury that obviously didn't agree with your assertion of your defense. But nonetheless it's my obligation to stand here and to go over some of the same issues that we've had to talk about before.

We first consider whether counsel's comment was professionally unreasonable, and if so, whether there is a reasonable possibility that the comment affected the outcome of the punishment stage. *Strickland*, 466 U.S. at 687-89, 104 S. Ct. at 2064-65, 80 L.Ed.2d 674. [Petitioner] contends that in this comment, defense counsel conceded that he was only advocating for [Petitioner] out of obligation, and that the death penalty was a foregone conclusion. We disagree on both counts.

Counsel's comment was typical of those often seen in bifurcated trials (where the issue of punishment is reserved until after a finding of guilt), and in capital cases in particular. In those situations, the defendant and his counsel must eventually abandon the fight over guilt or innocence, accept the jury's verdict on that score, and move on to arguments related to punishment. The "obligation" counsel refers to in the quoted

passage is clearly not an obligation to defend a person he believes his guilty or deserving of the death penalty. As we read the passage, counsel was simply reiterating his belief in his client's cause, and expressing disappointment that the jury did not share his belief.

Nor do we read counsel's comment as a concession that the death penalty was inevitable. Rather, counsel was asking the jurors to indulge his references to guilt-stage evidence, even though they had rejected the defense theory, because some of that evidence was relevant to punishment as well.[FN18] Far from being any sort of concession, counsel's comment evinced an unflagging determination to defend his client. Counsel's comment was neither unreasonable, unprofessional, nor prejudicial. *Strickland*, 466 U.S. at 687-89, 104 S. Ct. at 2064-65, 80 L.Ed.2d 674 (1984); *Kelsey v. State*, 1987 OK CR 206, ¶ 4, 744 P.2d 190, 191-92. This proposition is denied.

> FN18. Evidence relating to both aggravating circumstances was presented in the guilt stage of trial, and that evidence was formally incorporated into the punishment stage. In fact, the punishment stage evidence was essentially limited to victim-impact and mitigation witnesses.

Pavatt, 159 P.3d at 293-94.

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Asserting that the OCCA's decision is an unreasonable determination of the facts, Petitioner claims that had the OCCA known "the woeful inadequacy of trial counsel's investigation" based on "additional outside the record evidence," it would have equated this comment by trial counsel as "a flag of surrender." Petition, p. 210; Reply, p. 132. The fallacy of this argument is ever apparent. The OCCA cannot be faulted for unreasonably determining facts based on evidence *outside* of the record. *See* 28 U.S.C. § 2254(d)(2) (the determination of whether a decision is an unreasonable determination of the facts is made "in light of the evidence presented in the State court proceeding"). The OCCA examined the comment in light of the trial record, and Petitioner has not shown that its decision to deny relief is based on an unreasonable determination of the facts or an unreasonable application of *Strickland*.

Regarding the comment made by a mitigation witness, Respondent correctly points out that the substantive claim to the witness's comment was raised and rejected by the OCCA on direct appeal. *See Pavatt*, 159 P.3d at 293. However, the issue of trial counsel's ineffectiveness with respect to the witness's comment is unexhausted because it was not presented on direct appeal or in Petitioner's original application for post-conviction relief. Response, p. 176. Petitioner makes no mention of this claim in his Reply. Because it is clear that Petitioner has never presented this claim to the OCCA and because presentation of the claim now in a third post-conviction application would be undoubtedly barred, the Court finds that it is subject to an anticipatory procedural bar. *Lott*, 705 F.3d at 1179.

2. Appellate Counsel Ineffectiveness.

Aptly describing Petitioner's appellate counsel claim as a "laundry list," Respondent asserts that to the extent these claims were not otherwise effectively argued in connection with other presented grounds for relief, this Court should decline to review these claims due to their inadequate and cursory presentation. Respondent, pp. 177-78. The Court is wholly in agreement.

Petitioner's list of appellate counsel errors includes such vague references as "failed to raise the error in the admission of irrelevant evidence," "did not identify all the prosecutorial misconduct that there was," "failed to raise issues relating to evidentiary foundations of evidence," and "failed to conduct any investigation or interview any potential witnesses." Petition, p. 211. In his Reply, Petitioner's counsel asserts that "[i]t is not necessary to separately analyzed [sic] direct appeal counsel's failures when they have been set forth in relationship to the claims presented separately, and adopted from the arguments presented to the state by post-conviction counsel." Reply, p. 145. While the Court agrees with Petitioner (and Respondent) on the first point, the Court rejects Petitioner's second assertion that his bullet points of error constitute sufficient pleading.[50] The Court declines to pour over the state court record in an attempt to discern what irrelevant evidence appellate counsel failed to object to,

50. Despite the assertion that these errors are adopted from arguments presented in state post-conviction proceedings, there is not a single citation to the state court record in support of this ground for relief. Petition, pp. 210-12.

what additional prosecutorial misconduct claims could have been raised, what further investigation could have been conducted, etc.

As repeatedly noted herein, under the AEDPA, Petitioner bears the burden of establishing his entitlement to relief, and with respect to ineffectiveness claims, this burden is exponentially increased. Therefore, to the extent Petitioner has effectively presented allegations of appellate counsel ineffectiveness within his other fourteen grounds for relief, they have been appropriately addressed herein. However, regarding the snippets of appellate counsel errors set forth in his Ground Fifteen, the Court declines to address them as they fall woefully short of acceptable presentation, especially in light of the AEDPA standard and Petitioner's representation by appointed learned counsel (who, with the exception of this ground for relief, have presented Petitioner's request for habeas relief with an overabundance of argument and authority in a 216-page Petition and a 146-page Reply).[51] *Richie v. Sirmons*, 563 F.Supp.2d 1250, 1313-14 (N.D. Okla. 2008)

51. This leads the Court to believe that Petitioner's counsel has determined that these appellate counsel claims are not among Petitioner's stronger grounds for relief. *Cf. Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983), for the proposition that "the hallmark of effective appellate advocacy" is the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail."). The Court notes that since the filing of Petitioner's case, the Court has established page limitations for capital habeas cases. *See* General Order 10-1. A beneficial byproduct of this order will be the necessity of habeas counsel to winnow through a petitioner's claims.

("Petitioner's cursory treatment of his general claim of ineffective assistance of appellate counsel provides no basis for an analysis by this Court. Generalized allegations are insufficient to establish a violation of a constitutional right."). *Cf. Lockett*, 711 F.3d at 1230 (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir.2007), "'[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief.'"); *Hooks*, 689 F.3d at 1173 n.12 (same); *LaFevers v. Gibson*, 182 F.3d 705, 725 (10th Cir. 1999) ("We have repeatedly warned litigants that issues adverted to in a perfunctory manner and without developed argumentation are deemed waived on appeal.").

3. Conclusion.

For the reasons set forth above, the Court finds that Petitioner has failed to establish his right to relief. Accordingly, Ground Fifteen is denied.

V. Motions for Discovery and Evidentiary Hearing.

With respect to Grounds One, Four, Five, Seven, and Fifteen, Petitioner has made requests for both discovery and an evidentiary hearing.[52] Docs. 43 and 55. With due consideration of these motions, along with the multiple responses, replies, and further supplemental pleadings which have been filed with respect thereto, the Court

52. Although Petitioner originally sought an evidentiary hearing with respect to Ground Nine, he effectively withdrew that request in his reply. Doc. 78 at 6-7.

denies the requests because, as fully discussed herein, they are not necessary to the Court's resolution of these five grounds.

Regarding discovery, "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). Thus, Rule 6(a) of the Rules Governing Section 2254 Cases in the United District Courts provides that discovery may be permitted in a habeas proceeding only upon a showing of "good cause." As the Supreme Court acknowledged in *Bracy*, Rule 6 is meant to be consistent with *Harris v. Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969). *Id.* at 909. In *Harris*, the Supreme Court held that adequate inquiry should be permitted "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief. . . ." *Harris*, 394 U.S. at 300. *See Wallace v. Ward*, 191 F.3d 1235, 1245 (10th Cir. 1999) (citing *Bracy*); *LaFevers*, 182 F.3d at 723 (citing *Harris* and *Bracy*). Moreover, "[t]he purpose of an evidentiary hearing is to resolve conflicting evidence." *Anderson v. Att'y Gen. of Kansas*, 425 F.3d 853, 860 (10th Cir. 2005). Thus, if there is no conflict, or if the claim can be resolved on the record before the Court, then an evidentiary hearing is unnecessary. *Id.* at 859.

With respect to Ground One, Petitioner's pretrial publicity claim, Petitioner requests an evidentiary hearing "to establish the frequency, nature, and content of the

publicity which occurred in the print and electronic media between the change of venue hearing [held in January 2003] and the time of [his] trial [which began in August 2003]." Petitioner contends that "[t]his evidence will establish the impact these stories . . . must have had upon the jury deciding his case." Doc. 55 at 2. In order to obtain this evidence, Petitioner also requests a subpoena directed to "media sources serving Oklahoma County." Doc. 43 at 7. As discussed in both Ground One and Ground Fifteen (in connection with a related trial counsel ineffectiveness claim), *supra*, voir dire confirms that despite the pretrial publicity, an impartial jury was selected to hear Petitioner's case. A review of the media produced in the months preceding the trial will have no impact on this well-supported record determination.

With respect to Ground Four, Petitioner's claim that he was denied the right to present a defense by the trial court's exclusion of third-party perpetrator evidence, Petitioner seeks the opportunity to depose the prosecutor, Fern Smith, and Mr. Wood, the alleged third-party perpetrator, about Mr. Wood's confession. In related claims, Petitioner also seeks subpoenas to obtain "[a]ny information known to the Oklahoma County District Attorney's Office, Oklahoma City Police Department, Oklahoma County Sheriffs's Office, or the FBI, that [1] [Petitioner] did not shoot and kill Rob Andrew . . . [and] [2] that [Mr. Wood], Brenda Andrew or some person other than Petitioner shot and killed Rob Andrew. . . ." Doc. 43 at pp. 7-8. Finally, Petitioner requests an evidentiary hearing to "present the testimony of [Mr. Wood], the letters that he authored, and the testimony of Detention Officer

Holisak who maintains [Mr. Wood] wrote the letters and confessed to the homicide of Rob Andrew." Doc. 55 at 3. For the reasons discussed in Ground Four, *supra*, the Court finds the information Petitioner seeks to obtain and present is simply more of the same information which was deemed insufficient to support admission of the evidence. Petitioner still fails to offer any corroborating evidence for Mr. Wood's confession. Moreover, the Court finds that Petitioner's requests to obtain any information known by law enforcement agencies that he did not kill Rob, and who instead may have done it, are best characterized as fishing expeditions which the Court will not permit. *Teti v. Bender*, 507 F.3d 50, 60 (1st Cir. 2007) ("A habeas proceeding is not a fishing expedition."); *Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000) (noting that Rule 6 is not meant for fishing expeditions and that "factual allegations must be specific, as opposed to merely speculative or conclusory").

With respect to Ground Five, Petitioner's claim that his appellate counsel was ineffective for failing to raise claims on appeal regarding the State's handwriting expert, Petitioner seeks an evidentiary hearing to "present testimony concerning the unreliability and lack of empirical support for handwriting identification . . . [and] that there was no strategic reason for failure to raise the issue on direct appeal." Doc. 55 at 4. In the adjudication of Petitioner's Ground Five, the Court found that the OCCA did not unreasonably apply *Strickland* to find that appellate counsel was not ineffective in this instance. In denying Petitioner's claim, the OCCA found Petitioner had failed to show that he was prejudiced by

appellate counsel's omission of the claims in the absence of controlling authority that would have prevented admission of the evidence. Therefore, even if Petitioner were to demonstrate that appellate counsel had no strategic reason for omitting the claims, such demonstration would relate only to the issue of deficient performance. Because the OCCA assumed deficient performance and denied Petitioner's claim due to a lack of prejudice, the purposes for which Petitioner seeks an evidentiary hearing on this claim both are collateral and unnecessary to the adjudication of Petitioner's Ground Five.

With respect to Ground Seven, Petitioner seeks both discovery and an evidentiary hearing regarding his second allegation of prosecutorial misconduct labeled "Use of Bullet Evidence." Petition, pp. 105-10; Doc. 55 at 4-5; Doc. 43 at 7-8. Because the Court has procedurally barred this claim due to Petitioner's failure to present it to the OCCA until his second post-conviction application, neither discovery nor an evidentiary hearing is warranted on this claim.

With respect to Ground Fifteen, Petitioner seeks an evidentiary hearing on the issue of trial counsel ineffectiveness. Doc. 55 at 6-8. Petitioner's initial request is that he be granted an evidentiary hearing to make a general showing that his trial counsel lacked the qualifications and experience to serve as qualified counsel. However, Petitioner has failed to show why an evidentiary hearing is needed to present this evidence and how it is

relevant to any particular claim of ineffectiveness raised.[53] Irrespective of how many capital defense seminars trial counsel may have attended or how many capital cases he may have previously tried, the question under *Strickland* is whether trial counsel rendered deficient performance in Petitioner's trial and if so, whether it resulted in prejudice to Petitioner. There is no per se rule of ineffectiveness based on an attorney's qualifications and experience. *But see United States v. Bergman*, 599 F.3d 1142, 1148 (10th Cir. 2010) (" adopt[ing] a *narrow* per se rule of ineffectiveness where a defendant is, unbeknownst to him, represented by someone who has not been admitted to any bar based on his 'failure to ever meet the substantive requirements for the practice of law'") (citation omitted).

Petitioner's remaining requests with respect to his Ground Fifteen relate to his first, second, and eighth allegations of trial counsel ineffectiveness. Petition, pp. 188-95, 199-211 (wherein Petitioner has alleged that his trial counsel was ineffective with respect to his confession letter, the bullet evidence, and in the investigation and presentation of his mitigation case). Because the Court has procedurally barred these claims due to Petitioner's failure to present them to the OCCA until his second post-conviction application, an evidentiary hearing on these claims is clearly unwarranted.

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53. The Court notes that Petitioner has made a similar request with respect to his appellate counsel in a supplemental motion. Doc. 85. It is likewise denied.

Appendix D

VI. Conclusion.

After a thorough review of the entire state court record, the pleadings filed herein, and the applicable law, the Court finds that Petitioner is not entitled to his requested relief. Accordingly, Petitioner's Petition (Doc. 49), motion for discovery (Doc. 43), and motion for an evidentiary hearing (Doc. 55) are hereby **DENIED.** A judgment will enter accordingly.

IT IS SO ORDERED this 1st day of May, 2014.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX E — OPINION DENYING SECOND APPLICATION FOR POST-CONVICTION RELIEF AND APPLICATION FOR EVIDENTIARY HEARING IN THE OKLAHOMA COURT OF CRIMINAL APPEALS, FILED FEBRUARY 2, 2010

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case No. PCD-2009-777

JAMES DWIGHT PAVATT,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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

C. JOHNSON, PRESIDING JUDGE:

Petitioner, James Dwight Pavatt, was convicted by a jury in Oklahoma County District Court, Case No. CF-2001-6189, of First Degree Murder (21 O.S.2001, § 701.7) (Count 1) and Conspiracy to Commit First Degree Murder (21 O.S.2001, § 421) (Count 2). The jury found the existence

of two aggravating circumstances, and recommended a sentence of death on Count 1.[1] As to Count 2, the jury recommended ten years imprisonment and a $5000 fine. The trial court sentenced accordingly on October 21, 2003. This Court affirmed Petitioner's convictions and sentences on direct appeal. *Pavatt v. State,* 2007 OK CR 19, 159 P.3d 272. Petitioner sought *certiorari* review by the United States Supreme Court, which was denied. *Pavatt v. Oklahoma,* _ U.S. _, 128 S.Ct. 1229, 170 L.Ed.2d (2008). Petitioner sought post-conviction relief from this Court, which was denied. *Pavatt v. State,* Case No. PCD-2004-25 (April 11, 2008; not for publication). In 2008, Petitioner sought *habeas corpus* relief in the United States District Court for the Western District of Oklahoma (Case No. CIV-08-470-R). That case is pending.

Our consideration of Petitioner's claims is circumscribed by the provisions of the Post-Conviction Procedure Act, 22 O.S.Supp.2006, § 1080 *et seq.* The Act provides applicants with very limited grounds upon which to attack their convictions. Claims which could have been raised on direct appeal, but were not, are generally considered waived. Claims which were raised and addressed on direct appeal are barred from being relitigated by the doctrine of *res judicata.* Furthermore, claims which are properly raised in a post-conviction application may only afford relief if they "[s]upport a conclusion either that the outcome of the

1. The State alleged three aggravating circumstances in support of the death penalty on Count 1: (1) that the murder was especially heinous, atrocious, or cruel; (2) that the murder was committed for remuneration or the promise of remuneration; and (3) that the defendant constituted a continuing threat to society. The jury found the first and second circumstances existed.

trial would have been different but for the errors or that the defendant is factually innocent" 22 O.S.Supp.2006, § 1089(C).

Currently before the Court is Petitioner's Second Application for Post-Conviction Relief, Application for Evidentiary Hearing with Brief in Support, and two bound volumes of exhibits in support thereof.[2] Under the Post-Conviction Procedure Act, our consideration of successive applications for relief is even more limited than the review afforded to initial applications. We may not consider the merits of any claim made in a subsequent application for post-conviction relief, unless (1) the legal basis for that claim was previously unavailable, or (2) the facts supporting the claim were not previously ascertainable through the exercise of reasonable diligence, and those facts, "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).

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2. On September 9, 2009, Petitioner's counsel filed a "Motion to Supplement Exhibits." Counsel noted that a copy of Petitioner's first Application for Post-Conviction Relief (Case No. PCD-2004-25) had inadvertently been omitted from the exhibit package previously filed on September 2, 2009, and asked this Court to accept a tendered copy at that time. Our Rules require that copies of all prior post-conviction applications be appended to a new postconviction application. *See* Rule 9.7(A)(3)(d), *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2009). Petitioner's motion to supplement his exhibits with a copy of his first Application for Post-Conviction Relief is therefore **GRANTED.**

Appendix E

Petitioner raises numerous issues in this most recent application; they are grouped into six propositions of error. In Proposition 1, Petitioner claims he was denied a fair trial by a long list of inadmissible hearsay. Petitioner concedes that this issue was raised, and rejected, in his first application for post-conviction relief, but claims prior post-conviction counsel "did not argue the effect of such evidence in the second stage of trial." (Petitioner's Application at 11 & n. 3) The facts and law supporting the new slant on this claim were available to Petitioner in prior proceedings. We may not consider it at this time. 22 O.S.Supp.2006, § 1089(D)(8).

In Proposition 2, Petitioner lists several instances of alleged prosecutor misconduct. He concedes that both appellate counsel, and first post-conviction counsel, made claims of prosecutor misconduct in prior proceedings (Petitioner's Application at 20), but he offers some new arguments. We have reviewed the three categories of prosecutor misconduct presented, but all of them could have been raised in prior proceedings.[3] We decline to

3. Petitioner groups the alleged misconduct into three categories. First, he complains that many of the questions posed to various witnesses in the guilt stage of the trial elicited answers that could be characterized as "victim impact" evidence, which, when presented in the capital sentencing stage of a trial, is subject to certain restrictions. Second, he complains that the prosecutors misled the jury concerning forensic ballistics analyses made in the case. Petitioner does not allege that the State withheld any evidence from the trial defense team. While Petitioner's first post-conviction counsel has provided an affidavit that she "[does] not believe" she received all information from trial counsel's file relating to this issue, Petitioner offers no information as to whether

review them further at this time. 22 O.S.Supp.2006, § 1089(D)(8).

In Proposition 3, Petitioner claims he was denied a fair trial by the combined effect of gruesome photographs of the murder victim, and photo and video evidence showing the victim before his· demise. Petitioner concedes that on direct appeal, we rejected his claim that the post-mortem photographs of the victim were not unfairly gruesome. Nevertheless, he claims we have not considered whether the same photos were "unnecessarily cumulative and repetitive." (Petitioner's Application at 20) Petitioner also concedes that premortem visual images of the victim, introduced at trial, were complained about in his previous post-conviction application. The current arguments merely modify or expand claims made, and rejected, in prior proceedings, and are therefore barred by the doctrine of res *judicata.*[4] *Turrentine v. State,* 1998 OK CR

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direct appeal counsel considered the issue and rejected it. Third, Petitioner faults the State for using his written "confession" letter as substantive evidence of guilt at his trial, while in his co-defendant's trial, the prosecutors characterized the letter as "concocted." In the letter, Petitioner attempted to absolve his co-defendant of any involvement in the murder, and admitted some limited involvement of his own (although he denied being the triggerman). Not surprisingly, the prosecutors believed that the letter was relevant as an admission against Petitioner's interest — but that the details of the letter were not particularly reliable.

4. Petitioner's complaint about the post-mortem photographs is something of a moving target. As we noted on direct appeal, Petitioner's concern at trial was more about the number of photographs than their nature. On direct appeal, Petitioner

44, ¶¶ 12, 965 P.2d 985, 989. Finally, Petitioner claims the prosecutor improperly used the post-mortem photographs as evidence that the murder was especially heinous, atrocious, or cruel. This argument, based entirely on the trial record, could have been raised in prior proceedings but was not. It cannot be considered at this time. 22 O.S.Supp.2006, § 1089(D)(8).

In Proposition 4, Petitioner complains about one of the trial court's punishment-stage instructions. He contends that while the jury was instructed on the prevailing definition of "heinous, atrocious, or cruel" (referring to one of the aggravating circumstances alleged by the State), a more elaborate definition of that term was constitutionally required. He also claims the jury should have been instructed that any facts supporting that circumstance must be proven beyond a reasonable doubt before the circumstance could support a death sentence. Because this argument is based on the trial record, it could have been made in prior proceedings, and may not be considered now.[5] 22 O.S.Supp.2006, § 1089(0)(8).

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shifted focus, complaining about the gruesome nature of the photos individually, not about any cumulatively adverse effect. We noted that the trial court did exclude some of the proffered photos at defense counsel's request, and concluded that the remaining photos were not unfairly prejudicial. *Pavatt,* 2007 OK CR 19 at ¶¶ 54-55, 159 P.3d at 289-290.

5. In any event, we have rejected the same argument several times in the past. Petitioner essentially asks this Court to retroactively require an instruction that we promulgated — after Petitioner's conviction— in *DeRosa v. State,* 2004 OK CR 19, ¶¶ 91-97, 89 P.3d 1124, 1154-57. That instruction elaborates

Appendix E

In Proposition 5, Petitioner claims that the prevailing standards for finding a particular murder to be "especially heinous, atrocious, or cruel" are vague, and therefore, constitutionally inadequate. This legal argument could have been raised in prior proceedings, but was not. It is therefore waived.[6] 22 O.S.Supp.2006, § 1089(0)(8).

In Proposition 6, Petitioner makes a number of claims about the effectiveness of trial counsel, direct appeal counsel, and counsel on his first post-conviction proceeding. Petitioner reiterates many of the complaints listed above, and faults each of his preceding attorneys for either not raising these issues, or not raising them in a particular fashion. He takes trial counsel to task for not presenting a more thorough case in mitigation of sentence, and faults every attorney since for not making the same argument.

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on the meaning of "heinous, atrocious, or cruel," and the relevant Uniform Jury Instruction already in existence (No. 4-73) was amended a year later. *DeRosa* was handed down several months after Petitioner's trial. *DeRosa* does not hold that the Uniform Jury Instruction on this issue, being used at the time of DeRosa's and Petitioner's trials, was materially deficient. *DeRosa,* 2004 OK CR 19, ¶ 97, 89 P.3d at 1156 ("This opinion should not be interpreted as a ruling that the former uniform instruction was legally inaccurate or inadequate"). This same attack on the pre-*DeRosa* version of OUJI-CR (2nd) No. 4-73 has been rejected several times by this Court. *Jackson v. State,* 2006 OK CR 45, ¶¶ 36-38, 146 P.3d 1149, 1161-63; *Browning v. State,* 2006 OKCR 8, ¶¶ 52-56, 134 P.3d 816, 843-45; *Rojem v. State,* 2006 OK CR 7, ¶¶ 68-73, 130 P.3d 287, 300-01.

6. We have rejected the same argument many times in the past. *See e.g. Cole v. State,* 2007 OK CR 27, ¶ 37, 164 P.3d 1089, 1098.

Again, given the posture of Petitioner's case - a successive postconviction proceeding — we must focus on whether he has shown that current claims could not have been presented previously, in the exercise of reasonable diligence, and whether these new claims cast doubt on either the jury's finding of guilt, or its imposition of the death sentence. 22 O.S.Supp.2006, § 1089(D)(8)(b)(1), (2). Petitioner must also demonstrate that the instant application was filed within sixty days from the date that the new information could reasonably have been discovered. Rule 9.7(0)(3), *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2009).

We have reviewed Petitioner's complaints, and the evidentiary materials he has proffered to support them. Petitioner concedes that none of these claims are based on newly-discovered evidence, or on any material change in the law. He admits that all of the information he presents as the product of a more complete mitigation investigation was, in fact, available at the time of trial. (Petitioner's Application at 43) We are barred by the provisions of the Post-Conviction Procedure Act from considering these arguments and materials now. 22 O.S.Supp.2006, § 1089(D)(8).

DECISION

Petitioner's Second Application for Post-Conviction Relief, and his request for an evidentiary hearing, are hereby **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18,

App. (2009), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY THE HONORABLE SUSAN BRAGG, DISTRICT JUDGE

NO RESPONSE REQUESTED FROM THE STATE

OPINION BY C. JOHNSON, P.J.
A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: SPECIALLY CONCUR
LEWIS, J.: CONCUR

APPENDIX F — OPINION DENYING FIRST APPLICATION FOR POST-CONVICTION RELIEF IN THE OKLAHOMA COURT OF CRIMINAL APPEALS, FILED APRIL 11, 2008

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Case No. PCD-2004-25

JAMES DWIGHT PAVATT,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

OPINION DENYING APPLICATION FOR POST-CONVICTION RELIEF AND RELATED MOTIONS

C. JOHNSON, VICE-PRESIDING JUDGE:

Petitioner, James Dwight Pavatt, was convicted by a jury in Oklahoma County District Court, Case No. CF-2001-6189, of First Degree Murder (21 O.S.2001, § 701.7) (Count 1) and Conspiracy to Commit First Degree Murder (21 O.S.2001, § 421) (Count 2). The jury found the existence of two aggravating circumstances, and recommended. a sentence of death on Count 1.[1] As to Count 2, the jury

1. The State alleged three aggravating circumstances in support of the death penalty on Count 1: (1) that the murder was especially heinous. atrocious, or cruel; (2) that the murder was

recommended ten years imprisonment and a $5000 fine. The trial court sentenced accordingly on October 21, 2003. This Court affirmed Petitioner's convictions and sentences on direct appeal. *Pavatt v. State,* 2007 OK CR 19, 159 P.3d 272.[2] Petitioner sought *certiorari* review by the United States. Supreme Court, which was denied. *Pavatt v. Oklahoma,* ___ U.S. ___, ___ S.Ct. ___, 2008 WL 425560.

Currently before the Court is Petitioner's Original Application for Post-Conviction relief, filed April 17, 2006, and several related motions filed simultaneously therewith.[3] Our review of Petitioner's application is governed by the Post-Conviction Procedure Act, 22 O.S.Supp.2006, § 1080 *et seq.* The Act provides applicants with very limited grounds upon which to attack their convictions. Claims which could have been raised on direct

committed for remuneration or the promise of remuneration; and (3) that the defendant constituted a continuing threat to society. The jury found the first and second circumstances existed.

2. The record from Petitioner's trial was received by this Court in May 2004. Petitioner's brief in chief was filed in January 2005. The State's response brief was filed in May 2005. Petitioner filed a reply brief in July 2005. Oral argument was held in May 2006.

3. Petitioner's request to file an "oversize" application (exceeding the page limit set forth in our·Rules) is **GRANTED.** His request to file Proposition 2(G) under seal is **DENIED,** and the Clerk of this Court is **DIRECTED** to unseal that portion of the application. *See Pavatt,* 2007 OK CR 19 at ¶ 40 n. 10, 159 P.3d at 286 n. 10. His motion (filed April 17, 2006) requesting 30 days to supplement his application with additional matters, pending oral argument and other events in his direct appeal; is **DISMISSED AS MOOT.**

appeal, but were not, are generally considered waived. Claims which were raised and addressed on direct appeal are barred from being relitigated by the doctrine of *res judicata.* Furthermore, claims which are properly raised in a post-conviction application may only afford relief if they "[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).

Petitioner's numerous claims are grouped into three propositions of error. We address each proposition in turn.

In Proposition 1, Petitioner claims that two pieces of evidence not mentioned in his direct appeal, and an intervening change in the law, require relief. The evidence consists of testimony from two witnesses at the trial of Petitioner's co-defendant, Brenda Andrew, which took place after Petitioner's trial but before his direct appeal brief was filed.[4] At Petitioner's trial, Herman Roggow testified that he had known Brenda Andrew since she was a child. Roggow claimed that in November 2001, about a week before the murder, he saw Andrew, her brother-in-law, and another unidentified man, carrying firearms, as if preparing to engage in target practice, by the side of the road in rural Garfield County. Petitioner notes that subsequently, at Andrew's trial, Roggow had difficulty identifying Andrew in the courtroom. Thus,

4. Brenda Andrew and Petitioner were charged jointly with murdering Andrew's husband and conspiring to do so. Andrew was also sentenced to death for the murder. *Andrew v. State,* 2007 OK CR 23, 164 P.3d 176.

Petitioner claims, Roggow's testimony at Petitioner's trial was suspect, and the implication that Petitioner was the third, unidentified person engaged in target practice was unfairly suggested to the jury.

Contrary to Petitioner's claim, Roggow's testimony at Andrew's trial in mid-2004 is not "'newly discovered evidence"; it was available to direct appeal counsel, since the direct appeal brief was not filed until January 2005. Because the evidence was discoverable through reasonable diligence, Petitioner must show (1) that appellate counsel's failure to present it timely, during the pendency of the direct appeal, was professionally unreasonable, and (2) that the failure casts doubt on the outcome of Petitioner's appeal. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Slaughter v. State,* 1998 OK CR 63, ¶¶ 5-6, 969 P.2d 990, 993-94.

The thrust of Roggow's testimony was that he witnessed Brenda Andrew, not Petitioner, preparing to engage in target practice. Roggow did not know Petitioner, and he never identified Petitioner as being in Andrew's company on the occasion in question. Any inference that Petitioner was present was of course possible, but not required to support the State's theory that Petitioner and Andrew concocted a plan to kill Andrew's husband, and that each did a number of things to effect that result. Petitioner does not dispute that Roggow was personally familiar with Andrew, having known her since she was a child. Nor does he take issue with Roggow's identification of Andrew's brother-in-law at the same encounter, or with the fact that shotgun shells found at that location

were consistent with the unusual gauge of shotgun used to kill Andrew's husband. Andrew's trial was held almost three years after Roggow claimed to have seen her from the roadway. This Court has no information as to what kind of changes in physical appearance Andrew might have undergone during that time. Roggow was allowed to leave the witness stand, move closer to Andrew and did, in fact, identify her at her trial, with no further dispute by Andrew's defense counsel. Finally, the State's case by no means hinged on Roggow's testimony. Any initial difficulty Roggow might have had identifying Andrew at her trial is simply not material enough to have made any difference in the outcome of Appellant's appeal.

The second item of evidence Petitioner presents as "newly discovered" is the testimony of Bill Shadid at Andrew's trial. At Petitioner's trial, David Head testified about an altercation he had with co-defendant Andrew over work he performed at her home. Head testified that an unidentified man was present during the altercation. Subsequently, at Andrew's trial, one of Andrew's neighbors, Shadid, testified that he was the man who witnessed the altercation between Andrew and Head. Petitioner complains that, given Shadid's testimony at Andrew's trial, any implication from Head's testimony at Petitioner's trial; that Petitioner was the unidentified bystander, was unfair.

Again, this evidence was discoverable by direct appeal counsel, because Andrew's trial was held several months before Petitioner's appeal brief was filed. And again, Petitioner is unable to meet the *Strickland* criteria for

ineffective assistance of appellate counsel. As Petitioner concedes, Head did not know the male bystander and never positively identified him. Most importantly, the identity of the bystander was irrelevant, because he took no part in the altercation or the threat that Andrew made to Head. In fact, Head testified at Petitioner's trial that the man attempted to quell the dispute. There is no reasonable possibility that Shadid's testimony would have changed the outcome of Petitioner's trial or appeal.

Finally, Petitioner asks this Court to apply the new rule announced in *Anderson v. State,* 2006 OK CR 6, 130 P.3d 273, to his case. Oklahoma law provides that for certain enumerated crimes, a defendant must serve at least 85% of any sentence imposed before becoming eligible for any type of early release. In *Anderson,* this Court held that when a defendant is tried for a crime subject to the 85% Rule, the jury must be given that information. The rule in *Anderson* applied prospectively, and to any case pending on direct appeal at the time *Anderson* was announced. *Carter v. State,* 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244. Petitioner's case was pending on direct appeal at the time *Anderson* was decided.[5] However, we have made it clear that failure to instruct on the 85% Rule is not automatic grounds for reversal in every case. *Eizember v. State,* 2007 OK CR 29, ¶ 73, 164 P.3d 208, 229. As to Count 1, the jury in Petitioner's case had three punishment options — life with the possibility of parole, life without the possibility of parole, and death. It chose

5. This Court cited *Anderson* in Petitioner's direct appeal. *Pavatt,* 2007 OK CR 19, ¶ 30 n. 6, 159 P.3d at 283 n. 6.

the most severe option, to which the notion of parole is irrelevant. We can confidently conclude that, had the jury been instructed on the 85% Rule, that information would not have affected the verdict. *See Cole v. State,* 2007 OK CR 27, ¶ 65, 164 P.3d 1089, 1102. Proposition 1 is denied.

In Proposition 2, Petitioner attacks the performance of his retained counsel on direct appeal. In approximately two dozen sub-arguments, Petitioner reformulates or supplements claims that direct appeal counsel did raise, and advances some new claims that direct appeal counsel did not raise. The first group of claims are not accompanied by newly-discovered facts or new controlling case law. They are therefore. barred by *res judicata*.[6] Post-conviction may not be used to reformulate or supplement a claim that

6. The following claims are barred by *res judicata*: (B), alleging that appellate counsel failed to present all facts and law relevant to his argument concerning prospective juror's comment on parole during *voir dire;* (C), alleging that counsel failed to challenge Agent Stoner's testimony "completely, sufficiently, and adequately"; (D), faulting counsel for not continuing to present evidence of media coverage after the change-of-venue hearing and before trial; the record shows that those who actually served on Petitioner's jury could be fair and impartial (*Pavatt*, 2007 OK CR 19 at ¶¶ 17-18, 159 P.3d at 280): (E) and (F), challenging the sufficiency of evidence supporting Petitioner's convictions; (G), alleging that counsel failed to argue "sufficiently and adequately" concerning alternative-suspect evidence; (H); alleging that counsel failed to advance his prosecutorial misconduct claim "sufficiently"; (I), challenging the sufficiency of evidence supporting the aggravating circumstances; (J), faulting scope of counsel's argument concerning admission of a "live" photograph of the victim; *see also Marquez-Burrola v. State,* 2007 OK CR 14, ¶¶ 30-31, 157 P.3d 749,160 (rejecting similar argument).

was made on direct appeal. *See Browning v. State,* 2006 OK CR 37, ¶ 4, 144 P.3d 155, 157; *Davis v. State,* 2005 OK CR 21, ¶ 17, 123 P.3d 243, 248. As for the second group of claims, Petitioner has failed to demonstrate either (1) that appellate counsel's performance was professionally unreasonable,[7] or, assuming deficient performance only

7. In the following claims, Petitioner fails to· show that appellate counsel's performance was professionally unreasonable: (K), faulting appellate counsel for not challenging the admissibility of four pieces of evidence at trial; (i) the confession purportedly written by·Petitioner required no additional evidence of chain of custody, given the trial testimony and the fact that it was a unique, non-fungible item; (ii) any appellate challenge to introduction of insurance documents found at the victim's home was waived by trial counsel's failure to object, and Petitioner offers no information to dispute the trial testimony on this issue; (iii) trial testimony concerning a bullet found by Petitioner's daughter (including Petitioner's command that she "throw it away") was sufficient to establish its admissibility; (iv) as for the admissibility of various tape-recorded conversations, *see Andrew v. State*, 2007 OK CR 23, ¶¶ 68-71, 164 P.3d at 194 (rejecting similar argument in co-defendant's direct appeal; (L), regarding separation of jurors during deliberations to move their cars; the trial record confirms that trial defense counsel had no objection to this procedure; (N), faulting Appellate counsel for not interviewing two witnesses about their testimony at co-defendant Andrew's trial (*see* discussion in Proposition 1); (Q), faulting counsel for not challenging trial court's instruction on assessment of aggravating and mitigating circumstances; *see Wood v. State,* 2007 OK CR 17, ¶ 16, 158 P.3d 467. 475 (rejecting same argument); (R), faulting counsel for not alleging "structural" defects in Oklahoma's capital sentencing scheme; *see Hams v. State,* 2007 OK CR 32, ¶ 19, 167 P.3d 438, 445 (rejecting same argument); (S), faulting appellate counsel lot not challenging trial court's excusal of certain prospective jurors for cause; record shows that trial court thoroughly inquired to determine whether each panelist could impose the death penalty under any circumstance, and

for the sake of argument, (2) any outcome-determinative prejudice caused thereby.[8]

We have reviewed the materials properly included with Petitioner's application, and conclude that they do not raise new matters which would require either an evidentiary hearing or discovery. 22 O.S.Supp.2006, § 1089(D)(3), (5); Rule 9. 7(D), (E), *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S. Ch. 18, App. (2008).

Having found no grounds for relief in Petitioner's

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trial defense counsel made only *pro forma* objections and did not offer any reason for further inquiry; (V), faulting counsel for not claiming denial of fair tribunal due to trial judge's illness; Petitioner's claim is entirely speculative and not supported by any specific example of bias or impairment.

8. In the following claims, Petitioner fails to show that appellate counsel's alleged deficiencies likely made a difference in the outcome of the appeal; (A), alleging that counsel's brief contained citation and other editorial mistakes; Petitioner cannot show that any issues raised were forfeited due to these mistakes; (M), alleging that counsel failed to raise a claim about certain allegedly hearsay statements at trial; *see Andrew,* 2007 OK CR 23, ¶¶ 26-35, 164 P.3d at 188-190, rejecting similar argument in co-defendant's direct appeal, particularly given substantial evidence of guilt; (O), faulting counsel for not challenging testimony of handwriting expert; Petitioner fails to cite any controlling authority which would require exclusion of this evidence; (P), faulting counsel for not arguing that an instruction on accessory after the fact was appropriate; (T), alleging that medical examiner's staff had no authority to seize documents from victim's home, even though victim's wife/ co-defendant consented to a search; (U), alleging that counsel did not communicate with Petitioner frequently enough during the pendency of the appeal; (W), alleging that counsel tiled a reply brief out of time (with leave of this Court).

current claims, we likewise reject his cumulative-error argument in Proposition 3. Finally, we cannot say that the claims made in Petitioner's application and related pleadings suggest either a miscarriage of justice or the substantial violation of a constitutional or statutory right. *Slaughter*, 2005 OK CR 6, ¶ 19, 108 P.3d at 1055; 20 O.S.2001, § 3001.1.

DECISION

Petitioner's application for post-conviction relief, and requests 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. (2008), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

OPINION BY C. JOHNSON, V.P.J.
LUMPKIN, P.J.: CONCURS
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

APPENDIX G — OPINION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS, FILED MAY 8, 2007

COURT OF CRIMINAL APPEALS OF OKLAHOMA

Case Number: D-2003-1186

JAMES DWIGHT PAVATT,

Appellant,

-v-

STATE OF OKLAHOMA,

Appellee.

May 8, 2007, Decided
May 8, 2007, Filed

An Appeal from the District Court of Oklahoma County; the Honorable Susan Bragg, District Judge.

OPINION

C. JOHNSON, Vice-Presiding Judge:

Appellant, James Dwight Pavatt, was tried by jury in the District Court of Oklahoma County, Case No. CF-2001-6189, for the crimes of First Degree Murder (21 O.S.2001, § 701.7) (Count 1) and Conspiracy to Commit First Degree Murder (21 O.S.2001, § 421) (Count 2). The State alleged three aggravating circumstances in support

of the death penalty on Count 1: (1) that the murder was especially heinous, atrocious, or cruel; (2) that the murder was committed for remuneration or the promise of remuneration; and (3) that the defendant constituted a continuing threat to society. Jury trial was held August 25, 2003 through September 16, 2003 before the Honorable Susan Bragg, District Judge. The jury found Appellant guilty as charged on both counts, and recommended a sentence of ten years imprisonment and a $ 5000 fine on Count 2. In the capital sentencing phase of the trial, the jury found the existence of the first and second aggravating circumstances listed above and recommended a sentence of death on Count 1. On October 21, 2003, the trial court sentenced Appellant in accordance with the jury's recommendation, and Appellant timely lodged this appeal.

FACTS

Appellant and his co-defendant, Brenda Andrew, were each charged with conspiracy and first-degree capital murder following the shooting death of Brenda's husband, Robert ("Rob") Andrew, at the Andrews' Oklahoma City home on November 20, 2001.[1] Appellant met the Andrews while attending the same church, and Appellant and Brenda taught a Sunday school class together. Appellant socialized with the Andrews and their two young children in mid-2001, but eventually began having

1. Brenda Andrew was tried separately. She received the death penalty on the murder charge as well. Her direct appeal is presently before this Court in Case No. D-2004-1010.

a sexual relationship with Brenda.[2] Around the same time, Appellant, a life insurance agent, assisted Rob Andrew in setting up a life insurance policy worth approximately $ 800,000. Appellant divorced his wife in the summer of 2001. In late September, Rob Andrew moved out of the family home, and Brenda Andrew initiated divorce proceedings a short time later.

Janna Larson, Appellant's adult daughter, testified that in late October 2001, Appellant told her that Brenda had asked him to murder Rob Andrew. On the night of October 25-26, 2001, someone severed the brake lines on Rob Andrew's automobile. The next morning, Appellant and Brenda Andrew concocted a false "emergency," apparently in hopes that Rob would have a traffic accident in the process. Appellant persuaded his daughter to call Rob Andrew from an untraceable phone and claim that Brenda was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone in south Oklahoma City. The plan failed; Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police.

One contentious issue in the Andrews' divorce was control over the insurance policy on Rob Andrew's life. After his brake lines were severed, Rob Andrew inquired

2. The State presented evidence that the Andrews' marriage had been strained for several years, and that Brenda Andrew had a number of extramarital affairs.

about removing Brenda as beneficiary of his life insurance policy. However, Appellant, who had set up the policy, learned of Rob's intentions and told Rob (falsely) that he had no control over the policy because Brenda was the owner. Rob Andrew spoke with Appellant's supervisor, who assured him that he was still the record owner of the policy. Rob Andrew then related his suspicions about Appellant and Brenda to the supervisor. When Appellant learned of this, he became very angry and threatened to harm Rob for putting his job in jeopardy. At trial, the State presented evidence that in the months preceding the murder, Appellant and Brenda actually attempted to transfer ownership of the insurance policy to Brenda without Rob Andrew's knowledge, by forging his signature to a change-of-ownership form and backdating it to March 2001.[3]

On the evening of November 20, 2001, Rob Andrew drove to the family home to pick up his children for a scheduled visitation over the Thanksgiving holiday. He spoke with a friend on his cell phone as he waited in his car for Brenda to open the garage door. When she did, Rob ended the call and went inside to get his children. A short time later, neighbors heard gunshots. Brenda Andrew called 911 and reported that her husband had been shot.

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3. According to one witness, Brenda had told her husband that she could sign his name "better than he could." Among other evidence, the State presented recordings of telephone conversations from Appellant and Brenda to the insurance company's home office, inquiring about the status of the policy and attempting to persuade them that a legitimate ownership change had been made.

Emergency personnel arrived and found Rob Andrew's body on the floor of the garage; he had suffered extensive blood loss and they were unable to revive him. Brenda Andrew had also suffered a superficial gunshot wound to her arm. The Andrew children were not, in fact, packed and ready to leave when Rob Andrew arrived; they were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.

Brenda was taken to a local hospital for treatment. Her behavior was described by several witnesses, experienced in dealing with people in traumatic situations, as uncharacteristically calm for a woman whose husband had just been gunned down. One witness saw Brenda chatting giddily with Appellant at the hospital later that night.

Rob Andrew was shot twice with a shotgun. A spent shotgun shell found in the garage fit a 16-gauge shotgun, which is a rather unusual gauge. Andrew owned a 16-gauge shotgun, but had told several friends that Brenda refused to let him take it from the home when they separated. Rob Andrew's shotgun was missing from the home when police searched it. One witness testified to seeing Brenda Andrew engaging in target practice at her family's rural Garfield County home about a week before the murder. Several 16-gauge shotgun shells were found at the site.

Brenda told police that her husband was attacked in the garage by two armed, masked men, dressed in black, but gave few other details. Brenda's superficial wound

was caused by a .22-caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance as she ran from the garage into the house. About a week before the murder, Appellant purchased a .22-caliber handgun from a local gun shop. On the day of the murder, Appellant borrowed his daughter's car and claimed he was going to have it serviced for her. When he returned it the morning after the murder, the car had not been serviced, but his daughter found a .22-caliber bullet on the floorboard. In a conversation later that day, Appellant told Larson never to repeat that Brenda had asked him to kill Rob Andrew, and he threatened to kill Larson if she did. He also told her to throw away the bullet she had found in her car.

Police also searched the home of Dean Gigstad, the Andrews' next-door neighbor. There they found evidence that someone had entered the Gigstads' attic through an opening in a bedroom closet. A spent 16-gauge shotgun shell was found on the bedroom floor, and several .22-caliber bullets were found in the attic itself. There were no signs of forced entry into the Gigstads' home. Gigstad and his wife were out of town when the murder took place, but Brenda Andrew had a key to their home. The .22-caliber bullet found in Janna Larson's car was of the same brand as the three .22-caliber bullets found in the Gigstads' attic; the .22-caliber bullet fired at Brenda and retrieved from the Andrews' garage appeared consistent with them in several respects. These bullets were capable of being fired from the firearm that Appellant purchased a few weeks before the murder; further testing was not possible because that gun was never found. The shotgun

shell found in the Gigstads' home was of the same brand and odd gauge as the 16-gauge shell found in the Andrews' garage. Ballistics comparison showed similar markings, indicating that they could have been fired from the same weapon. Whether these shells were fired from the 16-gauge shotgun Rob Andrew had left at the home was impossible to confirm because, as noted, that gun also turned up missing.

In the days following the murder, Appellant registered his daughter as a signatory on his checking account, and asked her to move his belongings out of his apartment. He obtained information over the Internet about Argentina, because he had heard that country had no extradition agreement with the United States. Larson also testified that after the murder, Brenda and Appellant asked her to help them create a document, with the forged signature of Rob Andrew, granting permission for the Andrew children to travel with Brenda out of the country. Brenda also asked Larson to transfer funds from her bank account to Larson's own account, so that Larson could wire them money after they left town.

Brenda Andrew did not attend her husband's funeral. Instead, she and Appellant drove to Mexico, and took the Andrew children with them. Appellant called his daughter several times from Mexico and asked her to send them money. Larson cooperated with the FBI and local authorities in trying to track down Appellant and Brenda. In late February 2002, having run out of money, Appellant and Brenda Andrew re-entered the United States at the Mexican border. They were promptly placed under arrest.

At trial, the State also presented a letter purportedly from Appellant to one of the Andrew children, written after Appellant had been arrested. In the letter, Appellant claimed to have enlisted the help of another man to kill Rob Andrew, but claimed that Brenda had nothing to do with the plan. The State presented expert testimony that the handwriting of the letter was consistent in a number of respects with known exemplars of Appellant's handwriting. Appellant did not testify at trial. While defense counsel did not deny that Appellant and Brenda were having an affair, he challenged the State's claim that Appellant wrote the confession letter, and maintained that Appellant was not in any way involved in Rob Andrew's death. Additional facts will be discussed as relevant to Appellant's propositions of error.

ISSUES RAISED ON APPEAL

I. Appropriate standard of review.

In Proposition 1, Appellant claims that harmless-error analysis cannot be applied in this case. However, Appellant fails to explain why this is so as a general matter, without reference to any specific legal argument made on appeal. We have rejected such categorical claims of "harmless-error immunity" in the past. *See Stemple v. State*, 2000 OK CR 4, 2004 OK CR 4, PP 70-76, 994 P.2d 61, 74. No trial is perfect, and the State and federal constitutions guarantee only a fair trial, not a perfect one. *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986); *Stemple*, 2000 OK CR 4 at P 73, 994 P.2d at 74. Under Oklahoma law, this Court is unable to

grant relief unless the error complained of "has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2001, § 3001.1. Whether an error occurred at all, and the likelihood that it affected the outcome of the trial, can only be determined by reference to the nature of the specific error alleged, the context in which it may have occurred, and the entire record of the trial proceedings. Proposition 1 is denied.

II. Change of venue.

In Proposition 4, Appellant claims the trial court erred in not granting his request for a change of venue. Prior to trial, Appellant joined in a motion filed by his co-defendant seeking a change of venue due to extensive pretrial publicity. The trial court held a hearing on the motion January 9 and 21, 2003. The defense presented evidence of the extensive coverage of the case in the local media, as well as polling data showing that a substantial number of Oklahoma County residents were somewhat familiar with the case. After considering this evidence, the trial court denied the motion, stating:

> I don't think we're going to know [whether unbiased jurors can be seated] until such time as we bring in a large panel, put them up in the jury box and *voir dire* them. It's unfortunate but that's actually the only way . . . that you can make that determination.

Appendix G

We review the trial court's denial of Appellant's motion for change of venue for an abuse of discretion. *DeRosa v. State*, 2004 OK CR 19, P 21, 89 P.3d 1124, 1135-36. Pretrial publicity alone does not warrant a change of venue. *United States v. McVeigh*, 918 F. Supp. 1467, 1473 (W.D.Okl. 1996) ("Extensive publicity before trial does not, in itself, preclude fairness"). The influence of the news media must be shown to have actually pervaded the trial proceedings. *Hain v. State*, 1996 OK CR 26, 1996 Okla. Crim. App. LEXIS 26, P 8, 919 P.2d 1130, 1136. We consider all relevant evidence to determine whether a fair trial was possible at that particular place and time, keeping in mind the ultimate issue: whether the trial court was in fact able to seat twelve qualified jurors who were not prejudiced against the accused. *DeRosa*, 2004 OK CR 19 at P 19, 89 P.3d at 1135 ("if a trial court denies a defendant's change of venue motion and the defendant is then tried and convicted, the question is no longer about hypothetical and potential unfairness, but about what actually happened during the defendant's trial").

Appellant cites several cases from other jurisdictions where a change of venue was granted, but he offers no analysis as to how those cases are relevant here.[4] He also

4. All but one of the cases Appellant cites are procedurally distinguishable because they involve determinations made before *voir dire* was even attempted. *United States v. McVeigh*, 918 F. Supp. 1467, 1470 (W.D.Okl.1996) (trial court order granting change of venue; prosecution did not dispute the need for a change of venue, and disagreement was only over the more appropriate venue); *United States v. Engleman*, 489 F. Supp. 48 (D.Mo.1980) (trial court order granting change of venue); *State v. James*, 767

relies on *Coates v. State*, 1989 OK CR 16, 773 P.2d 1281, where we found error in the trial court's denial of a motion for change of venue. We see no parallels with *Coates*, however. The defendant in *Coates* was an elected public official, accused of embezzlement and other crimes directly related to the administration of her office. Therefore, all citizens of the county, and hence every juror, could have perceived themselves as "victims" of the alleged crimes. In fact, two prospective jurors in *Coates*—at least one

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P.2d 549 (Utah 1989) (interlocutory appeal on change of venue). The posture of Appellant's case is different. He is raising the issue in the context of a direct appeal after conviction; and because the ultimate concern is an impartial jury, he must demonstrate that the jury actually empaneled to try him was not impartial. *See McVeigh*, 918 F. Supp. at 1470 ("Ordinarily, the effects of pre-trial publicity on the pool from which jurors are drawn is determined by a careful and searching *voir dire* examination"). The fourth case Appellant relies on is *State v. Stubbs*, 2004 UT App 3, 84 P.3d 837 (Utah App. 2004), where an appellate court found reversible error in the trial court's denial of a motion for change of venue. *Stubbs*, however, is factually distinguishable; the entire county had some 6000 residents, the alleged rape victim was from a locally prominent family, and *voir dire* actually demonstrated that acquaintance with members of the complainant's family and knowledge of the case was pervasive.

Appellant also notes that his alleged confession was reported in the press, which also occurred in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). But the confession disseminated in *Irvin* was only one of many factors which worked to deny the defendant a fair trial in that case. These factors resulted in actual prejudice in *Irvin*, as several jurors admitted that they could not presume the defendant to be innocent of the crime. This record in this case presents no such evidence of prejudice.

of whom actually sat on the jury—had been directly affected by the case because checks they had written to the defendant's office had gone missing. *Id.* at PP 14-16, 773 P.2d at 1286-87. Likewise, cases from other jurisdictions have noted that a change of venue may be in order when the community from which the jurors would be drawn may perceive a personal stake in the proceedings.[5] Appellant does not argue such facts here, and we find none.

From the beginning, this case received more than considerable attention in the local media. That fact cannot be disputed. The case had all the necessary elements to make it ripe for media attention: sex, money, deception, and murder. Appellant refers us generally to the record of the hearing on his change-of-venue motion, but he does not articulate how an air of prejudice pervaded the trial proceedings themselves. Again, our chief concern is not how, or how often, the case played in the media, but whether, at the end of the day, the trial court was able to empanel twelve fair and impartial jurors.

The trial court is entitled to considerable discretion on issues involving jury selection, because it personally conducts *voir dire* and has the opportunity to observe the demeanor of the panelists—so much of which is lost in the transcription of the proceedings. *Harris v. State*, 2004 OK CR 1, P 11, 84 P.3d 731, 741. The trial court

5. *See e.g. McVeigh*, 918 F. Supp. at 1470-72 (detailing how local citizenry was affected by bombing of the federal building in Oklahoma City); *James*, 767 P.2d at 554-55 (giving particular weight to the widespread community participation in the month-long search for the murder victim's body).

excused a number of prospective jurors who admitted that pretrial publicity had affected their ability to be impartial. On the other hand, several panelists—including at least three who ultimately sat on the jury—said they had heard nothing about the case. Each person who actually sat on Appellant's jury assured the court that he or she could fairly evaluate the evidence, and could consider all three punishment options if Appellant were found guilty. Nowhere in his brief does Appellant claim, much less demonstrate, that any juror actually seated was biased against him due to adverse pretrial publicity. Indeed, defense counsel waived his last peremptory challenge without comment, which we must interpret as satisfaction with the final makeup of the jury. The trial court did not abuse its discretion in denying a change of venue. This proposition is denied.

III. Double jeopardy/double punishment.

In Proposition 6, Appellant claims that convictions for both First Degree Murder, and Conspiracy to Commit Murder, violate both the prohibitions against double jeopardy in the federal and state constitutions, as well as the prohibition against double punishment found in 21 O.S.2001, § 11. We disagree.

The double jeopardy clauses of the federal and Oklahoma constitutions afford protection from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same prosecution. *North Carolina v. Pearce*, 395

U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). As interpreted in the third situation, applicable here, the "double jeopardy" ban simply prevents the State from punishing a person more harshly than the legislature intended. *See Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983); *Ellis v. State*, 1992 OK CR 35, PP 27-30, 834 P.2d 985, 990-91. Oklahoma statute defines and punishes conspiracy to commit crime separately from the completed crime, *see* 21 O.S.2001, § 421, and on numerous occasions we have interpreted Oklahoma law to punish an agreement to commit crime, followed by an overt act in furtherance of that plan, separately from the completed crime itself. *See e.g. Harjo v. State*, 1990 OK CR 53, 1990 Okla. Crim. App. LEXIS 53, P 17, 797 P.2d 338, 342; *Stohler v. State ex rel. Lamm*, 1985 OK CR 30, P 4, 696 P.2d 1038, 1040; *McCreary v. Venable*, 86 Okl.Cr. 169, 190 P.2d 467 (1948).

Appellant relies heavily on *Stewart v. State*, 662 So.2d 552 (Miss. 1995). In *Stewart*, the Supreme Court of Mississippi held that a defendant's conviction for both conspiracy to commit murder, and "murder for hire" as defined under Mississippi law, violated double jeopardy principles. Conceding that "[c]onspiracy and the underlying substantive offense are normally distinct and separate offenses," *id.* at 561, the *Stewart* court nevertheless observed that the particular variant of murder that the defendant was charged with required proof of an agreement to kill for money.

Stewart is inapposite here, and Appellant fails to recognize the differences between the statutory schemes

of Oklahoma and Mississippi. In *Stewart*, the fact that the murder was a contract killing was an essential element of the crime, as defined by the Mississippi legislature. In fact, the *Stewart* court noted that the defendant could have properly been convicted of conspiracy to commit murder in addition to some other variant of murder under Mississippi law. *Id.* at 561. Oklahoma has no discrete "murder for hire" variant of homicide.

Appellant points out that the evidence of a conspiracy between himself and Brenda Andrew was an important part of the State's claim, in the *capital sentencing phase* of the trial, that the murder was committed for remuneration. This is true, but it does not mean that Appellant was twice placed in jeopardy for the same offense. In essence, Appellant claims that evidence of a separate criminal offense, presented in the guilt phase of a capital murder trial, cannot also be used as a factor supporting a death sentence for the murder. We have rejected similar claims in the past. *See Dodd v. State*, 2004 OK CR 31, P 107, 100 P.3d 1017, 1048 (in prosecution for double murder, State was not estopped from using evidence of either victim's murder to support the "great risk of death to more than one person" aggravating circumstance, alleged as to each murder in the punishment phase of the trial); *Martinez v. State*, 1999 OK CR 33, P 76, 984 P.2d 813, 831 (rejection of same argument on double jeopardy grounds); *cf. Bowie v. State*, 1995 OK CR 4, PP 13-18, 906 P.2d 759, 762 (where defendant was on trial for one murder, State was not collaterally estopped from using evidence of a second unrelated murder to support capital aggravating circumstance that the defendant was a

"continuing threat to society"). The fact that evidence of a plan to profit financially from Rob Andrew's murder was relevant to both the conspiracy charge, and the "murder for remuneration" aggravating circumstance supporting the death sentence for the murder charge, does not offend double jeopardy principles.

Finally, under these facts, convictions for both the conspiracy and murder do not violate Oklahoma's statutory ban on "double punishment." 21 O.S.2001, § 11. That statute, which bars multiple punishments based on a single act or omission, must be considered in conjunction with the legislative prerogative to define crimes in general, and with the applicable statutory enactments defining the conduct which constitutes the particular crimes at issue. The evidence in this case showed that Appellant and Brenda Andrew planned the murder, and acted on that plan many times, well in advance of actually consummating the killing. The anticipated receipt of the victim's life insurance proceeds may have been a motive to plan the murder, but it was not a fact critical to its commission. Then again, a financial motive to murder does not necessarily require any agreement with anyone else. Neither crime was an indispensable part of the other. The murder, and the plan to commit it, were not the "same act" as contemplated by 21 O.S.2001, § 11. *Stohler*, 1985 OK CR 30 at PP 5-6, 696 P.2d at 1040. Appellant was not subjected to either double jeopardy or double punishment, and this proposition is denied.

Appendix G

IV. Issues relating to jury selection.

In Proposition 2, Appellant claims his jury was irreparably tainted by a comment on parole possibilities made by a prospective juror. As we have already observed, the trial court is in a unique position to judge, first-hand, the demeanor and candor of the prospective jurors as *voir dire* is conducted. Thus we defer to the trial court's discretion in matters pertaining to jury selection, and review this claim only for a clear abuse of that discretion. *Harris*, 2004 OK CR 1 at P 11, 84 P.3d at 741; *Douglas v. State*, 1997 OK CR 79, P 16, 951 P.2d 651, 661.

During *voir dire*, Prospective Juror Walker was asked if he could consider all three punishments available for first-degree murder: life imprisonment (with the possibility of parole), life imprisonment without the possibility of parole, or death. Mr. Walker said he could not. The trial court asked for clarification:

> THE COURT: So you're telling me that irregardless [sic] of the law and irregardless [sic] of the facts and circumstances of the case you would not be able to impose the penalty of life imprisonment?
>
> PROSPECTIVE JUROR WALKER: Not if charged with murder in the first degree and convicted.
>
> THE COURT: Okay. And as you know, Mr. Pavatt is charged with murder in the first

> degree. So let me ask it just as you gave it to me. If you found him guilty as a juror, if the jury unanimously found him guilty of murder in the first degree could you impose a penalty of life imprisonment?
>
> PROSPECTIVE JUROR WALKER: With a chance that he would be on the street in ten years, no.

Defense counsel moved for a mistrial. He claimed that Mr. Walker's comment implied to the other panelists that he had "some specialized knowledge concerning when someone convicted of life imprisonment would be eligible or likely to receive parole." The trial court denied the motion, and refused to instruct the rest of the panel to disregard the comment. Mr. Walker was promptly excused for cause, without objection by the State.

Appellant claims that Mr. Walker's concerns about parole irreparably tainted the entire panel and, consequently, the jury that ultimately convicted and sentenced him. He insists that he is not required to prove prejudice under these circumstances. We disagree. Appellant was certainly entitled to a fair and impartial jury, one that could consider all available punishment options. U.S.Const. Amend. VI; Okla.Const. art. 2, § 20. But for the reasons explained below, the case law Appellant relies on is inapposite.

As an initial matter, we reject Appellant's claim that prejudice must be presumed in this situation. A

presumption of prejudice arises when the jury is exposed to outside influence after it has retired for deliberations. *Johnson v. State*, 2004 OK CR 23, P 20, 93 P.3d 41, 47; *Matthews v. State*, 2002 OK CR 16, P 7, 45 P.3d 907, 913; *compare Edwards v. State*, 1991 OK CR 71, PP 12-15, 815 P.2d 670, 673-74 (no presumption of prejudice where juror suddenly realized, during trial, that she recognized a witness and went to the same church as the prosecutor). The presumption does not attach every time the *venire panel* is exposed to a comment by a prospective juror made during *voir dire*, particularly if the person making the comment is ultimately excused from service. Otherwise, every personal opinion expressed in *voir dire* could conceivably taint every venire panel, and make jury trials a virtual impossibility. The very purpose of *voir dire* (literally, "to speak the truth") is to explore the potential biases of prospective jurors, and excuse those whose biases prevent them from following the law. *Dodd*, 2004 OK CR 31 at P 24, 100 P.3d at 1029. It is by necessity an open and frank exchange, and must continue to be so to ensure the defendant is judged only by impartial members of the community. Thus, we will not presume prejudice in this situation. Appellant must demonstrate that Mr. Walker's comment so affected the panelists who ultimately sat on his jury as to have denied Appellant a fair trial.

Turning to the heart of Appellant's argument, we have long held that speculation about the parole process is not a proper part of the jury's function in deciding appropriate punishment in a criminal case. *See e.g. Bell v. State*, 1962 OK CR 160, P 18, 381 P.2d 167, 173 ("To permit the jury to project itself in this manner into the executive branch

of the government is clearly contrary to our constitutional concept of division of powers"). But in 1987, the Oklahoma Legislature amended our law to add "life without parole" (or, more accurately, life imprisonment without the *possibility* of parole) as a third punishment option for first-degree murder, alongside life imprisonment (with at least the possibility of parole) and death. Laws 1987, Ch. 196, § 1; *Salazar v. State*, 1993 OK CR 21, P 32, 852 P.2d 729, 737. The purpose behind this amendment is plain: to permit the sentencer to bar a particular defendant from even the possibility of release in the future through parole, which is otherwise administered by the Oklahoma Pardon and Parole Board, a constitutionally-created body.[6] Thus, where parole ineligibility is an express part of a legislative punishment definition, the jury must necessarily consider the *possibility* of parole in deciding appropriate punishment. *See Mayes v. State*, 1994 OK CR 44, P 136, 887 P.2d 1288, 1318 ("[W]hile we hold a jury may logically consider the possibility or absence of parole in determining the sentence a capital murder defendant is to receive, we also hold there is no requirement for a trial judge to explain the Oklahoma parole process to a jury"). By offering the jury the choice to bar parole eligibility

6. Okla. Const. art. VI, § 10. We continue to hold that the subject of parole is not germane to the jury's function, except to the extent that the Legislature has expressed a specific limitation on parole eligibility, as part of a statutory definition of punishment for a particular crime. *See Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 (requiring juries to be instructed consistent with statute that bars those convicted of certain crimes from parole consideration until they have served 85% of their sentence, and noting that this information actually curbs jury speculation about parole).

altogether, the "life without parole" option works to curb juror speculation about such contingencies.

Appellant cites cases from various jurisdictions, including Oklahoma, where an empaneled jury or venire panel was tainted by some sort of information prejudicial to the accused. But the cases Appellant relies on generally involve either (1) comments from the trial judge or prosecutor to the jury about various methods of seeking post-trial relief from a sentence (such as parole, pardon, commutation, earning credits in prison, or the appellate process); (2) prejudicial information about the accused himself (such as the fact that he had prior convictions, or was awaiting trial for other crimes), before such had been properly placed into evidence; or (3) opinions or other comments to the jurors about the case, made outside of the trial proceedings, by a third party (judge, witness, spectator, etc.). We agree that these three types of situations can result in reversible error.[7] But none of these cases squarely addresses the situation presented here.

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7. *See e.g. Kovash v. State*, 1974 OK CR 26, P 12, 519 P.2d 517, 522 (it is error for the trial court or counsel for either party to discuss parole or other possible reductions to sentence with the jury); *Harris v. State*, 1962 OK CR 15, 369 P.2d 187 (it is error to make reference to a defendant's prior felony convictions when the jury is concerned only with guilt or innocence, unless the defendant himself places them in issue); *Perry v. State*, 1995 OK CR 20, P 26, 893 P.2d 521, 528 ("[A] trial court should not conduct communications with the jury outside the presence of counsel and the defendant during deliberations; nor should anyone communicate with the jury regarding the merits of the case prior to submission of the case to the jury") (footnotes omitted).

Appendix G

The subject of parole was broached during *voir dire* by a prospective juror, not by the prosecutor or the trial court. Mr. Walker's comment was not prejudicial information about Appellant, a potential witness, or any other aspect of the case. Appellant maintains that the comment implied some sort of first-hand knowledge about the parole process, *i.e.*, that a person serving a sentence of life with the possibility of parole would undoubtedly be "on the street" in ten years. This is an unreasonable interpretation. The comment merely expressed the panelist's concern about the *possibility* of parole, and his categorical inability to even consider a life sentence in any first-degree murder case. Mr. Walker referred to the "*chance*" that Appellant could be paroled in ten years—obviously indicating that neither he, nor anyone ultimately sitting on Appellant's jury, would have any control over that decision if a "straight" life sentence were imposed. But that concern is precisely why our Legislature added "life without parole" as an intermediate punishment option for first-degree murder. Appellant does not refer us to a single case where an isolated comment about parole issues, by a member of the venire panel who was ultimately excused, so tainted the panel as to require reversal of a conviction or modification of sentence.[8]

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8. Appellant's reliance on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997), is misplaced. In *Mach*, a prosecution for child sexual abuse, a prospective juror related her professional experience as a social worker dealing specifically with child victims of sexual abuse. During *voir dire* she expressed difficulty in being impartial, because sexual abuse had been confirmed in every case she had been professionally involved in. She made several statements to similar effect during further questioning before the entire panel.

As the State notes in its response, we addressed a similar claim in *Wade v. State*, 1992 OK CR 2, 825 P.2d 1357. In that capital case, a member of the venire panel told the trial court that she could not consider a life sentence, because "in Oklahoma a life sentence usually doesn't turn out that way." The panelist was excused from service, but the defendant moved for a mistrial, which was overruled. We found no error, noting that all jurors ultimately empaneled swore that they could be fair and impartial. *Id.* at P 15, 825 P.2d at 1361-62.

In this case, the trial court stated that she did not perceive Mr. Walker's remark as anything but an opinion, and doubted that the rest of the panel would have

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Even though the trial court eventually removed the panelist for cause, the Ninth Circuit Court of Appeals, on *habeas* review, found that her comments irreparably tainted the entire panel. The court's decision was based on "the nature of [the] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated," as well as the fact that the case essentially boiled down to a credibility contest between the defendant and the complainant. None of these factors is present in this case. The isolated comment was not clearly based on any specialized, first-hand knowledge; it reflected only a general concern about the "chance" of parole; and the evidence in this case involved much more than a simple credibility contest. The Ninth Circuit has actually distinguished *Mach* on facts more similar to those in this case. *United States v. Uriarte-Perez*, 1998 U.S. App. LEXIS 24941 1998 WL 704102 (9th Cir. 1998) (finding no tainted jury panel where panelist made a single comment related to the fact that guilty people sometimes proclaim their innocence; comment was not based on specialized knowledge, and panelist was immediately excused).

considered it any other way. We defer to the trial court's own perceptions and experience in these matters. The trial court's decision not to draw further attention to the comment by admonishing the rest of the panel to disregard it, was not an abuse of discretion. *Tate v. State*, 1995 OK CR 24, PP 18-21, 896 P.2d 1182, 1188-89. Defense counsel himself could have questioned the rest of the panel to determine if the comment affected them, but chose not to. All of those who ultimately sat on Appellant's jury swore that they could be fair and impartial, and that they could consider all three punishment options available to them. After hearing the evidence, the jury did not even feel that life without the possibility of parole was the appropriate punishment. Appellant has failed to demonstrate any prejudice from the prospective juror's comment. This proposition is denied.

V. Issues relating to the guilt-innocence phase.

(a) Sufficiency of the evidence.

In Proposition 5, Appellant claims the evidence was insufficient to support either of his convictions. Appellant essentially claims that there is no direct evidence linking him to Rob Andrew's murder, or to any conspiracy to commit the murder. On issues of fact and witness credibility, we give substantial deference to the jury. When reviewing the sufficiency of the evidence to support a criminal conviction, we will only grant relief if, considering all of the evidence in a light most favorable to the State, no rational juror could have found the existence of all elements of the offense by proof beyond a reasonable

doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *Myers v. State*, 2000 OK CR 25, P 39, 17 P.3d 1021, 1032.

Appellant claims there is no "physical evidence" or "forensic evidence" linking him to the crimes. He misapprehends the nature of evidence long held to be admissible and credible in a court of law. A fingerprint at a crime scene may be considered "physical" or "forensic" evidence, though it is not direct evidence of a crime; rather, it is circumstantial evidence from which a jury can infer (in light of other circumstances) that the person with that fingerprint was present and participated in the crime. The same is true of DNA evidence. Both are circumstantial in nature, requiring an inference unnecessary for "direct" evidence, such as a witness's personal observation of a crime. That both fingerprints and DNA can be so compelling as evidence of guilt (or exoneration) attests to the powerful effect circumstantial evidence can have. *See generally Ex parte Jefferies*, 7 Okl.Cr. 544, 548, 124 P. 924, 925-26 (1912). In fact, classic sources of "direct" evidence—a confession, an eyewitness identification, the testimony of an informant or accomplice—are themselves the subject of special cautionary instructions and corroboration rules.[9] In the end, the law makes no distinction between direct and circumstantial evidence;

9. *See* OUJI-CR (2nd) No. 9-19 (cautionary instruction regarding eyewitness identifications); OUJI-CR (2nd) No. 9-43 (cautionary instruction regarding informant witnesses); OUJI-CR (2nd) No. 9-28 (requirement that accomplice testimony be corroborated); OUJI-CR (2nd) No. 9-13 (requirement that a defendant's confession be corroborated).

either, or any combination of the two, may be sufficient to support a conviction. *Clark v. State*, 1983 OK CR 79, P 8, 664 P.2d 1065, 1066; OUJI-CR (2nd) No. 9-4. The jury may consider all competent evidence, along with rules of law and basic common sense, in reaching a verdict.

Although Brenda Andrew was an eyewitness to her husband's murder, the State obviously did not believe that her account of two masked assailants was true. The State thus relied on evidence that Appellant and Brenda Andrew had several motives to murder Rob Andrew (money, dissolution of the Andrew marriage, control over the Andrew children), all related to the illicit affair that Appellant never disputed having with Brenda.

But the State's evidence demonstrated much more than motive. There was, in fact, a considerable amount of physical evidence, including bullets, shotgun shells, and forged documents, which linked Appellant to the murder and a pre-existing plan to get away with it. The testimony of Janna Larson, Appellant's daughter, helped to show that Appellant and Brenda had planned to harm Rob Andrew for some time, and that the failure of their first attempt (by cutting the brake lines on his car) only emboldened them. Larson also related a number of incriminating statements from both Appellant and Brenda. Larson may not have been an eyewitness to the murder itself, but she was certainly an eyewitness to many overt acts of the two conspirators, and to their preparations for flight after the murder. The State also presented the letter written by Appellant from jail, wherein he admitted complicity in the murder but attempted to exculpate Brenda. Both

parties rejected the letter as an accurate version of what happened, although obviously for different reasons. While the letter may have borne some relevance to show Appellant's complicity, it was perhaps more relevant to show how jealousy and greed can disfigure the human mind. Add to this the numerous other witnesses who spoke with and observed Rob Andrew, Brenda Andrew, and Appellant, as their relationships with one another evolved. In short, the evidence against Appellant was largely circumstantial, but that is not unusual in any kind of criminal case. What may be unusual was how large a quantity of circumstantial evidence the State was able to present.

All of the evidence presented at trial, when considered together, formed an intricate web of proof, from which any rational juror could find Appellant guilty of conspiring to murder Rob Andrew and consummating the murderous plan. *Plantz v. State*, 1994 OK CR 33, P 39, 876 P.2d 268, 280. The evidence was sufficient to support both of Appellant's convictions. This proposition is denied.

(b) Alternative-suspect evidence.

In Proposition 7, Appellant claims he was denied his right to present a defense, specifically, evidence that someone else had confessed to killing Rob Andrew. After Appellant's trial had begun, defense counsel received a handwritten letter, purportedly from Zjaiton Wood, an inmate at the Oklahoma County Jail, confessing to the murder of Rob Andrew and detailing how he supposedly committed the crime. A similar letter was sent to the trial judge. Defense counsel filed a motion to endorse Wood

as a defense witness, as well as two jailers who allegedly heard Wood make similar incriminating statements. The trial court held a hearing on the matter September 12 and 15, 2003.[10]

At the hearing, Wood appeared through counsel; he was in jail pending his trial on an unrelated capital murder charge. Wood's counsel strongly objected to her client being forced to testify concerning authorship and contents of the letters. After hearing argument from all parties, the trial court found the letters to be inherently untrustworthy, and refused to compel Wood to appear. Strangely, Appellant's defense counsel chose not to call the two jailers he had also moved to endorse as witnesses. Instead, counsel made an offer of proof that the jailers could testify to statements against penal interest that Wood made to them; that one jailer had seen other writings by Wood and believed the letters in question bore similar handwriting; and that Wood had actually handed the letters in question to one of the jailers and made an oral admission in conjunction therewith. The letters in question were admitted into evidence at the hearing, and are part of this appeal record.

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10. The trial court closed the courtroom to the press and spectators during this hearing, and directed that the transcript of the hearing be sealed. On appeal, the State sought and was granted permission to file its response to this proposition separately and under seal. We now **FIND** no substantial reason for either the pertinent parts of the appeal record or the State's response to remain under seal, and hereby **ORDER** that they be unsealed.

Appendix G

Appellant claims that the exclusion of the letters from his trial denied him his right to present a defense. The trial court has considerable discretion in deciding whether to admit or exclude evidence, and we review only for an abuse of that discretion. *West v. State*, 1990 OK CR 61, P 16, 798 P.2d 1083, 1087. We are also mindful, however, that a defendant has a right to present competent evidence in his own defense, and that rules of evidence may not arbitrarily impinge on that right. *See Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

We first consider whether Appellant had a right to compel Wood to appear at the hearing and testify as to whether he wrote the letters. We find that he did not. Under the Fifth Amendment to the United States Constitution, and Article 2, § 21 of the Oklahoma constitution, no person can be compelled to give evidence which could tend to incriminate him. This privilege applies to anyone called as a witness, not just to the accused in a criminal trial; it is not limited to answers which would directly incriminate the witness in the instant proceeding, but extends to any incriminating consequences which would flow from compelled disclosure. *See Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973); *Morgan v. State*, 1976 OK CR 263, P 5, 555 P.2d 1307, 1309; *Oklahoma Dept. of Public Safety v. Robinson*, 1973 OK 80, P 25, 512 P.2d 128, 132-33. The trial court is vested with discretion to determine, from all relevant circumstances, whether certain information should be compelled. *Rey v. Means*, 1978 OK 4, P 14, 575 P.2d 116, 120-21. Although an accused has a right to compulsory process for obtaining witnesses on his behalf, *see* Okla. Const. art. 2, § 20, he does not have the right to compel a witness to give testimony which could

violate this privilege, or to compel attendance of a witness for the sole purpose of invoking the privilege. *Sherrick v. State*, 1986 OK CR 142, P 6, 725 P.2d 1278, 1282; *Bryant v. State*, 1967 OK CR 196, P 9, 434 P.2d 498, 500.

Applying these principles to the facts at hand, Appellant could not compel Wood's presence in court, as defense counsel's expressed purpose for doing so was to determine authorship of the self-incriminating letters. As Wood's defense counsel explained, her concern was that anything Wood said on the witness stand—even a refusal to answer due to a claim of privilege, outside the presence of a jury—might be used against him by the State in Wood's own capital murder trial. *See Messier v. State*, 1967 OK CR 84, PP 2-12, 428 P.2d 338, 340-41 (reversible error occurred where defendant was called to testify at her co-defendant's preliminary hearing, but invoked her privilege against self-incrimination, and the State subsequently used the defendant's invocation of privilege at that hearing against the defendant at her own trial).[11] The trial court understood these concerns,

11. Even if Wood refused to answer on Fifth Amendment grounds, the State might have attempted (improperly) to use adverse inferences from that refusal as evidence that he was a "continuing threat to society," and therefore deserving of the death penalty, in his own murder trial. *See* 12 O.S.1991, § 2513 (prohibiting any adverse inference to be taken from a witness's claim of evidentiary privilege). Of course, the fact that such inferences are improper under our Evidence Code does not mean they are never suggested by zealous counsel. *See e.g. Johnson v. State*, 1995 OK CR 43, PP 7-15, 905 P.2d 818, 821-23 (prosecutor's repeated questioning of co-defendant, resulting in repeated invocations of his Fifth Amendment privilege in front of the jury, denied defendant a fair trial).

and declined to force Wood into that situation. We find no abuse of discretion on this point.

Whether Appellant was denied the right to present a defense ultimately turns on whether the evidence at his disposal was admissible. Unable to compel Wood to incriminate himself under oath, Appellant was left with letters, purportedly written by Wood, confessing to Rob Andrew's murder. The trial court ruled that the letters themselves were not admissible at trial because they were inherently unreliable. On appeal, neither party addresses the applicability of section 2804(B)(3) of the Evidence Code, which defines certain exceptions to the rule barring hearsay, and states in relevant part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> A statement which was at the time of its making contrary to the declarant's pecuniary or proprietary interest, or which tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, and which a reasonable person in the declarant's position would not have made unless the declarant believed it to be true. *A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. . . .*

12 O.S.Supp.2002, § 2804(B)(3) (emphasis added).

Section 2804(B)(3) is clearly applicable in this situation.[12] There is no question that the letters in question contained statements against the author's penal interest. The putative author of the letters (Wood) was unavailable because he could not be compelled to testify. 12 O.S.Supp.2002, § 2804(A)(1); *Funkhouser v. State*, 1987 OK CR 44, P 5, 734 P.2d 815, 816-17. Even assuming that Appellant could establish authorship of the letters, he was still required to establish (1) that a reasonable person in the author's position would not have made the statements if they were not true, and (2) corroborating circumstances which "clearly" indicate the trustworthiness of the letters. The trial court is not limited to gauging the credibility of an exculpatory statement by reference to the evidence supporting the State's theory. The court may, and indeed should, consider any relevant evidence—even evidence the State discounts—in determining whether the statement is trustworthy enough to be admissible.

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12. Out-of-court statements, tending to exonerate the defendant and implicate the declarant, have traditionally been viewed with great suspicion. *See Dykes v. State*, 11 Okl.Cr. 602, 611-14, 150 P. 84, 87 (1915) (citing Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913); *Peck v. State*, 86 Tenn. 259, 6 S.W. 389, 392 (Tenn.1888) ("To admit such [evidence] would be to overturn the well-settled rules of law which excludes [sic] hearsay; and would open the door to the most easily manufactured evidence. The admission is not part of the res gestae, is not made under oath, and can be made for the purpose of exculpating the defendant, and its falsity afterwards confessed, when it has accomplished the desired end. But it is needless to elaborate a principle so well settled by authority").

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The trial court had before it a number of facts which cast doubt on the letters' trustworthiness. As noted, Zjaiton Wood was himself awaiting trial on an unrelated charge of first-degree capital murder. He just happened to be housed in the same "pod" of the county jail as Appellant. The letters were handwritten but practically identical; that is, it appeared that one had been copied verbatim from the other, or that they had both been copied from another source. While the letters were detailed, they were perhaps *too* detailed, appearing to parrot certain key features of the State's case. The letters were mailed shortly after Appellant's trial began—after the State had publicly outlined the salient features of its case.[13] The trial court was also presented with information that Brenda Andrew had allegedly threatened a female witness who was to testify at one of the criminal proceedings against Wood, and that Wood had allegedly attempted to "confess" to other local murders besides this one. The trial court was entitled to consider all of this information in deciding whether the letters were presumptively credible enough to be admitted under § 2804. 12 O.S.2001, § 2103(B)(1); *Lee v. State*, 1983 OK CR 41, P 6, 661 P.2d 1345, 1349.

In addition, the contents of the letters were inconsistent with other evidence, including some facts beyond the State's theory of the case. For example, while the letters

13. *See State v. Pierre*, 277 Conn. 42, 890 A.2d 474, 493 (Conn. 2006) (for purposes of admitting a declarant's statement under hearsay exception for statements against penal interest, declarations made soon after the crime are generally more reliable than those made after a lapse of time, where a declarant has a more opportunity for reflection and contrivance).

claimed that the 16-gauge shotgun used to kill Andrew was left at the scene, no such weapon (or any weapon for that matter) was found in the vicinity. In fact, the 16-gauge shotgun used to kill Rob Andrew—which was the same unusual gauge of shotgun that Rob Andrew owned and had left in the home when he moved out—was never found. The letters claim that Wood acted alone in the murder, and this is inconsistent with both Brenda Andrew's own claim that *two* assailants attacked her husband, and the letter, written by Appellant, claiming that he enlisted another man to help him kill Rob Andrew. While the State obviously did not believe either account, the discrepancies between the letters purportedly written by Wood, and the defendants' respective versions of events, was something the trial court was entitled to consider in gauging the reliability of the letters.

Appellant refers us to *Gore v. State*, 2005 OK CR 14, 119 P.3d 1268, and *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), to support his claim that he was entitled, as a matter of due process, to present evidence of a possible third-party perpetrator. In *Holmes*, the Supreme Court found that a state evidentiary rule governing admissibility of third-party perpetrator evidence ran afoul of the Sixth and Fourteenth Amendment rights to a fair trial. The defendant in Holmes, charged with rape, burglary, robbery, and capital murder, proffered testimony suggesting that the forensic evidence against him had been contaminated and/or planted, and that another man, White, had admitted to the crime to several other people. White denied making any incriminating statements to others, and offered an alibi. The trial court

excluded this evidence. The state appellate court affirmed, holding that third-party perpetrator evidence should be excluded any time the evidence against the defendant is "strong," particularly when there is "strong forensic evidence" of the defendant's guilt.

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The United States Supreme Court found the rule applied by the state appellate court in *Holmes* to be too rigid. The Court pointed to several of its past cases, striking down similar rules that "serve[d] no legitimate purpose" or were "so disproportionate to the ends that they [were] asserted to promote."[14] *Holmes*, 547 U.S. at , 126 S.Ct. at 1732-33. Yet the Court recognized the authority of legislatures, and courts, to impose reasonable evidentiary rules in criminal trials, and noted that such authority—even regarding the admission of third-party perpetrator evidence—was not directly at issue. The only issue in Holmes was the South Carolina Supreme Court's recent expansion of its decades-old, judge-made rule, to make the admissibility of third-party perpetrator evidence entirely dependent upon the strength of the prosecution's evidence, considered in isolation. The Supreme Court found such a rule unconstitutional, in effect because it irrationally presumed that any evidence presented by the state was necessarily more credible than any evidence proffered by the defense.

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14. *See Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (state law which barred defendants from presenting the testimony of any co-defendant, unless the co-defendant had been acquitted, but imposed no such restriction on the prosecution); *Chambers*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (state "voucher rule" with prevented any party from impeaching its own witness); *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (court rule preventing defendant from introducing evidence, at trial, bearing on the credibility of his confession, after voluntariness had been determined by the court).

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In *Gore v. State*, this Court reversed a capital murder conviction because the defendant was barred from presenting an array of evidence that the murder might have been committed by others. *Gore* addressed what test should be applied to determine whether third-party perpetrator evidence is relevant and sufficiently material to be presented to a jury; but it did not hold that such evidence was immune from basic evidence rules. As we noted in *Gore*, a criminal defendant has a right to present evidence in his own defense, but must comply with the same evidentiary and procedural rules that are applicable to the State. *Gore*, 2005 OK CR 14 at P 21, 119 P.3d at 1275.

The rule applicable here—12 O.S. § 2804(B)(3)—is nothing like the rule invalidated in *Holmes*. It permits the reliability of the hearsay statement to be judged by any relevant evidence, presented to the court on the preliminary question of admissibility. Nor is the situation here anything like the one in *Gore*, where the defense had an array of evidence, both direct and circumstantial, suggesting that someone else may have committed the crime. The letters purportedly written by Wood were not inadmissible merely because they were inconsistent with the State's theory; they were inadmissible because there simply was nothing offered to corroborate them.[15]

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15. *See Costa v. State*, 1988 OK CR 74, PP 4-5, 753 P.2d 393, 394-95 (trial court properly excluded statement of unavailable declarant, allegedly admitting homicide, as unreliable under § 2804(B)(3), where, *inter alia*, parts of the statement were inconsistent with other testimony, and the only witnesses to the alleged confession were the defendant himself and defendant's girlfriend).

A confession tends to be more trustworthy if it provides hitherto-unknown facts which are not only verifiable, but also consistent with known facts. The letters at issue fail both parts of this test. As explained in our discussion of Proposition 5, a substantial amount of evidence, both direct and circumstantial, from a variety of witnesses and other sources, coalesced into a web of proof strongly implicating Appellant in a murderous conspiracy to kill Rob Andrew. We fail to see how a jury could possibly have discounted all of this evidence in favor of a theory that Zjaiton Wood—with no known connection to anyone in this case—happened to drive up and murder Rob Andrew for his wallet, in his garage, using the same unusual gauge of shotgun that used to be in the Andrews' home but which is now nowhere to be found. Under these circumstances, the trial court did not abuse its discretion in either refusing to compel Wood to affirm or deny authorship of the letters, or in excluding the letters from the trial, pursuant to 12 O.S. § 2804(B)(3), as uncorroborated and unreliable. This proposition is denied.

(c) Admission of gruesome crime-scene photographs.

In Proposition 8, Appellant claims error when the trial court admitted several photographs of the murder victim at the crime scene. At trial, defense counsel objected generally to the "multitude of bloody photographs" from the crime scene that the State offered to introduce. These photographs depicted Rob Andrew's body on the floor of the garage. He bled to death after being shot twice at close range with a shotgun. The photographs showed the body

from various angles. Appellant's objection at trial appears to focus more on the number of photographs rather than their gruesome nature. The trial court admitted many of the photos but did sustain the defense objection to several others.

On appeal, Appellant does not claim the photographs were needlessly cumulative, only that they were gruesome, and therefore "had no place in the trial." We review the trial court's decision to admit crime-scene photographs for an abuse of discretion. *DeRosa*, 2004 OK CR 19 at P 73, 89 P.3d at 1150. This Court has many times noted that gruesome crimes make for gruesome crime-scene photographs; the issue is whether the probative value of the evidence is substantially outweighed by its prejudicial effect. 12 O.S.2001, §§ 2401-03; *Dodd*, 2004 OK CR 31 at P 66, 100 P.3d at 1038; *Le v. State*, 1997 OK CR 55, P 25, 947 P.2d 535, 548. The State was entitled to corroborate and illustrate the testimony of its witnesses about what the crime scene looked like and the manner of death. The record shows that the trial court carefully considered each photograph before admitting it. We find no abuse of discretion here, and this proposition is denied.

(d) Improper first-stage hearsay and opinion evidence.

In Proposition 3, Appellant claims error when a State's witness was allowed to interject hearsay and give his personal opinion of Appellant's guilt. Defense counsel timely objected to this testimony, so the issue was preserved for appellate review. *Hooks v. State*, 2001 OK

CR 1, P 16, 19 P.3d 294, 308; *Ullery v. State*, 1999 OK CR 36, P 36, 988 P.2d 332, 349. We review the trial court's evidentiary rulings for an abuse of discretion. *West*, 1990 OK CR 61 at P 16, 798 P.2d at 1087.

Janna Larson, Appellant's daughter, testified in the State's case in chief about her conversations with her father before and after Andrew's murder, and about her observations of her father's conduct. Appellant made incriminating statements to Larson, told her of his affair with Brenda Andrew, and enlisted her help at various times in his efforts to perpetrate the murder and avoid detection. After Appellant and Brenda left for Mexico, Larson contacted an attorney, and soon agreed to cooperate with the authorities. One officer that she worked closely with was Agent Kurt Stoner of the Federal Bureau of Investigation. Larson was understandably not happy about having to testify against her father at trial. She implied that she cooperated with authorities out of fear that she might be implicated in the murder if she did not. While not an entirely hostile witness for the State, Larson was led by defense counsel, in cross-examination, to opine several times that she did not believe her father was actually complicit in Rob Andrew's murder.

After Larson testified, the State called Agent Stoner to the stand. Stoner offered his version of Larson's cooperation in the investigation. Stoner described Larson as angry with her father and eager to cooperate with the authorities; he denied that Larson was ever threatened with prosecution if she did not cooperate. The prosecutor then attempted, several times, to impeach parts of Larson's testimony on this point by asking Stoner what

Larson had told him about her father's involvement in the murders. Each time, defense counsel objected, and the trial court sustained the objection. We need not decide whether this would have been proper impeachment because the testimony was never adduced; Appellant's hearsay claim is unfounded. *Armstrong v. State*, 1991 OK CR 34, P 24, 811 P.2d 593, 599.

The prosecutor then asked Stoner if, based on his law enforcement experience and involvement in this case, he had an opinion about Appellant's guilt. Defense counsel promptly objected, but before the court could rule on the objection, Stoner said he believed Appellant was "directly involved" in the murder. The trial court denied defense counsel's request for a mistrial. The record shows that the parties had discussed with the court, *in limine*, the possibility of one party opening the door to such evidence, and the prosecutor pointed out that the defense had just elicited the very same type of opinion testimony from Larson. The trial court admonished the jury to disregard any opinions about Appellant's guilt, whether from Larson or Stoner.

We have often held that an admonition to disregard inadmissible testimony is presumed to cure any possible error. *See, e.g., Al-Mosawi v. State*, 1996 OK CR 59, P 59, 929 P.2d 270, 284. But given the situation presented in this case, we also find that any possible error was invited by the defense. *Hooper v. State*, 1997 OK CR 64, P 20, 947 P.2d 1090, 1100. Just before Agent Stoner took the stand, defense counsel elicited Larson's opinion as to her father's innocence several times. Stoner was used to impeach several aspects of Larson's testimony, not just

her opinion of her father's guilt. We do not condone counsel for either party gratuitously soliciting witness opinions as to what result the jury should reach. *See Littlejohn v. State*, 1998 OK CR 75, P 16, 989 P.2d 901, 907; Daniels v. State, 1976 OK CR 189, PP 18-20, 554 P.2d 88, 94-95. However, we do not believe the opinions of either Larson or Stoner—each of whom had a potential bias—left a serious impression on the jurors, particularly after the trial court admonished them to disregard both. *See Malicoat v. State*, 2000 OK CR 1, P 45, 992 P.2d 383, 404-05 (investigator's opinion that defendant intentionally abused child murder victim, uttered twice before trial court was able to rule on defense objection, was harmless, where court sustained objection and admonished jury to disregard opinion). This proposition is denied.

VI. Issues relating to the capital sentencing phase.

(a) Prosecutor misconduct.

In Proposition 9, Appellant contends that he was denied a fair trial by the prosecutor's arguments during the sentencing phase. Because Appellant did not object to any of these comments, we review them only for plain error. *Washington v. State*, 1999 OK CR 22, P 40, 989 P.2d 960, 974. In Proposition 10, he claims that his trial counsel was ineffective for not objecting to these comments. We address these related issues together.

First, Appellant complains of various comments that he describes as the personal opinions of the prosecutor. Appellant refers to the prosecutor's comments that this

was a "proper case for the death penalty"; that "there are no extenuating circumstances which mitigate the murder of Rob Andrew"; that this particular murder was "heinous, atrocious, or cruel"; that the jurors were "the only ones who can see that justice is done"; and, finally, that a death sentence was "the justice [Appellant] deserves."

Counsel enjoy significant latitude in arguing their respective positions, so long as the arguments are based on evidence the jury has received. *Washington*, 1999 OK CR 22 at P 42, 989 P.2d at 974. A prosecutor's comments do not amount to improper "personal opinion" merely because she asks the jury to impose the death penalty. *See Bernay v. State*, 1999 OK CR 46, 1999 OK CR 37, P 65, 989 P.2d 998, 1014 ("A prosecutor may comment on the punishment to be given"). The prosecutor's arguments in this case as to why Appellant "deserved" the death penalty were based on her assessments of the evidence presented in court, and were entirely proper. *See Toles v. State*, 1997 OK CR 45, P 65, 947 P.2d 180, 193 ("The prosecutor did not give his personal opinion of the death penalty; he argued why the death penalty was appropriate in this case").

Appellant also claims that the prosecutor improperly engaged in speculation and evoked sympathy for the victim in the following passage:

> When Rob Andrew lay dying on that garage floor, James Pavatt and Brenda Andrew looking at the sight that you see in those pictures, what do you believe his last words were? What do you believe he was trying to say when he was

> laying there on the floor looking up at Brenda Andrew's face? He was probably trying to say I love you, Brenda, because that's the kind of man he was.

Considering the evidence presented from the crime scene, and about Rob Andrew's feelings for his wife, this was actually a fair comment on the evidence. The prosecutor never suggested that the inference was based on anything the jury had not heard. *See Alverson v. State*, 1999 OK CR 21, P 45, 983 P.2d 498, 514 (prosecutor's reference to murder victim as an "innocent man, trying to make a living for his wife and two baby boys," was a proper comment on the evidence).

To the extent this comment may have evoked sympathy for the victim, we do not find it so outrageous as to have denied Appellant a fair sentencing proceeding. As the State had alleged that the murder of Rob Andrew was especially heinous, atrocious, or cruel, it was entitled to present evidence that Rob Andrew suffered extreme mental cruelty in conjunction with his death. *DeRosa*, 2004 OK CR 19 at P 96, 89 P.3d at 1156. The evidence reasonably led to the conclusion that the last images Rob Andrew saw were of his wife and her lover working together to end his life. The prosecutor was entitled to suggest reasonable inferences about what Rob Andrew's last thoughts might have been, in order to establish the "heinous, atrocious, or cruel" aggravator. *See Alverson*, 1999 OK CR 21 at P 46, 983 P.2d at 514 (prosecutor's asking the jury to imagine the feeling of a metal baseball bat hitting one's head was a permissible comment on the pain the victim may have felt

prior to death); *Hooper*, 1997 OK CR 64 at P 53, 947 P.2d at 1110 (prosecutor's statement that the murder victim "was immersed in a child's worst nightmare of being chased by an evil monster trying to kill her," and request that the jurors imagine what she went through, were based on the evidence presented and on the State's theory of how the victim died). We find no plain error in these statements.

Appellant's ineffective-counsel claim fails as well. To prevail on this claim, Appellant must demonstrate that (1) counsel acted in a professionally unreasonable manner by failing to object to the prosecutor's comments, and (2) a reasonable possibility exists that a different sentencing outcome would have resulted if counsel had objected. *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984); *Dodd*, 2004 OK CR 31 at P 112, 100 P.3d at 1049. As we have found that the prosecutor's comments were not improper, any defense objection to them would have been properly overruled and the ultimate outcome unchanged. Defense counsel was not ineffective for failing to object to comments which were not objectionable. *Short v. State*, 1999 OK CR 15, P 85, 980 P.2d 1081, 1106-07. These propositions are denied.[16]

16. Within Proposition 11, Appellant makes a passing request that trial counsel be deemed constitutionally ineffective if this Court finds any other "harmful error" that he did not object to. Essentially, Appellant seems to be asking this Court to search the record for additional arguments, which we decline to do. *Alverson*, 1999 OK CR 21 at P 77, 983 P.2d at 520; *Armstrong*, 1991 OK CR 34 at P 24, 811 P.2d at 599.

(b) Victim impact testimony.

In Proposition 11, Appellant claims he was denied a fair sentencing proceeding by improper victim-impact testimony. Specifically, Appellant complains of a single comment made by E. R. Andrew, the victim's father: a request that the perpetrators of the murder "never walk free." Appellant reads this as a recommendation for punishment, and claims its prejudicial effect was exacerbated by the comment of a prospective juror during *voir dire* that he could not consider a life sentence with the possibility of parole (addressed in Proposition 2).

We have acknowledged that under 22 O.S.2001, §§ 984 and 984.1, those eligible to give victim impact testimony in a capital sentencing proceeding may give an opinion as to punishment. *Dodd*, 2004 OK CR 31 at P 101, 100 P.3d at 1046; *Welch v. State*, 2000 OK CR 8, P 46, 2 P.3d 356, 374. The only punishment options for First Degree Murder are life imprisonment, life imprisonment without parole, and death. 21 O.S.2001, § 701.9(A). Mr. Andrew's opinion that Appellant should "never walk free" cannot reasonably be construed to advocate for any of the available punishment options in particular. Appellant has failed to demonstrate any prejudice from the comment, either in isolation, or in conjunction with a single statement during *voir dire* by someone who was ultimately excused from the jury panel (see Proposition 2). Appellant did not object to the comment, and we find no plain error in it. *Lott v. State*, 2004 OK CR 27, P 108, 98 P.3d 318, 346. This proposition is denied.

(c) Damaging mitigation testimony.

In Proposition 12, Appellant claims he was denied a fair sentencing proceeding by the testimony of one of his own mitigation witnesses. Appellant's step-father, Wade Veteto, was one of several witnesses called by the defense to ask the jury to spare Appellant's life. In his final comment to the jury, Veteto said, "Guess the only thing I can say to the jury is if there's any mercy in your heart please show it on my son." As defense counsel announced he had no further questions, Veteto added, "And if there ain't I hope God will show mercy on you." The witness then answered a number of questions posed by the prosecutor.

Appellant claims this last quoted statement prejudiced him, as the jurors were likely to have taken it as some sort of threat of divine retribution if they imposed a death sentence. Appellant cites cases which correctly hold that a prosecutor should not use religion to advocate a particular verdict or sentence.[17] We have applied that same principle to evidence sponsored by the State, *e.g.* victim impact statements in capital sentencing proceedings. *See Washington*, 1999 OK CR 22 at PP 60-62, 989 P.2d at 977-79. We find these cases inapposite, however, as the source of the comment in this case was a mitigation

17. *See e.g. Sandoval v. Calderon*, 241 F.3d 765, 775-780 (9th Cir. 2000) (where prosecutor contended that the death penalty was sanctioned by God); *Fontenot v. State*, 1994 OK CR 42, P 59, 881 P.2d 69, 85 (where prosecutor made Biblical references in closing argument); *Gibson v. State*, 1972 OK CR 249, PP 42-43, 501 P.2d 891, 900-01 (where prosecutor used "extensive recitation of Mosaic law" and "quotations from the New Testament" in closing argument).

witness called by the defense. It is true that the comment was not solicited by counsel, and we appreciate the delicate nature of objecting to the comments of any victim-impact or mitigation witness. Still, we note that defense counsel did not seek to follow up with additional questions or ask the trial court to admonish the jury to disregard the comment. Thus, relief is not warranted unless the comment amounts to plain error. *Lott*, 2004 OK CR 27 at P 108, 98 P.3d at 346. Having considered the entirety of the witness's testimony, we find no unfair prejudice, and hence no plain error. A few moments before making this comment, the same witness broke the tension of the courtroom with a humorous aside that made the jurors laugh. We detect nothing intimidating in the witness's testimony when read as a whole. This proposition is denied.

(d) Ineffective assistance of counsel.

In Proposition 13, Appellant claims trial counsel rendered deficient performance through a single comment made in punishment-stage opening statement:

> May it please the Court, Counsel, ladies and gentlemen of the jury. I think this task is probably one of the hardest for a defense attorney to do because it puts you in a position of talking to a jury that obviously didn't agree with your assertion of your defense. But nonetheless it's my obligation to stand here and to go over some of the same issues that we've had to talk about before.

We first consider whether counsel's comment was professionally unreasonable, and if so, whether there is

a reasonable possibility that the comment affected the outcome of the punishment stage. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-65, 80 L.Ed.2d 674. Appellant contends that in this comment, defense counsel conceded that he was only advocating for Appellant out of obligation, and that the death penalty was a foregone conclusion. We disagree on both counts.

Counsel's comment was typical of those often seen in bifurcated trials (where the issue of punishment is reserved until after a finding of guilt), and in capital cases in particular. In those situations, the defendant and his counsel must eventually abandon the fight over guilt or innocence, accept the jury's verdict on that score, and move on to arguments related to punishment. The "obligation" counsel refers to in the quoted passage is clearly not an obligation to defend a person he believes his guilty or deserving of the death penalty. As we read the passage, counsel was simply reiterating his belief in his client's cause, and expressing disappointment that the jury did not share his belief.

Nor do we read counsel's comment as a concession that the death penalty was inevitable. Rather, counsel was asking the jurors to indulge his references to guilt-stage evidence, even though they had rejected the defense theory, because some of that evidence was relevant to punishment as well.[18] Far from being any sort of concession, counsel's

18. Evidence relating to both aggravating circumstances was presented in the guilt stage of trial, and that evidence was formally incorporated into the punishment stage. In fact, the punishment stage evidence was essentially limited to victim-impact and mitigation witnesses.

comment evinced an unflagging determination to defend his client. Counsel's comment was neither unreasonable, unprofessional, nor prejudicial. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-65, 80 L.Ed.2d 674 (1984); *Kelsey v. State*, 1987 OK CR 206, P 4, 744 P.2d 190, 191-92. This proposition is denied.

(e) Sufficiency of evidence on aggravating circumstances.

In Propositions 14 and 15, Appellant challenges the sufficiency of the evidence to support the two aggravating circumstances alleged by the State as warranting the death penalty. Such challenges are reviewed under the same standard as challenges to the evidence supporting a criminal conviction. We consider the evidence in a light most favorable to the State, and determine whether any rational juror could have found the existence of the challenged aggravating circumstance beyond a reasonable doubt. *DeRosa*, 2004 OK CR 19 at P 85, 89 P.3d at 1153; *Lockett v. State*, 2002 OK CR 30, P 39, 53 P.3d 418, 430.

In Proposition 14, Appellant claims the evidence was insufficient to support the jury's finding that the murder of Rob Andrew was "especially heinous, atrocious, or cruel." To establish this aggravator, the State must present evidence from which the jury could find that the victim's death was preceded by either serious physical abuse or torture. Evidence that the victim was conscious and aware of the attack supports a finding of torture. *Davis v. State*, 2004 OK CR 36, P 39, 103 P.3d 70, 81; *Black v. State*, 2001 OK CR 5, P 79, 21 P.3d 1047, 1074 (evidence that victim consciously suffered pain during and after stabbing was

sufficient to support this aggravating circumstance); *Le*, 1997 OK CR 55 at P 35, 947 P.2d at 550; *Romano v. State*, 1995 OK CR 74, P 70, 909 P.2d 92, 118; *Berget v. State*, 1991 OK CR 121, P 31, 824 P.2d 364, 373. Our evaluation is not a mechanistic exercise. As we stated in *Robinson v. State*, 1995 OK CR 25, P 36, 900 P.2d 389, 401:

> As much as we would like to point to specific, uniform criteria, applicable to all murder cases, which would make the application of the "heinous, atrocious or cruel" aggravator a mechanical procedure, that is simply not possible. Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was proved. Unfortunately, no two cases present identical fact scenarios for our consideration, therefore the particulars of each case become the focus of our inquiry, as opposed to one case's similarity to another, in resolving a sufficiency of the evidence claim supporting the heinous, atrocious or cruel aggravator.

The evidence presented at trial showed that Rob Andrew suffered numerous wounds resulting from two shotgun blasts, which damaged his internal organs. The medical examiner testified that either wound would have caused sufficient blood loss to be independently fatal, but that death was not instantaneous. When emergency personnel arrived, Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggested that he either tried to ward off his attacker or shield himself from being shot. Brenda Andrew called 911

twice after the shooting; together, the two calls spanned several minutes. During the second call, she claimed that her husband was still conscious and attempting to talk to her as he lay bleeding to death on the garage floor. All of these facts tend to show that Rob Andrew suffered serious physical abuse, and was conscious of the fatal attack for several minutes. *See Ledbetter v. State*, 1997 OK CR 5, P 53, 933 P.2d 880, 896 (evidence that murder victim was likely aware that she was about to be assaulted because defendant had attempted to kill her one week earlier, that she tried to defend herself from the fatal attack, and that she attempted to communicate with a neighbor after the attack was sufficient to show that the murder was especially heinous, atrocious or cruel).

After finding that the murder was accompanied by torture or serious physical abuse, the jury may also consider the attitude of the killer and the pitiless nature of the crime. *Lott*, 2004 OK CR 27 at P 172, 98 P.3d at 358; *Phillips v. State*, 1999 OK CR 38, P 80, 989 P.2d 1017, 1039. That the victim was acquainted with his killers is a fact relevant to whether the murder was especially heinous, atrocious, or cruel. In finding the murder in *Boutwell v. State*, 1983 OK CR 17, P 40, 659 P.2d 322, 329 to be especially heinous, atrocious, or cruel, this Court observed:

> In this case the killing was merciless. The robbers planned well in advance to take the victim's life. Even more abhorrent and indicative of cold pitilessness is the fact that the appellant and the victim knew each other.

We find the situation in the present case even more pitiless. Rob Andrew correctly suspected his wife of having an affair with a man he trusted as his insurance agent. He correctly suspected his wife and her lover of trying to wrest control of his life insurance away from him. He correctly suspected his wife and her lover of attempting to kill him several weeks before by severing the brake lines on his car. He confided in others that he was in fear of his life. Having separated from his wife, Rob Andrew was murdered as he returned to the family home to pick up his children for the Thanksgiving holiday. From the evidence, a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he died. The evidence supported this aggravating circumstance, and this proposition is denied.

In Proposition 15, Appellant contends the evidence is insufficient to support the jury's finding that the murder was motivated by "remuneration or the promise of remuneration," as defined by 21 O.S.2001, § 701.12(3).[19] Relying on *Boutwell*, 1983 OK CR 17 at PP 30-38, 659 P.2d at 328-29, and *Johnson v. State*, 1982 OK CR 37, PP 38-41, 665 P.2d 815, 824, Appellant claims that this aggravating circumstance should not apply to every situation where a murder was accompanied by some sort of financial gain, but rather, only where the murder was "primarily" motivated by the hope of financial gain.[20]

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19. This statute defines the aggravating circumstance as follows: "The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration."

20. Appellant relies on this passage from *Johnson*: "Murder for remuneration has also been applied to killings motivated

Both *Boutwell* and *Johnson* involved murder during the commission of an armed robbery. In each case, we held that the "murder for remuneration" aggravator should not be read so broadly as to apply to every situation where a person was killed during a pursuit for money or property, such as an armed robbery. However, we have held that the aggravator is squarely applicable where the killing was motivated by the hope of receiving life insurance proceeds. *See e.g. Stemple*, 2000 OK CR 4 at PP 2-10, 65, 994 P.2d at 65-66, 73 (evidence that defendant, who was having an extramarital affair, arranged to have his wife killed and hoped to collect life insurance proceeds held sufficient to establish this aggravating circumstance); *see also Plantz*, 1994 OK CR 33 at PP 41-42, 876 P.2d at 281 and *Bryson v. State*, 1994 OK CR 32, P 50, 876 P.2d 240, 258-59 (evidence sufficient to support "murder for remuneration" aggravator, where wife (Plantz) and her boyfriend (Bryson) conspired and actually carried out plan to kill husband with the hope of obtaining insurance proceeds). The reason seems obvious to us and clearly within the letter and spirit of § 701.12(3).[21]

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primarily to obtain proceeds from an insurance policy, murder of a testator in order to secure a devise or legacy, and killings which occur in a kidnapping-extortion situation." *Johnson*, 1982 OK CR 37 at P 40, 665 P.2d at 824.

21. Other jurisdictions have reached similar conclusions based on their own capital sentencing schemes. *Cf. People v. Michaels*, 28 Cal. 4th 486, 122 Cal. Rptr. 2d 285, 49 P.3d 1032, 1052 (2002) ("A killing for the purpose of obtaining life insurance benefits, as contrasted with a killing during a burglary or robbery, falls squarely within the scope of the financial gain special circumstance"); *Fitts v. State*, 982 S.W.2d 175, 188 (Tex.App. 1998)

Appellant reads a passage in *Johnson* as requiring that the State to prove that financial gain was the "primary" motive for the murder. We disagree. Section 701.12(3) does not require the State to prove a financial motive to the exclusion or diminution of other possible motives. When read in context, the word "primarily" as used in *Johnson* distinguishes cases where the murder was merely incidental to a robbery or similar attempt to obtain property, as was the case in *Johnson* and *Boutwell*. We find the situation in the companion cases of *Bryson* and *Plantz* more analogous, and language from *Plantz* readily applicable here:

> Evidence in the present case showed that the crime was motivated by financial gain. It was committed after the opportunity of weeks of reflection. It was not a crime of passion, nor was the murder committed as an afterthought while Appellant was in the course of committing another felony offense, such as robbery or burglary. The fact that Appellant was apprehended before she could actually collect the money does not obviate this aggravating circumstance.

(capital sentencing factor involving motive of "remuneration" or "promise of remuneration" is "not limited to murder-for-hire situations," but encompasses "a broad range of situations, including compensation for loss or suffering and the idea of a reward given or received because of some act"); *see also State v. Chew*, 150 N.J. 30, 695 A.2d 1301, 1312 (1997) ("[A]lmost every jurisdiction that has considered a broadly-worded pecuniary gain [capital sentencing] factor has applied the factor to killings to collect insurance proceeds").

Plantz, 1994 OK CR 33 at P 42, 876 P.2d at 281 (emphasis added).

As in *Plantz*, the evidence in this case supports a finding that the murder of Rob Andrew was motivated by a desire to remove the third side of a love triangle, and reap financial gain from insurance proceeds in the process. The life insurance proceeds were no afterthought in this case. Appellant was not only having an affair with the victim's wife; he was the victim's life insurance agent as well. As such, he was particularly well-positioned to try to transfer ownership of Rob Andrew's life insurance policy to Brenda in the months before the murder.

Appellant claims that as a mere paramour, he had no standing to benefit directly from any proceeds Brenda might receive. We find no merit to this argument either. The evidence showed that Appellant hoped to enjoy a life with Brenda Andrew and her children without Rob Andrew's interference. Appellant clearly hoped to partake of the insurance proceeds, even if he was not a contractual beneficiary. *See Bryson*, 1994 OK CR 32 at P 50, 876 P.2d at 259. A rational juror could easily have found that the murder was committed with the hope of remuneration. *DeRosa*, 2004 OK CR 19 at P 85, 89 P.3d at 1153. This proposition is denied.

In Proposition 16, Appellant claims that if even one of the two aggravating circumstances is stricken for insufficient evidence, this Court cannot reassess the propriety of the death penalty based on the one remaining aggravator, but must instead modify Appellant's sentence

on Count 1 to life in prison without parole. Because we have found the evidence sufficient to support both aggravating circumstances found by the jury, this proposition is moot. *Patton v. State*, 1999 OK CR 25, P 15, 989 P.2d 983, 989; *LaFevers v. State*, 1995 OK CR 26, P 47, 897 P.2d 292, 311.

VII. Cumulative error and motion to supplement.

In Proposition 17, Appellant claims that the cumulative effect of the errors raised on appeal denied him a fair trial, or at least a fair capital sentencing proceeding. A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Dodd*, 2004 OK CR 31 at P 116, 100 P.3d at 1051. Even when there have been prejudicial irregularities during the course of a trial, relief is warranted only if the cumulative effect of all the errors denied Appellant a fair trial. *Id.*; *Bechtel v. State*, 1987 OK CR 126, P 12, 738 P.2d 559, 561. We have found no merit to the propositions of error raised by Appellant and, consequently, we find no error by accumulation.

In Proposition 18, Appellant asks to supplement his brief with any meritorious issues that may be raised in his pending capital post-conviction proceeding. As the State points out, any issues properly raised on post-conviction can be fully evaluated within the context of that action. Because Appellant cites no authority for such a request, and we are aware of none, this proposition is denied. *Torres v. State*, 1998 OK CR 40, P 32, 962 P.2d 3, 14.

Appendix G

VIII. Mandatory sentence review.

Pursuant to 21 O.S.2001, § 701.13(C), this Court is required to review Appellant's death sentence to determine (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's findings on aggravating circumstances as enumerated in 21 O.S.2001, § 701.12 . As to the latter, the jury found the existence of two aggravating circumstances: (1) that the murder was especially heinous, atrocious, or cruel, and (2) that the murder was committed for purposes of remuneration or the hope of remuneration. In our discussion of Propositions 14 and 15, we found that each aggravating circumstance was supported by evidence. We found no prejudice in the punishment-stage comments of the prosecutor (Propositions 9 and 10), victim impact evidence (Proposition 11), the comments of a mitigation witness (Proposition 12), or in defense counsel's own performance (Proposition 13). Upon our review of the record as a whole, we find that the sentence of death was not the product of passion, prejudice, or any other arbitrary factor. Finding no error warranting reversal or modification, the Judgment and Sentence is **AFFIRMED**.

DECISION

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. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

Appendix G

OPINION BY C. JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS

CHAPEL, J.: CONCURS IN PART/DISSENTS IN PART

A. JOHNSON, J.: CONCURS

LEWIS, J.: CONCURS

Concur by: CHAPEL (In Part)

Dissent by: CHAPEL (In Part)

Appendix G

CHAPEL, JUDGE, CONCURS IN PART/ DISSENTS IN PART:

I concur in affirming the conviction for First Degree Murder (Count I) and I concur in affirming the death sentence for that crime. However, I would reverse and dismiss the Conspiracy (Count 2) conviction, as I believe it to violate the double jeopardy clauses of both the State and Federal Constitutions.

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED OCTOBER 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6117

(D.C. No. 5:08-CV-00470-R) (W.D. Okla.)

JAMES DWIGHT PAVATT,

Petitioner-Appellant,

v.

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,*

Respondent-Appellee.

ORDER

Before TYMKOVICH, Chief Judge, BRISCOE, LUCERO, HARTZ, HOLMES, MATHESON, BACHARACH, PHILLIPS, McHUGH, MORITZ, EID and CARSON, Circuit Judges.**

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* Pursuant to Fed. R. App. P. 43(c)(2), Terry Royal, is replaced by Mike Carpenter as Interim Warden of the Oklahoma State Penitentiary.

** The Honorable Joel M. Carson took office on May 18, 2018 and did not participate in the original poll. He will, however, participate in the remaining *en banc* proceedings. The Honorable

Appendix H

This matter is before the court on the appellee's *Petition for Panel Rehearing or Rehearing En Banc* and the *Supplemental Petition for Rehearing En Banc* filed on July 25, 2018. We also have responses to both petitions from the appellant.

Upon consideration, and as the parties were advised previously, a poll was called and the poll carried. Consequently, the request for *en banc* rehearing is GRANTED. *See* Fed. R. App. P. 35(a); *see also* 10th Cir. R. 35.6 (noting the effect of the grant of *en banc* rehearing is to vacate the judgment and to restore the case on the docket).

This court has *en banc*ed the entire case, but we request the parties to specifically address the following questions in supplemental memorandum briefs:

> 1) Is Pavatt entitled to federal habeas relief on the basis of his sufficiency-of-the evidence challenge under *Jackson v. Virginia*, 443 U.S. 307 (1979), to the heinous, atrocious, or cruel (HAC) aggravator that was found by the jury in his case?
>
> > a) Was the sufficiency-of-the-evidence claim presented to and addressed by the OCCA?

Paul J. Kelly elected senior status on January 1, 2018 and did not participate in the *en banc* poll. As a member of the original hearing panel, however, Judge Kelly has elected to sit on the *en banc* panel. *See* 10th Cir. R. 35.5.

b) Was the OCCA's resolution of the sufficiency-of-the-evidence claim contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States?

2) Is Pavatt entitled to federal habeas relief on the grounds that (a) the HAC aggravator is unconstitutionally vague or broad, in violation of the Eighth and Fourteenth Amendments, or (b) that the OCCA did not in his case apply the narrowing construction of the HAC aggravator that was previously approved by this court?

a) Were either of these claims presented to and addressed by the OCCA? In other words, did Pavatt exhaust these claims in the Oklahoma state courts?

b) If not, are the claims now unexhausted or procedurally barred?

c) If the claims are unexhausted, has respondent, through counsel, expressly waived the exhaustion requirement for purposes of 28 U.S.C. § 2254(b)(3)?

d) Should this court sua sponte raise the exhaustion issue?

e) If the claims are procedurally barred, has respondent expressly waived that as a defense?

f) Were these claims presented to and resolved by the district court and, if so, was a COA granted on these claims?

g) Were these claims included in this court's case management order as issues to be raised by Pavatt?

h) If the claims can be reviewed on the merits by this court, has the OCCA construed the HAC aggravator in a manner consistent with the Eighth Amendment, and/or did the OCCA fail to apply in Pavatt's case the narrowing construction of the HAC aggravator that was previously approved by this court?

i) Was the OCCA, in light of *Bell v. Cone*, 543 U.S. 447 (2005), required to analyze, discuss, or even mention, controlling Supreme Court precedent regarding the constitutional requirements limiting death-penalty aggravators or the OCCA's own established construction of the HAC aggravator in rejecting Pavatt's

challenge to the jury's finding of the HAC aggravator in his case?

j) Did the OCCA, in rejecting Pavatt's challenge to the jury's finding of the HAC aggravator in his case, effectively expand the meaning of "conscious physical suffering" to encompass the brief period of conscious suffering necessarily present in virtually all murders?

k) Even if the HAC aggravator was improperly applied in this case, was there nevertheless no "constitutional error" in Pavatt's sentence, *Brown v. Sanders*, 546 U.S. 212, 221 (2006), because the jury properly found another aggravator and no evidence was admitted at the penalty phase that was relevant solely to the HAC aggravator?

3) If we reject Pavatt's challenges to the HAC aggravator, is he entitled to federal habeas relief on his ineffective-assistance claims relating to the penalty phase of his trial? And, in this regard, do *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), apply in the special circumstances of this case?

Appendix H

The appellee's supplemental brief shall be filed on or before November 16, 2018 and shall be limited to 40 pages in length in a 13 or 14 point font. In addition, within 2 business days of the electronic filing 16 hard copies must be received in the Office of the Clerk. On or before January 2, 2019, the appellant shall file a memorandum response brief subject to the same limitations. Like the appellee's brief, 16 hard copies must be received in the clerk's office within 2 business days.

Within 21 days of service of the memorandum response brief the appellee may file a reply. The reply shall be limited to 15 pages in length. Like the primary supplemental briefs, 16 hard copies of the reply shall be received in the Clerk's Office within 2 business days of the electronic filing.

The appeal will be set for an *en banc* hearing on the next available oral argument calendar once briefing is complete. The parties will be advised of the exact date and time for the argument and will receive additional information regarding the hearing via separate communication.

Entered for the Court

/s/

ELISABETH A. SHUMAKER, Clerk

APPENDIX I — ORDER OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JULY 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6117
(D.C. No. 5:08-CV-00470-R)
(W.D. Okla.)

JAMES DWIGHT PAVATT,

Petitioner-Appellant,

v.

TERRY ROYAL, WARDEN, OKLAHOMA STATE PENITENTIARY,

Respondent-Appellee.

ORDER

Before **BRISCOE**, **KELLY**, and **HARTZ**, Circuit Judges.

This matter is before the court on that portion of the appellee's *Petition for Panel Rehearing or Rehearing En Banc* which seeks panel rehearing. We have also reviewed the response filed on July 7, 2017.

Upon consideration, a majority of the original panel members have voted to deny. Accordingly, the request

for panel rehearing is denied. Judge Briscoe would grant panel rehearing.

That same panel majority has, however, determined *sua sponte* that amendment of the original panel decision is warranted. Consequently, the Clerk is directed to file the attached amended opinion *nunc pro tunc* to the original filing date of June 9, 2017. In response, Judge Briscoe has also amended her dissent and that amended version is likewise attached to this order and shall be filed *nunc pro tunc*.

The request for *en banc* rehearing continues to be taken under advisement and remains pending.

Entered for the Court

/s/_____
ELISABETH A. SHUMAKER,
Clerk

APPENDIX J — EXCERPTS OF RESPONDENT-APPELLEE'S ANSWER BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED AUGUST 10, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 14-6117

JAMES DWIGHT PAVATT,

Petitioner-Appellant,

v.

ANITA TRAMMELL, WARDEN OF THE OKLAHOMA STATE PENITENTIARY,

Respondent-Appellee.

RESPONDENT-APPELLEE'S ANSWER BRIEF

On Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-08-470-R)
The Honorable David L. Russell,
United States District Judge

Appendix J

***

ARGUMENT AND AUTHORITIES

I.

THE DISTRICT COURT PROPERLY DETERMINED THE OCCA'S DECISION THAT SUFFICIENT EVIDENCE SUPPORTED THE "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS NEITHER CONTRARY TO, NOR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED SUPREME COURT LAW.

Petitioner contends there was insufficient evidence to support the aggravating circumstance of "especially heinous, atrocious, or cruel" because the evidence did not show Rob Andrew endured "conscious physical suffering" before death. Raised on direct appeal and rejected by the OCCA on the merits, the Petitioner now argues the OCCA's decision on the matter was unreasonable. The district court applied AEDPA deference to the issue and concluded Petitioner had failed to show the OCCA's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law. Doc. 91 at 78-84.

A. Standard of Review.

The OCCA rejected Petitioner's proposition of error on substantive, not procedural grounds. *Pavatt*, 159 P.3d at 294-95. In doing so, the OCCA applied the same

standard of review mandated by *Jeffers*, 497 U.S. at 781-83, for evidentiary sufficiency challenges to aggravating circumstances. *Pavatt*, 159 P.3d at 294. In conducting its analysis, the OCCA discussed Oklahoma's requirements for satisfying this aggravator as well as the record evidence supporting its finding. *Id.* at 294-95. As such, the OCCA's decision constitutes an adjudication on the merits to which AEDPA deference applies. 28 U.S.C. § 2254(d). *Hooker v. Mullin*, 293 F.3d 1232, 1237 (10th Cir. 2002). This deference requires Petitioner, in order to receive habeas relief, to show that the OCCA's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law, or was based on an unreasonable determination of facts in light of the state court record. 28 U.S.C. § 2254(d).

The Supreme Court held in *Jeffers*, 497 U.S. at 781-83, that a challenge to the sufficiency of the evidence as to an aggravating circumstance was to be reviewed under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), asking whether any rational trier of fact—viewing the evidence in the light most favorable to the State—could have found the essential elements of the crime beyond a reasonable doubt. *See Matthews v. Workman*, 577 F.3d 1175, 1183 (10th Cir. 2009); *McCracken v. Gibson*, 268 F.3d 970, 981 (10th Cir. 2001). This Court's review under this standard is "sharply limited, and a court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Brown v. Sirmons*,

515 F.3d 1072, 1089 (10th Cir. 2008) (quoting *Messer v. Roberts*, 74 F.3d 1009, 1013 (10th Cir. 1996)) (internal quotations omitted).

A sufficiency of the evidence challenge to an aggravator in a habeas proceeding presents a mixed question of law and fact, making both § 2254(d)(1) (whether the state court reasonably applied of Supreme Court precedent) and (d)(2) (whether the state court reasonably determined the facts) applicable to the analysis. *Brown*, 515 F.3d at 1089. Still, the presumption of correctness afforded by 28 U.S.C. § 2254(e) requires this Court to defer to any determination of a factual issue made by the state court. *Id.*

Contrary to this well-established standard, Petitioner asserts the OCCA's decision is entitled to no deference because the jury rendered no findings as to Rob Andrew's conscious physical suffering. Petitioner's argument is misguided. First, the standard of review established in § 2254(d)-(e) is relative to the findings of the OCCA. Second, the OCCA determined the aggravating circumstance of "especially heinous, atrocious, or cruel" was supported, beyond a reasonable doubt, by evidence showing Rob Andrew "suffered serious physical abuse, and was conscious of the fatal attack for several minutes." *Pavatt*, 159 P.3d at 294. It is this decision which is to be granted deference.[3] 28 U.S.C. § 2254(d)-(e); *Wilson v.*

3. Even so, the jury was properly instructed on the aggravating circumstances under sufficiently narrowed aggravating-circumstance law existing at the time. Petitioner essentially argues that because the jury was not required to expressly find conscious physical suffering, that the jury finding of serious physical abuse is inaccurate

Sirmons, 536 F.3d 1064, 1108 (10th Cir. 2008) ("Even if the jury instruction did not sufficiently narrow the jury's discretion, the state court can also perform this narrowing function on review."); *Brown*, 515 F.3d at 1089 ("Here, we must consider whether the OCCA's conclusion that the evidence was sufficient to support a finding of extreme mental anguish constituted an unreasonable application of the *Jackson* standard).

B. Merits.

This Court looks to Oklahoma law to determine the "substantive elements of 'heinous, atrocious, or cruel' aggravating circumstance." *Turrentine v. Mullin*, 390 F.3d 1181, 1197 (10th Cir. 2004). To establish a murder as "especially heinous, atrocious, or cruel," the State must demonstrate the victim's death was preceded by torture or serious physical abuse. *Warner v. State*, 144 P.3d 838, 880 (Okla. Crim. App. 2006); *Lott v. State*, 98 P.3d 318, 358 (Okla. Crim. App. 2004). Evidence of a victim's "conscious physical suffering" is sufficient to establish torture or serious physical abuse leading up to death. *See Hooker*, 293 F.3d at 1240; *Medlock v. Ward*, 200 F.3d 1314, 1324

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or inadequate. This argument has been rejected multiple times by this Court, *Wilson v. Sirmons*, 536 F.3d 1064, 1108 (10th Cir. 2008); *Workman v. Mullin*, 342 F.3d 1100, 1115-16 (10th Cir. 2003); *Hooks v. Ward*, 184 F.3d 1206, 1239-40 (10th Cir. 1999), and was specifically rejected by the OCCA in its alternative holding in Petitioner's second post-conviction application. *Pavatt*, No. PCD-2009-777, slip op. at 5 n.5 (citing *Jackson v. State*, 146 P.3d 1149, 1161-63 (Okla. Crim. App. 2006); *Browning v. State*, 134 P.3d 816, 843-45 (Okla. Crim. App. 2006); *Rojem v. State*, 130 P.3d 287, 300-01 (Okla. Crim. App. 2006); *DeRosa v. State*, 89 P.3d 1124, 1154-57 (Okla. Crim. App. 2004))

(10th Cir. 2000); *Black v. State*, 21 P.3d 1047, 1074 (Okla. Crim. App. 2001).

The OCCA also holds that there are no "specific uniform criteria, applicable to all murder cases, which would make the application of the 'heinous, atrocious or cruel' aggravator a mechanical procedure." *Robinson v. State*, 900 P.2d 389, 401 (Okla. Crim. App. 1995). "Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was proved." *Id.* This rule necessarily makes the determination a case by case inquiry. *See id.*

In rejecting Petitioner's claim on direct appeal, the OCCA found as follows:

> ¶ 75 In Proposition 14, Appellant claims the evidence was insufficient to support the jury's finding that the murder of Rob Andrew was "especially heinous, atrocious, or cruel." To establish this aggravator, the State must present evidence from which the jury could find that the victim's death was preceded by either serious physical abuse or torture. Evidence that the victim was conscious and aware of the attack supports a finding of torture. *Davis v. State*, 2004 OK CR 36, ¶ 39, 103 P.3d 70, 81; *Black v. State*, 2001 OK CR 5, ¶ 79, 21 P.3d 1047, 1074 (evidence that victim consciously suffered pain during and after stabbing was sufficient to support this aggravating circumstance); *Le*, 1997 OK CR 55 at ¶ 35, 947 P.2d at 550; *Romano*

v. State, 1995 OK CR 74, ¶ 70, 909 P.2d 92, 118; *Berget v. State*, 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373. Our evaluation is not a mechanistic exercise. As we stated in *Robinson v. State*, 1995 OK CR 25, ¶ 36, 900 P.2d 389, 401:

> As much as we would like to point to specific, uniform criteria, applicable to all murder cases, which would make the application of the "heinous, atrocious or cruel" aggravator a mechanical procedure, that is simply not possible. Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was proved. Unfortunately, no two cases present identical fact scenarios for our consideration, therefore the particulars of each case become the focus of our inquiry, as opposed to one case's similarity to another, in resolving a sufficiency of the evidence claim supporting the heinous, atrocious or cruel aggravator.

¶ 76 The evidence presented at trial showed that Rob Andrew suffered numerous wounds resulting from two shotgun blasts, which damaged his internal organs. The medical examiner testified that either wound would have caused sufficient blood loss to be independently fatal, but that death was not instantaneous.

When emergency personnel arrived, Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggested that he either tried to ward off his attacker or shield himself from being shot. Brenda Andrew called 911 twice after the shooting; together, the two calls spanned several minutes. During the second call, she claimed that her husband was still conscious and attempting to talk to her as he lay bleeding to death on the garage floor. All of these facts tend to show that Rob Andrew suffered serious physical abuse, and was conscious of the fatal attack for several minutes. *See Ledbetter v. State*, 1997 OK CR 5, ¶ 53, 933 P.2d 880, 896 (evidence that murder victim was likely aware that she was about to be assaulted because defendant had attempted to kill her one week earlier, that she tried to defend herself from the fatal attack, and that she attempted to communicate with a neighbor after the attack was sufficient to show that the murder was especially heinous, atrocious or cruel).

¶ 77 After finding that the murder was accompanied by torture or serious physical abuse, the jury may also consider the attitude of the killer and the pitiless nature of the crime. *Lott*, 2004 OK CR 27 at ¶ 172, 98 P.3d at 358; *Phillips v. State*, 1999 OK CR 38, ¶ 80, 989 P.2d 1017, 1039. That the victim was acquainted with his killers is a fact relevant to whether the murder was especially heinous, atrocious,

or cruel. In finding the murder in *Boutwell v. State*, 1983 OK CR 17, ¶ 40, 659 P.2d 322, 329 to be especially heinous, atrocious, or cruel, this Court observed:

> In this case the killing was merciless. The robbers planned well in advance to take the victim's life. Even more abhorrent and indicative of cold pitilessness is the fact that the appellant and the victim knew each other.

¶ 78 We find the situation in the present case even more pitiless. Rob Andrew correctly suspected his wife of having an affair with a man he trusted as his insurance agent. He correctly suspected his wife and her lover of trying to wrest control of his life insurance away from him. He correctly suspected his wife and her lover of attempting to kill him several weeks before by severing the brake lines on his car. He confided in others that he was in fear of his life. Having separated from his wife, Rob Andrew was murdered as he returned to the family home to pick up his children for the Thanksgiving holiday. From the evidence, a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he died. The evidence supported this aggravating circumstance, and this proposition is denied.

Pavatt, 159 P.3d at 294-95.

Appendix J

The district court's ruling—that the OCCA's finding that sufficient evidence supported this aggravator was wholly reasonable in light of the governing law and facts—was the correct one in this situation. Doc. 91 at 79-84. The State presented evidence at trial that Rob Andrew was conscious before, during, and after the infliction of the two shotgun wounds. Brenda Andrew told a 911 operator that Rob was breathing, conscious, and trying to talk to her after sustaining two shotgun blasts to his neck and chest (Tr. 2148-49, 2434-35; State's Exhibit 34). Rob was discovered by emergency personnel clutching a garbage bag full of empty aluminum cans (Tr. 2178, 2295, 2305-08; State's Exhibits 41, 64, 66, 73). The medical examiner testified that Rob was hit with multiple shotgun pellets fired from two shots (Tr. 2434-38). The shotgun pellets spread across Rob's body because the shotgun was not fired from close range (Tr. 2437-38). The shotgun pellets damaged Rob's liver, right lung, and aorta (Tr. 2458-59; State's Exhibits 75-77, 106-12). Even though both shotgun wounds were independently fatal, Rob could have sustained life after being shot for up to ten (10) minutes (Tr. 2457-58). Death would not have been instantaneous (Tr. 2463). However, Rob would have lost consciousness within approximately five (5) minutes before bleeding to death from his external and internal injuries (Tr. 2458-59, 2461-62, 2465). The medical examiner stated that Rob likely suffered and experienced pain in the dying process (Tr. 2464, 2466-67).

Taking this evidence in the light most favorable to the prosecution—as this Court must—sufficient evidence was presented to establish serious physical abuse and,

in particular, conscious physical suffering by the victim. Brenda Andrew placed two (2) 911 calls to police after the shooting (Tr. 2148-49; State's Ex. 34). Both calls totaled approximately six (6) minutes (State's Exhibit 34). During the second call, Brenda told a 911 operator that Rob was breathing, conscious, and trying to talk to her (Tr. 2149; State's Exhibit 34). The district court relied upon this evidence, which showed Rob was alive for a significant period of time, suffering all the while from the extensive shotgun wounds spread across his body, in arriving at its conclusion. Doc. 91 at 83.

Petitioner attacks the OCCA's factual determination by claiming Brenda's statement to the 911 operator simply cannot be believed. But—as found by the district court—this was an issue for the jury, not this Court within a collateral federal challenge. Doc. 91 at 83. As an appellate court on collateral review, "[this] court may not weigh conflicting evidence or consider the credibility of witnesses." *Valdez v. Bravo*, 373 F.3d 1093, 1097 (10th Cir. 2004). Here, this Court must take the evidence in the light most favorable to the State and presume that the jury accepted as true Brenda's statements to police that the victim was conscious as late as the second 911 call. All Petitioner's argument proves "is that a rational juror *might not* accept" her statements on this point as true; "it doesn't show that a rational juror *could not* accept it, which is the question on which a sufficiency challenge necessarily must focus." *Matthews*, 577 F.3d at 1185.

Petitioner also argues that the OCCA's legal determination was unreasonable, citing multiple state

court decisions. Petitioner's comparison of his case to the application of the "especially heinous, atrocious, or cruel" aggravator in other capitol cases is of no consequence though. These cases are not Supreme Court cases, but rather, decisions from the OCCA and this Court. As such, they are not an independent basis for demonstrating unreasonableness under AEDPA. To the extent Petitioner suggests by citing to these other cases that the OCCA's application of the "especially heinous, atrocious, or cruel" aggravator in this case renders it unconstitutional, he is not entitled to relief. As noted by the Supreme Court, the question of whether state courts have properly applied an aggravating circumstance is separate from the question of whether the circumstance, as narrowed, is facially valid. *Arave v. Creech*, 507 U.S. 463, 476-77 (1993). Such analysis represents little more than a proportionality review of the state's application of the aggravating circumstance. *Walton v. Arizona*, 497 U.S. 639, 655-56 (1990), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584 (2002). Oklahoma law does not authorize proportionality review for death sentences and there exists no federal constitutional entitlement to such review. *Id.* ("proportionality review is not constitutionally required"); Okla. Stat. tit. 21, § 701.13(C) (describing mandatory sentencing review factors). In *Jeffers*, 497 U.S. at 779, the Supreme Court held:

> Our decision in Walton thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular

> case, then the "fundamental constitutional requirement" of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty, [*Maynard v.*] *Cartwright*, 486 U.S. [356], 362, has been satisfied.

See also Moore v. Gibson, 195 F.3d 1152, 1176 (10th Cir. 1999).[4]

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4. While Petitioner is not entitled to proportionality review, his claim that the OCCA does not consistently apply the aggravating circumstance of "especially heinous, atrocious, or cruel" is incorrect. The OCCA has found in several similar cases that evidence of consciousness of the victim for several minutes following the shooting will support a finding of the aggravating circumstance. *See Postelle v. State*, 267 P.3d 114, 143-44 (Okla. Crim. App. 2011) (finding the defendant's murders were "especially heinous, atrocious, or cruel" in light of evidence the victims were aware of the attacks and attempted to flee); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 238 (Okla. Crim. App. 2010) (finding the victim's murder was "especially heinous, atrocious, or cruel" due to evidence indicating the victim consciously suffered for approximately seven (7) minutes before dying); *Simpson v. State*, 230 P.3d 888, 902-03 (Okla. Crim. App. 2010) (finding one victim's death was "especially heinous atrocious, or cruel" because the gunshot wound to his chest did not kill him immediately, but rather caused him to have labored breathing and make gurgling sounds as his chest filled with blood before dying and because there was testimony that he was able to speak after being shot and finding as to another victim there was no evidence his death was "especially heinous, atrocious, or cruel" because "he likely died within seconds after being shot"); *Jones v. State*, 201 P.3d 869, 889 (Okla. Crim. App. 2009) (ruling the death of one of the victims was "especially heinous, atrocious, or cruel," because evidence from the medical examiner showed the victim remained

To be constitutional, an aggravating circumstance may not vague and apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave*, 507 U.S. at 474 (citing *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder)). Where, as here, the OCCA applied an interpretation of this aggravator that has previously been found constitutional, *see Wilson*, 536 F.3d at 1108 (noting the Tenth Circuit has routinely upheld Oklahoma's heinous, atrocious or cruel aggravator even where jury instructions did not specifically include the "conscious suffering" requirement), a habeas petitioner's constitutional challenge to that aggravator is at an end. *Jeffers*, 497 U.S. at 779. Nothing

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conscious for approximately five (5) minutes after his shooting). The cases cited by Petitioner may be distinguished on the grounds that the evidence of consciousness of being shot—for any amount of time—was particularly weak. *See, e.g., Cudjo v. State*, 925 P.2d 895, 901-02 (Okla. Crim. App. 1996) (noting the victim was unaware he was shot prior to death); *Cheney v. State*, 909 P.2d 74, 81 (Okla. Crim. App. 1995) (finding the evidence failed to sufficiently show the victim was conscious following the first shot and was, at most, conscious for "a couple of seconds"); *Davis v. State*, 888 P.2d 1018, 1021 (Okla. Crim. App. 1995) ("No testimony indicated that the victims who died were conscious or suffered pain at any time."); *Stouffer v. State*, 742 P.2d 562, 564 (Okla. Crim. App. 1987) ("There was no reason to believe from the evidence that [the victim] was conscious after the first shot.").

about the OCCA's discussion of the legal or factual basis for its conclusion here in any way suggests an overbroad or erroneous interpretation, let alone application, of Oklahoma's heinous, atrocious or cruel aggravator.

The OCCA also reasonably concluded that, having found that the murder was accompanied by torture or conscious physical abuse, evidence establishing the cruel and pitiless nature of the crime also supported a finding of this aggravator. *Pavatt*, 159 P.3d at 295. As noted by the OCCA in its facts, the record evidence established that in the weeks leading up to the murder, the victim feared for his life. Rob Andrew correctly believed Petitioner and his wife were trying to kill him, in part, over the Prudential life insurance policy which had been a major point of contention during the ongoing divorce proceedings. The brake line incident, in which Petitioner and Brenda Andrew attempted to lure him onto an interstate highway at high speeds in a car with no brakes, only heightened the cruel state of affairs this victim suffered in the weeks leading up to the murder. In light of this evidence, the OCCA reasonably found that "a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he died." *Id.* Taken in the light most favorable to the State, this evidence too supported the heinous, atrocious or cruel aggravating circumstance.

All things considered, Petitioner fails to show the impropriety of the district court's ruling on this decision by the OCCA. Petitioner fails to show the OCCA's decision on this issue falls into the category of the most serious

misapplication of Supreme Court precedent. *House v. Hatch*, 527 F.3d 1010, 1019 (10th Cir. 2008) (quoting *Maynard v. Boone*, 468 F.3d 665, 671 (10th Cir. 2006) ("only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254"). That is especially so considering that the state court was essentially applying a general standard in assessing this evidentiary sufficiency challenge, thus allowing even more leeway for its decision. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). This Court should, therefore, uphold the ruling of the district court denying habeas relief to the Petitioner.

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APPENDIX K — EXCERPTS OF THE APPELLANT'S OPENING BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JUNE 8, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6117

DEATH PENALTY CASE

JAMES DWIGHT PAVATT,

Appellant-Petitioner,

v.

ANITA TRAMMELL, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Appellee-Respondent.

On Appeal from the United States District Court
For the Western District of Oklahoma

The Honorable David L. Russell
District Judge

District Court Case No. CIV-08-470-W

Appendix K

APPELLANT'S OPENING BRIEF

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1212 (10th Cir. 2003); *Allen v. Mullin*, 368 F.3d 1220, 1234 (10th Cir. 2004). Where a district court has not conducted an evidentiary hearing and has before it only those facts developed in the state court record, this Court independently reviews those facts. *Allen*, 368 F.3d at 1234.

PROPOSITION I

There was Insufficient Evidence to Support the "Especially Heinous, Atrocious, or Cruel" Aggravating Factor.

I. Lower court proceedings.

Pavatt challenged the sufficiency of the evidence of the HAC aggravator in Ground Ten. (Doc. 49 at 147-57). The district court cited the *Jackson v. Virginia*, 443 U.S. 307 (1979) review standard, added barriers to relief created by the AEDPA, and evaluated Pavatt's claim under a "deference squared" standard, citing *Hooks v. Workman*, 689 F.3d 1148, 1166 (10th Cir. 2012). (Doc. 91 at 80-4). The district court determined the OCCA's decision denying relief was not unreasonable. (Doc. 91 at 84).

II. Argument summary.

This murder was not "especially heinous, atrocious, or cruel." While the jury found the HAC aggravator,

no deference should be afforded its verdict because it was rendered without any finding on the core element of conscious suffering and upon limited and flawed instructions. *See* Proposition II. The OCCA's determination upholding the jury's verdict was itself objectively unreasonable given the many cases where the OCCA found similar evidence insufficient to support the HAC aggravator. Additionally, the OCCA's historically inconsistent approach to the HAC aggravating circumstance provides context and further support for the determination that the evidence here – as related to the core element of conscious suffering – is constitutionally insufficient, and the OCCA's determination that there are speculative facts to support it was also unreasonable.

A. A shotgun death: no conscious suffering beyond what accompanies any murder.

Rob Andrew was shot twice with a shotgun at relatively close range. There was no gratuitous violence. There was no torture. There was no anguish or suffering beyond that which necessarily accompanied the underlying killing. The two shotgun blasts were both independently fatal. Pellets from both shots hit vital internal organs. Rob could not have remained conscious for more than a few moments, before going into shock and quickly bleeding to death. Additionally, the combination of both shots would have sped up the bleeding, causing Rob to die where he fell. If Rob Andrew's homicide was "heinous, atrocious or cruel," then any murder in which the victim does not die instantly satisfies this factor.

B. No deference for a verdict not finding facts of conscious suffering.

In the context of federal habeas, deference does not imply abandonment or abdication of judicial review, nor does deference, by definition, preclude relief. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Here, the district court presumed the trier of fact – in this instance Pavatt's jury – resolved any conflicting facts in favor of the prosecution when it found the HAC aggravator. It is in the resolution of conflicting facts that deference is afforded under *Jackson*. 443 U.S. at 326.

There were no conflicting facts about how Rob died. The jury made no factual findings regarding whether Rob consciously suffered great physical anguish or extreme mental cruelty. The jurors did not even know they needed to make such findings before concluding the murder was "especially heinous, atrocious, or cruel" because the instructions did not clearly advise them. *See* Proposition II.

It is likely the jury relied on the prosecutor's improper argument about what factors it could consider. The prosecutor pointed to vague definitions in the instructions and repeatedly told the jury it would be able to find the HAC aggravator by looking at photographs of Rob's wounds and of him lying dead in the garage. (Tr. 3740-41). In closing argument, the prosecutor openly displayed the after-death photographs, repeatedly asking the jury: "Is this serious, physical abuse? Is this serious, physical abuse? Is this serious, physical abuse?" (Tr. 3776). *See*

Spears v. Mullin, 343 F.3d 1215, 1226-27 (10th Cir. 2003) (finding none of the wounds in photographs of the deceased were probative to the question of conscious physical suffering).

The prosecutor urged the jury to imagine and speculate what emotional fear Rob felt and how he had time to contemplate his death. (Tr. 3742). The prosecutor even stressed that Pavatt's attitude the day following the crime supported that the murder was "wicked and vile and . . . preceded by physical abuse and torture." *Id.*

Moreover, the prosecutor repeated that the adjectives used to describe HAC were separated by "ors": "We only have to prove heinous, atrocious, or cruel. . . . We don't have to prove all of those." (Tr. 3777-78). Of course, every murder is "cruel," and based on the prosecutor's argument, nothing else need be proved. The prosecution's misdirection exacerbated the stunning failure to tell the jury about the core element of the aggravator, rendering the jury verdict virtually useless as an indicator HAC was properly assessed against Pavatt beyond a resaonable doubt.

C. The unreasonable legal and factual determination.

The OCCA's review of the sufficiency of the evidence of the HAC aggravator was an unreasonable application of clearly established law and an unreasonable determination of the facts. The OCCA unreasonably failed to follow its own precedent, relied on irrelevant speculation about what

Rob was feeling, and further compounded its historically inconsistent approach to what Oklahoma requires to support the HAC aggravator.

1. Failing to follow its own precedent.

Following this Court's opinion in *Cartwright v. Maynard*, 822 F.2d 1477, 1482 (10th Cir. 1987), holding the construction the OCCA had given the HAC aggravator was "unconstitutionally vague," the OCCA determined that a finding of torture or serious physical abuse was required for a murder to be "especially heinous, atrocious, or cruel." *Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987). Implicit in the opinion was the requirement that torture or serious physical abuse could exist only if there was evidence of conscious physical suffering. *Id.* at 564.

In Stouffer, the defendant shot his girlfriend's estranged husband in the arm, chest, and face with a .38 caliber handgun. The husband survived. The defendant shot the other victim in the head twice. She had contact wounds from the shots, and there was evidence that at the first shot she raised her hand to her head and said, "no." *Stouffer v. State*, 738 P.2d 1349 (Okla. Crim. App. 1987).

The OCCA concluded the evidence did not support a finding that the murder was "especially heinous, atrocious, or cruel." *Stouffer*, 742 P.2d at 563-64. The OCCA further noted that the facts were "striking[ly] similar[ ]" to those in *Odum v. State*, 651 P.2d 703 (Okla. Crim. App. 1982). *Stouffer*, 742 P.2d at 564. In *Odum*, the OCCA found the

HAC aggravator was not supportable where the victim was shot once in the neck, became unconscious, and died within minutes from asphyxiation. 651 P.2d at 707.

In keeping with *Stouffer* and *Odum*, the OCCA has repeatedly rejected sufficiency of the HAC aggravator in cases with a "striking similarity" to Pavatt's. *See*, *e.g.*, *Brown v. State*, 753 P.2d 908, 912 (Okla. Crim. App. 1988) (seven gunshot wounds to vital internal organs despite evidence defendant fired several shots that caused victim to run off the road, and then stuck his hand inside the window of the car and shot victim more times); *Davis v. State*, 888 P.2d 1018, 1020-21 (Okla. Crim. App. 1995) (two victims, both shot twice at relatively close range, after two other surviving victims were shot); *Sellers v. State*, 809 P.2d 676, 690 (Okla. Crim. App. 1991) (multiple victims shot and killed); *Booker v. State*, 851 P.2d 544, 546, 548 (Okla. Crim. App. 1993) (victim killed after being shot with a shotgun); *Marquez v. State*, 890 P.2d 980, 987 (Okla. Crim. App. 1995) (victim shot three times, shot to the chest would have resulted in death within minutes); *Cudjo v. State*, 925 P.2d 895, 901 (Okla. Crim. App. 1996) (victim was shot in the head after he asked defendant not to shoot, remained coherent at the scene, but later experienced nausea, vomiting, shortness of breath, and pain in his head); *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995) (estranged wife of defendant, after being confronted by defendant in parking garage, maced him and ran before being shot and killed); and *Myers v. State*, 133 P.3d 312, 332 (Okla. Crim. App. 2006) (rape victim had multiple lacerations, abrasions, and contusions, in addition to five gunshot wounds, including fatal wounds that ruptured the aorta and entered the head).

The OCCA recognized that some suffering naturally accompanies any homicide and that the HAC aggravator is only appropriate in cases of undue or substantial conscious suffering. *Crawford v. State*, 840 P.2d 627 (Okla. Crim. App. 1992) (overruled on other grounds). That something more was required to find "serious physical abuse" than the abuse that naturally occurs in the act of killing is pointedly illustrated in *Hawkins v. State*, 891 P.2d 586, 596 (Okla. Crim. App. 1994). In Hawkins, the victim was kidnapped from a shopping mall with her two young daughters in the car and held hostage overnight. The following morning she was dragged out of the house as she cried "goodbye" to her crying children. The defendant drove to the edge of a lake, hog-tied her, "pushed her into the water, watched the terror in her eyes, and held her under until she drowned." *Id.* at 592. The OCCA held there was "[n]o evidence of serious physical abuse, that is, gratuitous violence." *Id.* at 596. The OCCA recognized that for mental torture to support the aggravator, evidence that the victim was terrorized for a significant period of time would be required. *Cheney*, 909 P.2d at 80.

The OCCA imposed the same limitations on beating deaths, even though victims appeared to suffer serious physical abuse. *In Battenfield v. State*, 816 P.2d 555 (Okla. Crim. App. 1991), the OCCA found insufficient evidence of "conscious physical suffering" of victim who was beaten to death, suffering head and bodily injuries. The blow to the head would generally cause immediate loss of consciousness; the combined trauma to the head and body would have rendered the victim unconscious "very fast;" and death would have occurred "very rapidly." *Id.* at 565.

The OCCA confirmed more is required than abuse that necessarily occurs in the act of killing. *Berget v. State*, 824 P.2d 364, 373 (Okla. Crim. App. 1991) ("[t]he torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing"); *Booker*, 851 P.2d at 548 (finding where victim shot once in the chest with a shotgun "[t]he record does not support a finding of mental anguish beyond that which necessarily accompanied the underlying killing").

The OCCA turned its back on its own precedent to reach the unreasonable conclusion that the murder here met the requirements for an "especially heinous, atrocious, or cruel" murder. In claiming it would not apply a "mechanical procedure," it applied an unreasonable one to reach a speculative result on facts strikingly similar to those in cases cited above. *Pavatt*, 159 P.3d at 294.

2. Unreasonable speculation.

The OCCA resorted to unreasonable speculation to determine the HAC aggravator was supportable. The OCCA unreasonably applied Supreme Court law and unreasonably assessed facts when it concluded the following facts were sufficient to support HAC: 1) there were numerous wounds from two shotgun blasts that damaged Rob's internal organs; 2) both wounds caused sufficient blood loss to be independently fatal, but death was not instantaneous; 3) Rob was still clutching a trash bag full of empty aluminum cans, which reasonably suggests he either tried to ward off his attacker or shield himself from being shot; and 4) in Brenda's second call to

911, she claimed Rob was still conscious and attempting to talk to her as he lay bleeding to death. *Pavatt*, 159 P.3d at 294.

Though the OCCA concluded that "these facts tend to show that Rob Andrew suffered serious physical abuse," it failed to identify what serious physical abuse occurred, beyond what naturally occurs in any shooting. *Id.* Specifically, 1) the "numerous wounds" occurred almost simultaneously and did not contribute to an inordinate amount of conscious pain prior to death; 2) the quick loss of blood from both wounds resulted in shock and loss of consciousness within one minute; 3) clutching the plastic trash bag was meaningless in determining whether Rob consciously suffered and thus, it was unreasonable for the OCCA to speculate about why Rob may have been holding the bag; and 4) it was unreasonable to conclude that Rob consciously suffered based on Brenda's statements in her 911 calls, when everything she said in those calls was determined to be false. Brenda's report of Rob being conscious, breathing, and attempting to talk is not credible and does not satisfy this aggravating factor.

The OCCA concluded the jury could have found HAC beyond a reasonable doubt because Rob had time to reflect on the "cruel state of affairs" before his death. *Id.* at 295. This "cruel state of affairs" is completely unrelated to whether Rob consciously suffered prior to his death.[11]

11. The "cruel state of affairs" that according to the OCCA makes this a "pitiless" crime – and therefore "especially heinous, atrocious, or cruel" – is not due to the manner of the killing, but is based on Rob's correct suspicions: 1) that his wife was having an

There was no evidence to support the OCCA's hypothesis, and it is purely speculation about what thoughts Rob might have had, assuming he was having any conscious thoughts at all.

There was insufficient evidence to establish the HAC aggravator. In *Thomas v. Gibson*, 218 F.3d 1213, 1227 (10th Cir. 2000), this Court found that the OCCA unreasonably applied Supreme Court law and made an "'unreasonable determination of the facts in light of the evidence presented in the State court proceeding'" when it found the victim consciously suffered during beating, stabbing, and strangulation, which caused multiple bruises, lacerations, fractures, and hemorrhaging. The same unreasonableness exists here.

There is not ample evidence the victim consciously suffered physical abuse while trying to ward off his attacker. *Brown v. Sirmons*, 515 F.3d 1072, 1090 (10th Cir. 2008) (revealing victim was bound prior to attack with baseball bat and had defensive wounds on hands, fingers, and wrist and a hinge from handcuffs embedded in his skull). The "numerous wounds" referred to by the OCCA were caused by pellets from the same shotgun, shot at nearly the same time. All the "wounds" occurred simultaneously. None of the other "facts" cited by the

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affair with "a man he trusted as his insurance agent," 2) that his wife and "her lover" were trying to "wrest control of his life insurance away from him," and 3) that his wife and "lover" attempted to kill him weeks earlier. The OCCA found this irrelevant speculation and the fact Rob was murdered "as he returned to the family home to pick up his children" for Thanksgiving as supportive of the HAC aggravator. *Id.* at 295.

OCCA remotely relate to whether there was "serious physical abuse." Therefore, the OCCA's finding that the victim's death was heinous, atrocious, or cruel was unreasonable.

The unreasonableness of the OCCA's determination is further demonstrated by this Court's holdings. When this Court upheld HAC in crimes involving shooting deaths, there has been severe pain and suffering and a lingering death. *See, e.g. McCracken v. Gibson*, 268 F.3d 970, 982 (10th Cir. 2001); *Toles v. Gibson*, 269 F.3d 1167, 1183 (10th Cir. 2001); *Robinson v. Gibson*, 35 Fed.Appx. 715 (10th Cir. 2002). Each of these cases reveals there was something substantially more than the typical wounds resulting from two shotgun shots.

A timeline reveals Rob called his friend at approximately 6:00 p.m. and told him Brenda needed more time and would have the children ready by 6:15 p.m. (Tr. 1551). Rob waited in the driveway while on the phone. (Tr. 1551-53).

At 6:19:44 p.m., Brenda made the first 911 call, which lasted 2 minutes, 36 seconds. She called back seven seconds later (APCR, Ex. 9). According to the prosecution's theory, Rob was shot prior to the first call, and Brenda was shot between the two calls. (Tr. 3611). In the first call, Brenda said nothing about Rob breathing and trying to talk.

Indeed, in Brenda's statement to police, she said she went inside to retrieve the phone and to check on the children in the master bedroom. After walking through the house to the master bedroom, she returned to the

garage to wait for paramedics and law enforcement officers while making her 911 calls.

The blood spatter expert found no trail of blood consistent with Brenda's claim that she went inside the home for the phone after being shot. (Tr. 3186-87).

Sgt. Frost, who was patrolling the neighborhood, arrived within one minute of the call going out over the radio. He and other officers found Rob dead on the garage floor and Brenda on the phone with the 911 operator. (Tr. 2169-71) (St. Ex. 34).

Brenda said nothing about Rob being dead or alive in her first call. She said there was "blood everywhere," and Rob had "blood all over him." (St. Ex. 34).

In the second call, the one relied upon by the prosecution and the OCCA as support for Rob being conscious prior to his death, Brenda put on a show of trying to get Rob to talk to her. Brenda repeatedly said, "He's breathing. He's breathing," also said he was "bleeding bad though, with blood everywhere." *Id.* She was repeating that Rob was breathing when the officers arrived and found Rob dead. (St. Ex. 34). The two 911 calls lasted 6 minutes. (Tr. 2149). Clearly, Rob was not breathing when the officers and paramedics arrived. Rob's death was recorded at 6:20 p.m. before either 911 call was initiated. (Tr. 2433).

Reasonably viewed, the evidence simply does not support a lingering and especially painful death beyond

a reasonable doubt. The OCCA's determination was unreasonable.

3. The OCCA's historically inconsistent approach.

Despite previously determining the momentary pain of being shot to death, without more, would not support the existence of the HAC aggravator, the OCCA has now retreated from this prior narrowing of the circumstance. *See also Andrew*, 164 P.3d at 201. This Court recognized such a retreat in *Thomas*, 218 F.3d at 1227 and found the OCCA completely unwound the requirement of conscious suffering by concluding that, in a bludgeoning death, the existence of more than one blow would support a HAC finding. *Id.* at 1229. This approach is objectively unreasonable especially when compared to *Maynard v. Cartwright*, 486 U.S. 356 (1988) where the Supreme Court found Oklahoma's HAC aggravator was constitutionally vague on its face.

The Eighth and Fourteenth Amendments require that an aggravator serve a narrowing function rather than become a standardless catch-all. *Arave v. Creech*, 507 U.S. 463, 474 (1993) and *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). Oklahoma has veered off the course forced on it by *Cartwright*, coming full circle and no longer limiting this clearly vague aggravating circumstance in a manner that minimizes "the risk of wholly arbitrary and capricious action." *Maynard*, 486 U.S. at 362-63.

Oklahoma's failure to consistently apply a narrowing definition to each case that comes before it provides

context that further supports that the OCCA reached a determination that was contrary to or an unreasonable application of Supreme Court law. The determination was further based on an unreasonable determination of the facts. The evidence was insufficient to establish that the homicide was any more heinous, atrocious, or cruel than any other homicide, and was constitutionally insufficient to support the death penalty for Mr. Pavatt.

III. Conclusion.

The OCCA's determination that "serious physical abuse" existed was based on unbelievable and irrelevant speculative "facts." Rob Andrew was not tortured. There was no gratuitous violence – no lingering death. He died from two blasts from a shotgun and died within minutes.

The Writ should be granted and Pavatt's death sentence vacated.

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APPENDIX L — EXCERPTS OF SECOND APPLICATION FOR POST-CONVICTION RELIEF IN THE OKLAHOMA COURT OF CRIMINAL APPEALS, DATED SEPTEMBER 2, 2009

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

Oklahoma Co. District Court

Case No. CF-2001-6189

Court of Criminal Appeals
Direct Appeal Case No. D-2003-1186

Post Conviction Case No. _____

JAMES DWIGHT PAVATT,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

COURT OF CRIMINAL APPEALS FORM 13.11A

SECOND APPLICATION FOR POST-CONVICTION RELIEF - DEATH PENALTY CASE

Appendix L

PART A: PROCEDURAL HISTORY

Petitioner, James Dwight Pavatt, through undersigned counsel, submits his application for post-conviction relief under Section 1089 of Title 22 and Section 3001.1 of Title 20. This is the second time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death.

Pursuant to Rule 9.7A(3)(d), 22 O.S. Ch. 18, App., a copy of the Judgment and Sentences and Death Warrant entered by the District Court are filed herewith and attached to this Application as Exhibits A-B. *Appendix of Exhibits to Second Application for Post-Conviction Relief.*

1. Court in which sentence was rendered:

(a) Oklahoma County District Court.

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instruction that properly narrowed the otherwise facially vague terms. It is critical that the sentencing jury in a capital case be properly instructed on what law applies. *Simmons v. South Carolina,* 512 U.S. 154, 114 S. Ct. 2187, 129 L.Ed.2d 133 (1994); *Walton v. Arizona,* 497 U.S 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990) (overruled on other grounds).

Had Mr. Pavatt been tried seven (7) months later, such an instruction would have been required under *DeRosa.* Mr. Pavatt's constitutional right to have his jury properly guided in its life and death decision should not turn on vagaries in this state's jurisprudence. Because there was no instruction properly limiting and channeling the jury's discretion, Mr. Pavatt's constitutional rights were violated and post-conviction relief should be granted.

PROPOSITION FIVE

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ARE VIOLATED BY OKLAHOMA'S CONTINUED USE OF THE FACIALLY VAGUE AGGRAVATING CIRCUMSTANCE THAT A MURDER IS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL."

This Court's efforts to adopt a narrowing construction of the phrase "heinous atrocious or cruel" after *Cartwright v. Maynard,* 822 F.2d 1477 (l0th Cir. 1987) and *Maynard v. Cartwright,* 486 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988), have not been consistent. *Stouffer v. State,* 1987 OK CR 166, 742 P.2d 562, 563 (Okla. Crim. App. 1987) appeared to limit the aggravating circumstance to murders in which "torture or serious physical abuse" is present. In the wake of *Stouffer,* this Court attempted to formulate additional limitations by holding that unless there was evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met. *Perry v. State,* 893 P.2d 521, 533-534 (Okla. Crim. App. 1995); *Booker v. State,* 851

P.2d 544, 548 (Okla. Crim. App. 1993); *Stafford v. State,* 832 P.2d 20, 23 (Okla. Crim. App. 1992); *Battenfield v. State,* 816 P.2d 555, 565 (Okla. Crim. App. 1991); *Brown v. State,* 753 P.2d 908, 912 (Okla. Crim. App. 1988) (finding requisite torture or serious physical abuse not shown by death from multiple gunshot wounds); *Davis v. State,* 888 P.2d 1018, 1020-21 (holding requisite torture or serious physical abuse was not shown by death of two victims, both shot twice with a .38 caliber handgun at relatively close range, after two other surviving victims were shot); *Cheney v. State,* 909 P.2d 74, 80 (Okla. Crim App. 1995) (concluding serious physical abuse required more than showing that estranged wife of defendant, after being confronted by the defendant in parking garage, maced him and ran before being shot and killed). Thus, there seemed to be recognition by this Court that some suffering naturally accompanies any homicide and that the especially heinous, atrocious, or cruel aggravator was only appropriate in cases of undue or substantial conscious suffering. *Crawford v. State,* 840 P.2d 627 (Okla. Crim. App. 1992) (overruled on other grounds).

In *Hawkins v. State,* 891 P.2d 586, 592, 596 (Okla. Crim. App. 1994), the Court indicated something more is required than the abuse that necessarily occurred in the act of killing itself. Inexplicably, this Court found serious physical abuse in Mr. Pavatt's case, even though there was no gratuitous violence, and the killing was much like that in *Cartwright.* The ever-changing analysis of what is or is not an especially heinous, atrocious, or cruel murder has resurrected the vagueness challenge supported in the *Cartwright* cases. Accordingly, this post-conviction

application should be granted and the Petitioner's death sentence should be vacated.

PROPOSITION SIX

MR. PAVATT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL, DIRECT APPEAL, AND POST-CONVICTION COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has not been presented with complete evidence of ineffectiveness of Mr. Pavatt's trial and appellate counsel. Here, trial counsel remained as an attorney of record on appeal, and participated in the oral argument. Two instances of trial level ineffectiveness were

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APPENDIX M — EXCERPTS OF RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED JULY 31, 2009

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

Case No. CIV-08-470-R

JAMES DWIGHT PAVATT,

Petitioner,

-vs-

RANDALL WORKMAN, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

JULY 31, 2009

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Oklahoma's state-of-mind exception of taped statements introduced through Prudential Insurance employees showing the victim's fear of Petitioner and Brenda Andrew and a motive for the killing. *Id.* at 189. McDaniel's testimony is of the same ilk and would unquestionably have been deemed admissible under Oklahoma law. The

OCCA's rejection of this claim therefore was reasonable. Viewed through AEDPA's "forgiving lens", *Matthews*, 2009 WL 1927051, at *8, Petitioner fails to establish as unreasonable the OCCA's conclusion that Petitioner failed to meet his burden of establishing ineffective assistance of appellate counsel. Petitioner fails to show that the OCCA's adjudication of this claim falls into the category of the most serious misapplication of Supreme Court precedent. *House*, 527 F.3d at 1019. Relief must therefore be denied. 28 U.S.C. § 2254(d).

III.

THE OCCA REASONABLY FOUND THAT SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT PETITIONER'S CONVICTION FOR THE FIRST DEGREE MURDER OF ROB ANDREW.

In Ground Three, Petitioner complains that insufficient evidence was presented at trial to support his conviction for the first degree malice aforethought murder of Rob Andrew.[6] Petitioner urges that his conviction stems from the improperly admitted hearsay evidence described in Ground Two as well as testimony from Agent Kurt Stoner relaying his opinion that Petitioner was directly involved in the murder (discussed in Ground Seven). He complains

6. Petitioner apparently does not challenge the sufficiency of evidence supporting his conviction in Count Two for Conspiracy to Commit First Degree Murder. On direct appeal, he challenged both convictions. *See Pavatt*, 159 P.3d at 284 ("[i]n Proposition 5, Appellant claims the evidence was insufficient to support either of his convictions").

that the jury would have acquitted him but for omission of the third-party perpetrator evidence (discussed in Ground Four) and but for biased jurors (discussed in Ground One). Petitioner attacks the significance of certain pieces of evidence, including Petitioner's handwritten confession and evidence that Petitioner and Brenda Andrew were having an affair. He also claims no forensic or physical evidence convicted him to the murder. Doc. 42 at 73-79.

A. Exhaustion.

Petitioner raised an evidentiary sufficiency challenge to his murder conviction on direct appeal which the OCCA rejected on the merits. *Pavatt*, 159 P.3d at 284-85. This claim is therefore exhausted for purposes of federal habeas review.

B. Standard of Review.

Under clearly-established Supreme Court precedent, "sufficient evidence exists to support a conviction if, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Matthews v. Workman*, 2009 WL 1927051, at *6 (10th Cir. July 7, 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The OCCA rejected Petitioner's evidentiary sufficiency challenge under this standard. The OCCA actually cited *Jackson* in its opinion and recited the standard from that case as part of its analysis. *See Pavatt*, 159 P.3d at 284. Because the OCCA applied *Jackson* to the record evidence in deciding this claim, AEDPA deference

applies. *Matthews*, 2009 WL 1927051, at *6. Thus, this Court's review is limited to inquiring whether the OCCA's application of *Jackson* was unreasonable. *Id.*

C. Merits.

The evidence presented at Petitioner's trial to convict Petitioner easily satisfies the *Jackson* standard and shows that the OCCA's rejection of this claim was wholly reasonable. The State incorporates here by reference the detailed statement of facts set forth in the opening section of the instant response brief. The evidence supporting Petitioner's murder conviction can be summarized as follows: (1) Brenda Andrew's repeated statements in Fall of 2001 that she wished Rob Andrew would die so she could get his money and go on with her life and that she was "going to have him fucking killed" (Tr. VI 1469-70; Tr. VII 1831); (2) Brenda's extramarital affair with Petitioner during the Fall of 2001 (Tr. V 1332, 1343-44, 1347; Tr. XI 2832-36); (3) Petitioner's statement to Janna Larson that at the end of October 2001 Brenda asked Petitioner to murder Rob (Tr. XI 2838); (4) Rob's multiple statements in the Fall of 2001 that he was afraid of Petitioner and Brenda and believed they would murder him (Tr. VI 1597; Tr. VII 1860, 1930); (5) evidence that Petitioner and Brenda cut Rob's brake lines on October 26, 2001, and attempted to murder Rob by luring him to Norman with sabotaged brakes under the ruse of a hospital emergency involving his wife (Tr. VII 1786; Tr. XI 2840-46; State's Exhibit 22); (6) evidence that Petitioner and Brenda engaged in a scheme in the Fall of 2001 to fraudulently change ownership of the $800,000 life insurance policy

from Rob to Brenda by [a] forging Rob's signature; [b] on a backdated change of ownership form; and [c] attempting to convince the insurance company of the validity of that change (Tr. VIII 2048-50, 2062-73; State's Exhibits 24 & 27, 28-32; Tr. XII 3265-3280; Tr. XIII-A 3315-27; Tr. VII 1891-92, 1897); (7) evidence that Petitioner and Brenda improperly attempted to thwart Rob's attempts to change the beneficiary on the $800,000 insurance policy in the Fall of 2001 (Tr. VII 1858, 1986-92; Tr. VIII 2062-71; State's Exhibits 28-32); (8) Petitioner's refusal to turn over Rob's insurance file to Rob's divorce attorney and the fact Petitioner was "very upset" by Rob's attempts to obtain his insurance file (Tr. V 1389; Tr. VI 1662; Tr. VII 1878-82, 1892-93, 1990-92); (9) Petitioner's threat to Rob (Tr. VII 1858-60; Tr. XI 2848); (10) Petitioner's statements to multiple people in Fall of 2001 that his stint in the Special Forces required him to kill people (Tr. VI 1597-98, 1653; Tr. XI 2838-39); (11) evidence that Brenda had Petitioner following Rob in late October 2001 (Tr. X 2567-68, 2574); (12) Brenda's anger in November 2001 about Rob having custody of the Andrew children over the Thanksgiving holiday (Tr. V 1375-77; Tr. VI 1473-74); (13) Brenda's possessiveness over the Andrew children and the fact she did not want Rob to visit the children (Tr. VI 1451); (14) Brenda's calm behavior at the crime scene and in the hours immediately following the murder (Tr. VI 1637-38; Tr. IX 2148-49, 2180-82, 2222-23; State's Exhibit 34); (15) evidence that the crime scene was staged (Tr. IX 2170-75, 2178, 2183-85, 2189-97; Tr. XII 3184-89); (16) evidence that it would not be possible for Brenda's gunshot wound to be self-inflicted (Tr. XII 3190); (17) Brenda and Petitioner's exchange of a large number of cell

phone calls the day Rob's brake lines were cut and the day before the murder (Tr. VII 1944-67, 1970; State's Exhibit 12-13); (18) Petitioner's unannounced use of Janna Larson's car the day of the murder (Tr. XI 2854-59); (19) Larson's discovery of a live .22 caliber bullet on the floorboard of her car after Petitioner returned the vehicle and Petitioner's command to Larson to throw the bullet away and not tell anyone about it (Tr. XI 2867-68; Tr. XIII-A 3362-65; State's Exhibit 171); (20) Petitioner's threat to Larson the day after the murder that he would kill her if she told anyone about Brenda's previous request that Petitioner kill Rob (Tr. XI 2855, 2862-64, 2865); (21) Brenda's chipper demeanor with Petitioner at the emergency room the day after the murder (Tr. X 2470-74, 2478); (22) Petitioner's plan to flee to Argentina with Brenda and the Andrew children to avoid arrest and prosecution for Rob's murder (Tr. XI 2876-77; Tr. XII 3088); (23) Petitioner's attempt after the murder to get Janna Larson to notarize Rob Andrew's forged signature on documents granting Brenda permission to take the Andrew children out of the United States (Tr. XI 2878-79, 2885-86; Tr. XIV-B 3464-66); (24) Petitioner's flight to Mexico with Brenda and the Andrew children the day before Rob's funeral, just five days after the murder (Tr. XI 2886-89); (25) failure of Brenda, Petitioner and the Andrew children to attend Rob's funeral (Tr. X 2597; Tr. XI 2737-38); (26) discovery of the three .22 caliber bullets and a spent shotgun shell in the Gigstad attic and spare bedroom--a residence to which Brenda had a key (Tr. X 2598-2626; Tr. XI 2673-95, 2699, 2713-26; State's Exhibits 134 & 137); (27) ballistics evidence that the spent shotgun shells found at the crime scene and in Gigstad's spare bedroom were fired from

the same shotgun and were 16 gauge Winchester shells (Tr. IX 2249-50; Tr. XIII-A 3375-80; State's Exhibit 43); (28) ballistics evidence that the live ammo recovered from the Gigstad's attic and Larson's car were .22 caliber long rifle CCI rim fire bullets that were consistent in several respects with the .22 caliber projectile found in the Andrew's garage door (Tr. IX 2265-67; Tr. X 2505-38; Tr. XIII-A 3381-86; State's Exhibits 134, 171, 183); (29) Petitioner's purchase of a .22 caliber long rifle revolver six days before the murder that was capable of firing the bullets used to shoot Brenda and the live ammo found in Gigstad's attic and in Larson's car (Tr. X 2505-38. Tr. XIII-A 3381-84; State's Exhibits 134 & 171); (30) Brenda's possession of Rob's 16 gauge shotgun and her refusal to give it to him in the weeks leading up to the murder (Tr. VI 1554-56; Tr. VII 1923-25); (31) Petitioner's familiarity with Rob's 16 gauge shotgun (Tr. VII 1926-34; State's Exhibit 118); (32) Petitioner's handwritten confession to the murder of Rob Andrew (Tr. XII 3198-3209, 3213-3221, 3233-65; State's Exhibit 222).

The above evidence, taken in the light most favorable to the State, overwhelmingly establishes Petitioner's guilt under Oklahoma law for the first degree malice murder of Rob Andrew. To summarize, the evidence shows that Brenda wanted Rob dead so she could collect on his $800,000 life insurance policy and start a new life with Petitioner. On September 1, 2001, Brenda said that she was "going to have [Rob] fucking killed." Petitioner was also overly possessive of her children and did not want Rob to have visitation of the children over the Thanksgiving 2001 holiday. Petitioner and Brenda engaged in an extramarital

affair in the months leading up to the murder. In early October 2001, Brenda had Petitioner following Rob. In late October 2001, Brenda asked Petitioner to murder Rob. Petitioner and Brenda attempted to do just that by cutting Rob's brake lines on October 26, 2001, and then creating a ruse designed to lure Rob onto an interstate highway at high speeds with those sabotaged brakes. Both Petitioner and Brenda actively attempted to defraud Rob and Prudential Insurance over a period of several months by forging a change of ownership form to the $800,000 life insurance policy that would make Brenda the owner. Petitioner and Brenda both contacted the insurance company to persuade it to recognize Brenda as owner of the policy based on the forged document. On November 1, 2001, Brenda was "pissed" by a ruling in divorce court that appointed her as trustee of the life insurance policy for her two children. Petitioner took an overt act towards commission of the murder by purchasing a .22 caliber pistol on November 14, 2001, that was used in the murder to stage Brenda's gunshot wound. Brenda took an overt act in furtherance of the conspiracy to commit the first degree murder of Rob by luring Rob inside the garage of the Andrew residence on the evening of November 20, 2001, under the guise of allowing him to take the Andrew children for the Thanksgiving holiday and having him light the pilot light to the heater. The pair then carried out the murder and fled to Mexico to avoid arrest and prosecution.

The State presented strong circumstantial evidence from which the existence of a conspiracy may by inferred as well as actual commission of the murder by Petitioner and Brenda Andrew. Recognizing the strength of

the State's evidence, the OCCA rejected Petitioner's evidentiary sufficiency challenge and, in the process, many of the sub-arguments he now tenders on habeas in support:

> ¶ 36 Appellant claims there is no "physical evidence" or "forensic evidence" linking him to the crimes. He misapprehends the nature of evidence long held to be admissible and credible in a court of law. A fingerprint at a crime scene may be considered "physical" or "forensic" evidence, though it is not direct evidence of a crime; rather, it is circumstantial evidence from which a jury can infer (in light of other circumstances) that the person with that fingerprint was present and participated in the crime. The same is true of DNA evidence. Both are circumstantial in nature, requiring an inference unnecessary for "direct" evidence, such as a witness's personal observation of a crime. That both fingerprints and DNA can be so compelling as evidence of guilt (or exoneration) attests to the powerful effect circumstantial evidence can have. *See generally Ex parte Jefferies,* 7 Okl.Cr. 544, 548, 124 P. 924, 925-26 (1912). In fact, classic sources of "direct" evidence-a confession, an eyewitness identification, the testimony of an informant or accomplice-are themselves the subject of special cautionary instructions and corroboration rules. In the end, the law makes no distinction between direct and circumstantial evidence; either, or any combination of the two, may

be sufficient to support a conviction. *Clark v. State,* 1983 OK CR 79, ¶ 8, 664 P.2d 1065, 1066; OUJI-CR (2nd) No. 9-4. The jury may consider all competent evidence, along with rules of law and basic common sense, in reaching a verdict.

¶ 37 Although Brenda Andrew was an eyewitness to her husband's murder, the State obviously did not believe that her account of two masked assailants was true. The State thus relied on evidence that Appellant and Brenda Andrew had several motives to murder Rob Andrew (money, dissolution of the Andrew marriage, control over the Andrew children), all related to the illicit affair that Appellant never disputed having with Brenda.

¶ 38 But the State's evidence demonstrated much more than motive. There was, in fact, a considerable amount of physical evidence, including bullets, shotgun shells, and forged documents, which linked Appellant to the murder and a pre-existing plan to get away with it. The testimony of Janna Larson, Appellant's daughter, helped to show that Appellant and Brenda had planned to harm Rob Andrew for some time, and that the failure of their first attempt (by cutting the brake lines on his car) only emboldened them. Larson also related a number of incriminating statements from both Appellant and Brenda. Larson may not have been an eyewitness to the murder itself, but she was certainly an eyewitness to many

> overt acts of the two conspirators, and to their preparations for flight after the murder. The State also presented the letter written by Appellant from jail, wherein he admitted complicity in the murder but attempted to exculpate Brenda. Both parties rejected the letter as an accurate version of what happened, although obviously for different reasons. While the letter may have borne some relevance to show Appellant's complicity, it was perhaps more relevant to show how jealousy and greed can disfigure the human mind. Add to this the numerous other witnesses who spoke with and observed Rob Andrew, Brenda Andrew, and Appellant, as their relationships with one another evolved. In short, the evidence against Appellant was largely circumstantial, but that is not unusual in any kind of criminal case. What may be unusual was how large a quantity of circumstantial evidence the State was able to present.
>
> ¶ 39 All of the evidence presented at trial, when considered together, formed an intricate web of proof, from which any rational juror could find Appellant guilty of conspiring to murder Rob Andrew and consummating the murderous plan. *Plantz v. State,* 1994 OK CR 33, ¶ 39, 876 P.2d 268, 280. The evidence was sufficient to support both of Appellant's convictions. This proposition is denied.

Pavatt, 159 P.3d at 284-85 (footnote omitted).

Appendix M

The Tenth Circuit has recognized that a federal habeas court's review under *Jackson* is "sharply limited, and a court faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Boltz v. Mullin*, 415 F.3d 1215, 1232 (10th Cir. 2005). Additionally, federal review "is even more limited given that AEDPA governs this issue." *Id.* The Tenth Circuit has referred to the standard of review regarding evidentiary sufficiency challenges under AEDPA as "deference squared." *Young v. Sirmons*, 486 F.3d 655, 666 n.3 (10th Cir. 2007). *See also Knowles*, 129 S. Ct. at 1420 (state court's application of general standard entitled to doubly deferential judicial review under AEDPA).

To the extent Petitioner complains that no physical or forensic evidence was presented to support his conviction, and that his third-party perpetrator evidence was omitted at trial, he is not entitled to relief. "*Jackson* does not require such evidence to sustain a criminal conviction." *Matthews*, 2009 WL 1927051, at *8 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even through proof beyond a reasonable doubt is required")). Further, "the focus of a *Jackson* inquiry is not on what evidence is missing from the record, but whether the evidence in the record, viewed in the light most favorable to the prosecution, is sufficient for any rational trier of fact to

find the defendant guilt beyond a reasonable doubt." *Id.*[7] And as noted by the OCCA, the prosecution did present "a considerable amount of physical evidence" which linked Petitioner to the conspiracy and murder. *Pavatt*, 159 P.3d at 285. Petitioner's attempt to discount certain portions of the State's evidence (like Petitioner's handwritten letter and evidence establishing Petitioner was having an affair with Brenda Andrew) simply ignores *Jackson's* requirement that the record evidence be taken in the light most favorable to the State.

To the extent Petitioner cites alleged evidentiary error and alleged juror bias from other grounds in his § 2254 petition as a reason for finding insufficiency of evidence as to his conviction, he is not entitled to relief. Those particular claims must stand or fall on their own merits.

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7. Incidentally, the "opinion" testimony of Agent Kurt Stoner that Petitioner is so concerned about, Doc. 42 at 73-75, is not record evidence at all because the trial court sustained an objection to the testimony and admonished the jury to disregard it. *Pavatt*, 159 P.3d at 290-91; (Tr. XII 3065). Petitioner fails to present the full story about this testimony. The prosecution did not introduce this evidence to "shore-up any failure in the [State's evidentiary] presentation" as Petitioner claims, but rather, as discussed more fully in connection with Ground Seven below, in response to defense counsel's repeated improper elicitation of opinion testimony during cross-examination of Janna Larson "that she did not believe her father was actually complicit in Rob Andrew's murder." *Id.* at 290. The OCCA reasonably concluded that the opinions of Larson and Stoner did not leave a serious impression on the jury in light of the trial court's admonishment. *Id.* at 291. "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). But again, this issue will be discussed more fully below in connection with the substantive claim.

Evidentiary sufficiency review is not an opportunity for a habeas petitioner to bootstrap voluminous alleged trial errors into the *Jackson* analysis. The focus is on the record evidence and whether, when viewed in the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime(s) charged–not alleged evidentiary and trial errors committed by the trial judge. This is true even where some erroneous government evidence was admitted at trial. In such instances, a reviewing court considers both the properly admitted evidence as well as that deemed improperly admitted in making the *Jackson* inquiry. *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988). *See also United States v. Mejia*, 545 F.3d 179, 202 (2d Cir. 2008); *United States v. Lopez-Medina*, 461 F.3d 724, 749-50 (6 Cir. 2006); *United States v. Wood*, 958 F.2d th 963, 970 n.9 (10th Cir. 1992); *Pemberton v. Collins*, 991 F.2d 1218, 1224 (5th Cir. 1993); *Tate v. Armontrout*, 914 F.2d 1022, 1026 (8th Cir. 1990). The State will therefore respond to the procedural and substantive merits of Petitioner's individual claims of trial error as they arise in Petitioner's § 2254 petition, not as part of a *Jackson* evidentiary sufficiency analysis.

All things considered, habeas relief must be denied. The OCCA's adjudication of the claim was wholly reasonable in light of the record evidence. 28 U.S.C. § 2254(d).

Appendix M

IV.

THE OCCA'S REJECTION OF PETITIONER'S THIRD-PARTY PERPETRATOR EVIDENCE WAS WHOLLY REASONABLE AS SAID EVIDENCE WAS WHOLLY UNRELIABLE.

In Ground Four, Petitioner complains that his constitutional right to present a defense was violated, along with his Eighth Amendment right to a reliable sentencing proceeding, when the trial judge excluded unreliable third-party perpetrator evidence relating to an Oklahoma County Jail inmate named Zjaiton Wood. Doc. 42 at 79-92.

A. Exhaustion.

Petitioner raised this claim on direct appeal and the OCCA rejected it on the merits. *Pavatt*, 159 P.3d at 285-89. It is therefore exhausted for purposes of federal habeas review.

B. Standard of Review.

In an extended analysis, the OCCA found no error stemming from the trial court's rejection of the Zjaiton Wood third-party perpetrator evidence. Although ultimately denying admissibility of this evidence under Okla. Stat. tit. 12, § 2804(B)(3), Oklahoma's provision relating to admission of statements against penal interest offered to exculpate a criminal defendant, the OCCA expressly cited, and applied, pertinent Supreme Court

cases relating to the Sixth Amendment right to present a defense vis-a-vis state evidentiary rules, including *Holmes v. South Carolina*, 547 U.S. 319 (2006), *Crane v. Kentucky*, 476 U.S. 683 (1986),

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X.

THE OCCA'S REJECTION OF PETITIONER'S EVIDENTIARY SUFFICIENCY CHALLENGE TO THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR WAS WHOLLY REASONABLE.

In Ground Ten, Petitioner alleges that insufficient evidence was presented at trial to support the jury's finding of the especially heinous, atrocious or cruel aggravator. Doc. 42 at 147-57.

A. Exhaustion.

This claim was raised on direct appeal and the OCCA rejected it on the merits. *Pavatt*, 159 P.3d at 294-95. It is therefore exhausted for purposes of federal habeas review.

B. Standard of Review.

The OCCA's rejection of this claim rests on substantive, not procedural, grounds. The OCCA recited and applied the standard of review mandated by *Lewis v. Jeffers*, 497 U.S. 764, 781-83 (1990) for evidentiary sufficiency

challenges to aggravating circumstances. *Pavatt,* 159 P.3d at 294. In conducting this analysis, the state court discussed Oklahoma's requirements for satisfying this aggravator as well as the record evidence supporting it. *Id.* at 294-95. The OCCA clearly applied federal law in denying Petitioner's constitutional challenge to the sufficiency of the evidence supporting the especially heinous, atrocious or cruel aggravator. Thus, this constitutes an adjudication on the merits to which AEDPA deference applies. *Matthews v. Workman*, 2009 WL 1927051, at *6 n.3 (10th Cir. July 7, 2009).

C. Merits.

The Supreme Court held in *Lewis v. Jeffers* that, with regard to the sufficiency of the evidence for aggravating circumstances, the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979)—whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential element of the crime beyond a reasonable doubt—is applicable. *Jeffers*, 497 U.S. at 781-82. Although aggravating circumstances are not "elements" of any offense, the standard of review for determining whether evidence is sufficient to convict is equally applicable to protecting a defendant's Eighth Amendment right to be free from the arbitrary and capricious imposition of the death penalty. *Id.* at 782. Like factual findings, state court findings of aggravating circumstances often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id. See also Boltz v. Mullin,* 415 F.3d 1215, 1232

(10th Cir. 2005); *Fields v. Gibson*, 277 F.th 3d 1203, 1220 (10th Cir. 2002). The Tenth Circuit has recognized that a federal habeas court's review under *Jackson* is "sharply limited, and a court faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Boltz*, 415 F.3d at 1232. Additionally, federal review "is even more limited given that AEDPA governs this issue." *Id.* The Tenth Circuit has referred to the standard of review regarding evidentiary sufficiency challenges under AEDPA as "deference squared." *Young v. Sirmons*, 486 F.3d 655, 666 n.3 (10th Cir. 2007).

Petitioner fails to show that the OCCA's adjudication of his sufficiency of the evidence claim was either contrary to, or an unreasonable application of, *Jackson* or that it was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). *Brown v. Sirmons*, 515 F.3d 1072, 1089 (10th Cir. 2008) (quoting *Maynard v. Boone*, 468 F.3d 665, 673 (10th Cir. 2006)) ("[s]ufficiency of the evidence on a habeas petition is a mixed question of law and fact. We ask whether the facts are correct and whether the law was properly applied to the facts, 'which is why we apply both 28 U.S.C. 2254(d)(1) and (d)(2) when reviewing sufficiency of the evidence on habeas.' In light of the presumption of correctness afforded by 28 U.S.C. § 2254(e), we must defer to any determination of a factual issue by the state court") (internal citations omitted). This Court looks to Oklahoma law in determining the substantive requirements of the great risk of death aggravator. *Id.*

In rejecting this claim, the OCCA found as follows:

> ¶ 75 In Proposition 14, Appellant claims the evidence was insufficient to support the jury's finding that the murder of Rob Andrew was especially heinous, atrocious, or cruel. To establish this aggravator, the State must present evidence from which the jury could find that the victim's death was preceded by either serious physical abuse or torture. Evidence that the victim was conscious and aware of the attack supports a finding of torture. *Davis v. State,* 2004 OK CR 36, ¶ 39, 103 P.3d 70, 81; *Black v. State,* 2001 OK CR 5, ¶ 79, 21 P.3d 1047, 1074 (evidence that victim consciously suffered pain during and after stabbing was sufficient to support this aggravating circumstance); *Le,* 1997 OK CR 55 at ¶ 35, 947 P.2d at 550; *Romano v. State,* 1995 OK CR 74, ¶ 70, 909 P.2d 92, 118; *Berget v. State,* 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373. Our evaluation is not a mechanistic exercise. As we stated in *Robinson v. State,* 1995 OK CR 25, ¶ 36, 900 P.2d 389, 401:
>
> As much as we would like to point to specific, uniform criteria, applicable to all murder cases, which would make the application of the "heinous, atrocious or cruel" aggravator a mechanical procedure, that is simply not possible. Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was

proved. Unfortunately, no two cases present identical fact scenarios for our consideration, therefore the particulars of each case become the focus of our inquiry, as opposed to one case's similarity to another, in resolving a sufficiency of the evidence claim supporting the heinous, atrocious or cruel aggravator.

¶ 76 The evidence presented at trial showed that Rob Andrew suffered numerous wounds resulting from two shotgun blasts, which damaged his internal organs. The medical examiner testified that either wound would have caused sufficient blood loss to be independently fatal, but that death was not instantaneous. When emergency personnel arrived, Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggested that he either tried to ward off his attacker or shield himself from being shot. Brenda Andrew called 911 twice after the shooting; together, the two calls spanned several minutes. During the second call, she claimed that her husband was still conscious and attempting to talk to her as he lay bleeding to death on the garage floor. All of these facts tend to show that Rob Andrew suffered serious physical abuse, and was conscious of the fatal attack for several minutes. *See Ledbetter v. State,* 1997 OK CR 5, ¶ 53, 933 P.2d 880, 896 (evidence that murder victim was likely aware that she was about to be assaulted because defendant had attempted

to kill her one week earlier, that she tried to defend herself from the fatal attack, and that she attempted to communicate with a neighbor after the attack was sufficient to show that the murder was especially heinous, atrocious or cruel).

¶ 77 After finding that the murder was accompanied by torture or serious physical abuse, the jury may also consider the attitude of the killer and the pitiless nature of the crime. *Lott,* 2004 OK CR 27 at ¶ 172, 98 P.3d at 358; *Phillips v. State,* 1999 OK CR 38, ¶ 80, 989 P.2d 1017, 1039. That the victim was acquainted with his killers is a fact relevant to whether the murder was especially heinous, atrocious, or cruel. In finding the murder in *Boutwell v. State,* 1983 OK CR 17, ¶ 40, 659 P.2d 322, 329 to be especially heinous, atrocious, or cruel, this Court observed: In this case the killing was merciless. The robbers planned well in advance to take the victim's life. Even more abhorrent and indicative of cold pitilessness is the fact that the appellant and the victim knew each other.

¶ 78 We find the situation in the present case even more pitiless. Rob Andrew correctly suspected his wife of having an affair with a man he trusted as his insurance agent. He correctly suspected his wife and her lover of trying to wrest control of his life insurance away from him. He correctly suspected his wife

> and her lover of attempting to kill him several weeks before by severing the brake lines on his car. He confided in others that he was in fear of his life. Having separated from his wife, Rob Andrew was murdered as he returned to the family home to pick up his children for the Thanksgiving holiday. From the evidence, a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he died. The evidence supported this aggravating circumstance, and this proposition is denied.

Pavatt, 159 P.3d at 294-95.

The OCCA's finding that sufficient evidence supported this aggravator was wholly reasonable in light of the governing law and facts. The State presented evidence at trial that Rob Andrew was conscious before, during and after the infliction of the two shotgun wounds. Brenda Andrew told the 911 operator that her husband was breathing, conscious and trying to talk to her after being shot (Tr. IX 2148-49; State's Exhibit 34). He was discovered by emergency personnel clutching a garbage bag full of empty aluminum cans. *See*, *e.g.*, (Tr. IX 2178, 2295, 2305, 2306, 2308; State's Exhibits 41, 64, 66, 73). Rob suffered two shotgun wounds to the neck and chest. The medical examiner testified that Rob was hit with multiple shotgun pellets from the two shotgun blasts. The shotgun pellets were spread across Rob's body because the shotgun was not fired at close range. The shotgun pellets damaged Rob's liver, right lung and aorta (Tr.

X 2434-55, 2459; State's Exhibit 75-77, 106-112). Even though both shotgun wounds were independently fatal, the victim could have sustained life after being shot for "[l]ess than ten" minutes (Tr. X 2457). Death would not have been instantaneous (Tr. X 2463). However, the victim would have lost consciousness before he died because he was bleeding to death both from his external wounds and the injuries suffered to his internal organs (Tr. X 2458-59, 2465). Loss of consciousness would have occurred in less than five (5) minutes (Tr. X 2461-62). The medical examiner testified that the shotgun wounds would have been painful and that the victim could have suffered and experienced pain in the process of dying (Tr. X 2464, 2466-67).

Taking this evidence in the light most favorable to the prosecution as this Court must, sufficient evidence was presented to establish serious physical abuse and, in particular, conscious physical suffering by the victim. Brenda Andrew placed two (2) 911 calls to police after the shooting. Both calls totaled six (6) minutes. Brenda told the 911 operator during the second 911 call that Rob was breathing, conscious and trying to talk to her (Tr. IX 2149; State's Exhibit 34). This evidence shows that Rob was alive for a significant period of time, suffering all the while from the extensive shotgun wounds spread across his body.

Petitioner argues that Brenda Andrew's statements to the 911 operator simply cannot be believed. But that was an issue for the jury, not this Court on collateral federal challenge. "As an appellate court on collateral review,

[this Court is] not allowed to 'weigh conflicting evidence or consider the credibility of witnesses.'" *Matthews*, 2009 WL 1927051, at *6 (quoting *Valdez v. Bravo*, 373 F.3d 1093, 1097 (10th Cir. 2004)). Here, this Court must take the evidence in the light most favorable to the State and presume that the jury accepted as true Brenda Andrew's statements to police that the victim was conscious as late as the second 911 call. All Petitioner's argument proves "is that a rational juror *might not* accept" her statements on this point as true; "it doesn't show that a rational juror *could not* accept it, which is the question on which a sufficiency challenge necessarily must focus." *Id.* at *7.

To the extent Petitioner cites a 911 call log not made part of the record to support his evidentiary challenge, he is not entitled to relief. Doc. 42 at 152. "[T]he focus of a *Jackson* inquiry is not on what evidence is missing from the record, but whether the evidence in the record, viewed in the light most favorable to the prosecution, is sufficient for any rational trier of fact to find" existence of the aggravating circumstance beyond a reasonable doubt. *Matthews*, 2009 WL 1927051 at *8.

Petitioner's comparison of his case to the application of this aggravator in other capital murder cases is of no consequence. These cases are not Supreme Court cases, but rather, decisions from the OCCA and the Tenth Circuit. They are therefore not an independent basis for relief under AEDPA. To the extent Petitioner suggests, by citing to these other cases, that the OCCA's application of the especially heinous, atrocious or cruel aggravator in this case renders it unconstitutional, he is not entitled to relief. As noted by the Supreme Court, the

question whether state courts have properly applied an aggravating circumstance is separate from the question whether the circumstance, as narrowed, is facially valid. *Arave v. Creech*, 507 U.S. 463, 476-77 (1993). Such analysis represents little more than a proportionality review of the state's application of the aggravating circumstances. *Walton v. Arizona*, 497 U.S. 639, 655-56 (1990). Oklahoma law does not authorize proportionality review for death sentences, *see* Okla. Stat. tit. 21, § 701.13(C) (describing mandatory sentencing review factors) & *Mann v. State*, 749 P.2d 1151, 1161 (Okla. Crim. App. 1988), and there exists no federal constitutional entitlement to such review. *Walton*, 497 U.S. at 655-56 ("proportionality review is not constitutionally required"). In *Lewis v. Jeffers*, the Supreme Court held:

> Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting ... the sentencer's discretion in imposing the death penalty," *Cartwright*, 486 U.S., at 362, has been satisfied.

Id., 497 U.S. at 779. *See also Moore v. Gibson*, 195 F.3d 1152, 1176 (10th Cir. 1999).

To be constitutional, an aggravating circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted

of murder. It must not also be unconstitutionally vague. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave*, 507 U.S. at 474 (citing *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder)). Where, as here, the OCCA applied an interpretation of this aggravator that has previously been found constitutional, *see Wilson v. Sirmons*, 536 F.3d 1064, 1108 (10th Cir. 2008) (noting Tenth Circuit has routinely upheld Oklahoma's heinous, atrocious or cruel aggravator even where jury instructions did not specifically include the "conscious suffering" requirement), a habeas petitioner's constitutional challenge to that aggravator is at an end. *Jeffers,* 497 U.S. at 779. Nothing about the OCCA's discussion of the legal or factual basis for its conclusion here in any way suggests an overbroad or erroneous interpretation, let alone application, of Oklahoma's heinous, atrocious or cruel aggravator.

Petitioner's suggestion that the governing standard of review should require a finding that "[a]ll of the facts and circumstances, taken together, must be inconsistent with any reasonable theory or conclusion other than the existence of the aggravating circumstance", Doc. 42 at 148 & 149, is of no consequence. Petitioner ignores that under AEDPA, the OCCA's adjudication of this claim is only to be compared to clearly-established Supreme Court precedent, *Williams v. Taylor*, 529 U.S. 362, 412 (2000)

(O'Connor, J., concurring), not state-law standards of review. *Matthews*, 2009 WL 1927051, at *6 n.4 (rejecting habeas petitioner's claim that reasonable hypothesis test applied to sufficiency of evidence challenge to conviction); *Romano v. Gibson*, 239 F.3d 1156, 1164-65 (10th Cir. 2001) (applying *Jackson* standard instead of "reasonable hypothesis" standard applied by OCCA). The Supreme Court has expressly rejected the "reasonable hypothesis" standard, *Holland v. United States*, 348 U.S. 121, 139-40 (1954), instead opting for *Jackson*'s rational trier of fact standard. *Jackson*, 443 U.S. at 318 n. 9 (citing *Holland*, 348 U.S. at 140). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citing *Holland*, 348 U.S. at 140) ("we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required"). *See also Corbin v. United States*, 253 F.2d 646, 648-49 (10th Cir. 1958) (requirement that court of appeals find facts in circumstantial evidence case are inconsistent with any reasonable hypothesis of innocence runs contrary to *Holland*). Hence, the appropriate standard of review on habeas is supplied by *Jackson*. *Romano*, 239 F.3d at 1164-65. Moreover, Brenda Andrew's statements to the 911 operator constitute direct evidence regarding conscious physical suffering.

The OCCA also reasonably concluded that, having found that the murder was accompanied by torture or conscious physical abuse, evidence establishing the cruel and pitiless nature of the crime also supported a finding of this aggravator. *Pavatt*, 159 P.3d at 295. As discussed at length in the statement of facts and Section III above, the

record evidence established that in the weeks leading up to the murder, the victim feared for his life. Rob Andrew correctly believed Petitioner and his wife were trying to kill him, in part, over the Prudential life insurance policy which had been a major point of contention during the ongoing divorce proceedings. The brake line incident, in which Petitioner and Brenda Andrew attempted to lure him onto an interstate highway at high speeds in a car with no brakes, only heightened the cruel state of affairs this victim suffered in the weeks leading up to the murder. In light of this evidence, the OCCA reasonably found that "a rational juror could have concluded, beyond a reasonable doubt, that Rob Andrew had time to reflect on this cruel state of affairs before he died." *Id.* Taken in the light most favorable to the State, this evidence too supported the heinous, atrocious or cruel aggravating circumstance.

All things considered, Petitioner fails to show that the OCCA's decision on this issue falls into the category of the most serious misapplication of Supreme Court precedent. *House v. Hatch*, 527 F.3d 1010, 1019 (10th Cir. 2008) (quoting *Maynard v. Boone*, 468 F.3d 665, 671 (10th Cir. 2006) ("only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254"). That is especially so considering that the state court is essentially applying a general standard in assessing this evidentiary sufficiency challenge, thus allowing even more leeway for the state court's decision. *See Knowles v. Mirzayance*, __U.S.__, 129 S. Ct. 1411, 1420 (2009). Habeas relief should therefore be denied.

Appendix M

XI.

PETITIONER'S CHALLENGE TO THE UNIFORM INSTRUCTION GIVEN TO HIS JURY FOR THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR IS UNEXHAUSTED.

In Ground Eleven, Petitioner challenges Instruction No. 5, the uniform Oklahoma instruction defining the especially heinous, atrocious or cruel aggravator, which was given to his jury during penalty phase deliberations (O.R. 2052). Petitioner complains that this instruction did not advise the jury that it must find Rob Andrew's death was preceded by conscious physical abuse or torture as required by Oklahoma case law interpreting this aggravator. Doc. 42 at 157-62.

A. Exhaustion.

Petitioner did not raise this claim at any point in state court. It is therefore unexhausted and procedurally barred from habeas review on independent and adequate state law grounds

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APPENDIX N — EXCERPTS OF PETITION FOR WRIT OF HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED APRIL 1, 2009

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

No. CIV-08-470-R

JAMES DWIGHT PAVATT,

Petitioner,

vs.

MARTY SIRMONS, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254**

Prisoner's Name: JAMES DWIGHT PAVATT
Prisoner's DOC Number: 455677
Place of Confinement: Oklahoma State Penitentiary
McAlester, Oklahoma

Appendix N

Robert R. Nigh, Jr., OBA #11686
BREWSTER & DEANGELIS
2617 East 21st Street
Tulsa, Oklahoma 74114
(918) 742-2021 – Telephone
(918) 742-2197 – Facsimile
rnigh@brewsterlaw.com

And

Patti Ghezzi, OBA #6875
215 Dean A. McGee
Suite 707, Old Post Office Building
Oklahoma City, OK 73002
(405) 609-5975 – Telephone
(405) 609-5976 – Facsimile
Patti_p_ghezzi@fd.org
COUNSEL FOR PETITIONER
JAMES PAVATT

April 1, 2009

***

CONCLUSION

Mr. Pavatt was deprived of a fair trial and a fair sentencing hearing by the blatant use of gruesome, crime scene photographs and the use of images of Rob Andrew in life at both stages of his trial. There was no relevant evidentiary purpose to the use of such photographic evidence. Mr. Pavatt's constitutional rights to due process of law and a fair and reliable sentencing trial under the Eighth amendment to the U.S. Constitution were

infringed. Accordingly the writ should issue, and/or the Court should grant Mr. Pavatt a new trial, or alternatively, vacate his death sentence.

GROUND TEN

PETITIONER'S SENTENCE DOES NOT COMPORT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THAT THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL."

Here, the evidence was insufficient to support the jury's finding that this murder was an "especially heinous, atrocious, or cruel" one. The undeniable facts are that Rob Andrew was shot twice with a shotgun, both shots hitting vital internal organs. Thus, either shot would have resulted in Andrew going into shock, losing consciousness, and bleeding to death within minutes. However, the combination of both shots would have sped up the bleeding process, revealing that Rob Andrew clearly died where he fell on the garage floor.

These facts should have clearly shown that this murder was not especially heinous, atrocious, or cruel. Yet, because the court was able to determine otherwise, the OCCA applied an incorrect standard of review when addressing this claim. The OCCA concluded that the following "facts tend to show that Rob Andrew suffered serious physical abuse:" 1) there were numerous wounds

from the two shotgun blasts that damaged Andrew's internal organs; 2) both wounds caused sufficient blood loss to be independently fatal, but the death was not instantaneous; 3) Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggests that he either tried to ward off his attacker or shield himself from being shot; and 4) in Brenda Andrew's second call to 911, she claimed that her husband was still conscious and attempting to talk to her as he lay bleeding to death on the garage floor. *Pavatt v. State*, 2007 OK CR 19, 159 P.3d 272, 294 (Okla.Crim.App 2007).

Though the Oklahoma court concluded that "these facts tend to show Rob Andrew suffered serious physical abuse," the court failed to identify what serious physical abuse occurred, beyond what naturally occurs in *any* shooting. Thus, when the jury was instructed that "[a]ll of the facts and circumstances, taken together, must be inconsistent with any reasonable theory or conclusion other than the existence of the aggravating circumstances," and each of the facts cited by the Oklahoma court was consistent with a reasonable theory or conclusion that the murder was not an "especially heinous, atrocious, or cruel" one, there should have been a matching finding. *See* OUJI B CR (2d) 4-77. *See also* (O.R. Vol. 11 at 2055). This truth becomes clear upon even a cursory review of the facts. Specifically, the facts showed that 1) the "numerous wounds" occurred almost simultaneously and did not contribute to an inordinate amount of conscious pain prior to death; 2) the quick loss of blood from both wounds resulted in shock and a loss of consciousness within one minute; 3) the clutching of the plastic trash

bag was meaningless in determining whether Rob Andrew consciously suffered and that it was reasonable to conclude that he was holding the trash bag when shot, or that he instinctively grabbed for it as he fell; and 4) it was reasonable to conclude that Rob Andrew was dead when Brenda Andrew made her 911 calls, and her report of Rob Andrew being conscious, breathing, and attempting to talk was simply poor acting.

Yet, as stated above, instead of applying this "reasonable hypothesis" standard of review to the claim, the court evaluated whether a rational juror, considering the evidence in the light most favorable to the state, could have found the aggravating circumstance to exist beyond a reasonable doubt. *Pavatt,* 159 P.3d at 294. By so evaluating the claim, the court concluded that the jury could have found the aggravating circumstance beyond a reasonable doubt because Rob Andrew had time to reflect on the cruel state of affairs before his death. *Id.* at 295.

Regardless of the standard, however, there was simply not enough evidence to establish that this murder was either especially heinous, atrocious, or cruel. Indeed, this is not a case where the only material question is whether the victim was conscious during a severe beating, which itself clearly amounts to "serious physical abuse." *Thomas v. Gibson,* 218 F.3d 1213, 1227 (10th Cir. 2000) (finding insufficient evidence that victim consciously suffered during beating, stabbing, and strangulation, which caused multiple bruises, lacerations, fractures, and hemorrhaging). And, this is not a case where there is ample evidence that the victim consciously suffered physical

abuse while trying to ward off his attacker. *Brown v. Sirmons,* 515 F.3d 1072, 1090 (10th Cir. 2008) (revealing victim was bound prior to attack with baseball bat and had defensive wounds on hands, fingers, and wrist and a hinge from handcuffs embedded in his skull). Instead, this is a case where there is *no* serious physical abuse. The "numerous wounds" referred to by the Oklahoma court are wounds caused by pellets from the same shell, shot at the same time, from the same gun. All of the "wounds" occurred instantaneously with the firing of the shotgun. None of the other "facts" cited by the Oklahoma court remotely relate to whether there was "serious physical abuse." Therefore, there was no reason for the OCCA to conclude that this was an especially heinous, atrocious, or cruel murder.

The OCCA's error becomes clear in light of Tenth Circuit holdings. When the Tenth Circuit has upheld findings of "especially heinous, atrocious, or cruel" crimes in shooting deaths showing "serious physical abuse," there has been severe pain and suffering and a lingering death. In *McCracken v. Gibson,* 268 F.3d 970, 982 (10th Cir. 2001), serious physical abuse existed where the third victim, who was shot at a bar, was conscious and complaining of pain to police and emergency medical technicians who treated her, only for her to later die at the hospital. The circuit court recognized that whether the fourth shooting victim suffered serious physical abuse was the more difficult question. The fourth victim was alive and convulsing at the bar, after being shot. He had vomited on himself and was described as being in a "semi-conscious state" and later died at the hospital.

However, the court found it unnecessary to consider the constitutional sufficiency of this evidence as to the fourth victim because it concluded the evidence was otherwise constitutionally sufficient to support a finding that the death was preceded by extreme mental cruelty. In *Toles v. Gibson,* 269 F.3d 1167, 1183 (10th Cir. 2001), the circuit court found the evidence sufficient to support a finding that the murders were especially heinous, atrocious, or cruel where one victim continued to physically struggle with the killer after having been shot in the arm and the chest with a .22 caliber firearm. He slowly suffocated from the internal bleeding caused by the chest wound. The other victim did not lose consciousness immediately from the shot to the back of his head, but moved from where he was shot to his bedroom, where he was heard crying and gasping for air. He died after being taken off life support, which had been administered by the paramedics upon their arrival at the scene. *See also Robinson v. Gibson*, 2002 WL 13158 (10th Cir 2002) (finding evidence sufficient to establish claim where killer shot at victim's feet as he ran, then shot him twice in the back; victim remained conscious, asking bystanders to call an ambulance for him and posing questions to the killer; victim was shot two more times in the heart and lungs, and yet, remained conscious requesting an ambulance before he finally lost consciousness and died). Each of these cases reveals that there was something substantially more than simply the typical wounds resulting from two shotgun shots.

In Mr. Pavatt's case, it is disturbing to imagine that the constitutional sufficiency of the evidence of a critical aggravating circumstance rests upon gross speculation

concerning why Andrew was gripping a trash bag of aluminum cans when he died, or upon Brenda Andrew's words in her second 911 call a call which is promoted by the prosecution as false in all other aspects. A timeline of Rob Andrew's death reveals that Ron Stump received a phone call from Rob Andrew at approximately 6:00 p.m. and was told Brenda needed more time to have the children ready so they would not be ready until 6:15 p.m. (Tr. Vol. 6 at 1551). Rob Andrew waited in the driveway while on the phone with Stump. (Tr. Vol. 6 at 1551-1553). The log for Brenda Andrew's 911 calls shows that the first call was recorded at 6:19:44 p.m. and lasted 2 minutes, 36 seconds. It ended at 6:22:19 p.m., and her second call was received seven (7) seconds later at 6:22:26 p.m. (Post Conv. Ex. 9). According to the prosecution's theory, Rob Andrew was shot prior to the first 911 call, and Brenda Andrew was shot between the two calls. (Tr. Vol. 14B at 3611). Only in the second call did Brenda say anything about Rob Andrew still breathing and trying to talk to her. In fact, in Brenda Andrew's statement to Sergeant Frost and later to Detective Garrett, after Rob Andrew and she were shot, she says she went into the home to retrieve the phone and to check on the children in the master bedroom. After this sojourn, she returned to the garage to wait for the paramedics and law enforcement officers while making her phone calls to 911. According to Tom Bevel, however, there was no trail of blood consistent with Brenda Andrew's claim that she went inside the home for the phone after she'd been shot. (Tr. Vol.12, at 3186-87) Sergeant Roger Frost, who was patrolling the neighborhood, arrived at the Andrew home within one minute of the call going out over the radio. He and two

other officers arrived at the same time and found Rob Andrew dead on the garage floor, and Brenda Andrew sitting in the garage by the door leading into the home. (Tr. Vol. 9 at 2169-71). She'd been on the phone with the 911 operator when the officers arrived. (State's Ex. 34). In the first 911 call, Brenda Andrew said nothing about Rob Andrew being dead or alive. She simply told the operator that she couldn't tell where Rob has been shot, but that it looked like his shirt has been ripped. She repeated that there was "blood everywhere," and that Rob Andrew had "blood all over him." She said nothing about whether he was conscious, breathing, or talking.

It was not until the second 911 call, the one relied upon by the prosecution and the OCCA to conclude that Rob Andrew consciously suffered "serious physical abuse prior to his death," that the 911 operator asked Brenda Andrew if her husband was conscious, and Brenda responded "Rob? Yeah, he's conscious." Brenda Andrew later said, "Rob, come on, wake up. He's breathing. He's fine. He's fine." When the operator told her to try to get him to talk to her by telling him a story, Brenda said "Rob, tell me a story. Rob, talk to me. Rob, talk to me. He's trying to talk to me. Come on Rob." Brenda Andrew repeatedly said, "He's breathing. He's breathing." She told the operator that he was "bleeding bad though, with blood everywhere," but when the operator asked her if she had tried to apply any kind of bandage to the wound, she responded "No. No." She was repeating that Rob Andrew was breathing when the officers first arrived at the scene. (State's Ex. 34). The entire length of the two 911 calls was 6 minutes. (Tr. Vol. 9 at 2149). Clearly, Rob Andrew was not breathing

when the officers and paramedics arrived at the scene. Rob Andrew's death was recorded at 6:20 p.m. before the second 911 call was initiated. (Tr. Vol. 10 at 2433). It is a reasonable hypothesis that Brenda Andrew's act of trying to minister to her dying husband was done for the benefit of the 911 operator and not because Rob Andrew was still alive during the calls. In fact, no rational juror could have determined otherwise.

Petitioner recognizes that Rob Andrew's death was not instantaneous, but it is not reasonable to conclude that Andrew remained conscious while his wife wernt into the home, retrieved the phone, checked on the children, returned to the garage, and made the two 911 phone calls, and yet, stopped breathing immediately upon the arrival of the officers and the paramedics. Rob Andrew was dead when Brenda Andrew made her first call.

As with the Tenth Circuit, Oklahoma courts have found this aggravating circumstance unsupportable even in light of such facts when shooting deaths have not been instantaneous. The death of Karl Myers' victim was not instantaneous. *Myers v. State,* 133 P.3d 312, 332 (Okla. Crim. App. 2006) (centering around a rape victim who had multiple lacerations, abrasions, and contusions, in addition to the wounds from five gunshots, the fatal wound being one to the chest, which ruptured the aorta but with one of the head wounds probably rendering her unconscious before her death). The death of William Keith Cudjo's victim was not instantaneous. *Cudjo v. State,* 1996 OK CR 43, 925 P.2d 895, 901 (Okla. Crim. App. 1996) (involving a victim shot in the head after he asked the defendant not

to shoot, but who remained coherent at the scene, later experiencing nausea, vomiting, shortness of breath, and his head hurting, only to die later after being transported to one hospital and then flown to another). The death of Garry Michael Cheney's victim was not instantaneous. *Cheney v. State,* 1995 OK CR 72, 909 P.2d 74, 81 (Okla. Crim. App. 1995) (stemming from an initial confrontation in a parking garage where victim maced her husband and Cheney ran after his wife and shot her repeatedly, with five of the shots being fatal and two of the shots capable of rendering her immediately unconscious). The death of Ralph A. Brown's victim was not instantaneous. *Brown v. State,* 1998 OK CR 59, 753 P.2d 908, 912 (finding that after Brown shot his wife seven times, with one fatal shot going through the heart and another fatal shot going through the aorta, she would have survived a few minutes). The death of B.J. Stouffer's victim was not instantaneous. *Stouffer v. State,* 1987 OK CR 166, 742 P.2d 562, 563-64 (Okla. Crim. App. 1987) (showing that victim, who was asleep on couch and was shot twice in the head, died within minutes at the scene). The death of Huey Don Odom's victim was not instantaneous. *Odum v. State*, 1982 OK CR 148, 651 P.2d 703, 707 (Okla. Crim. App 1982) (revealing victim shot once in the neck from close range died within minutes of asphyxiation). In all of the cases cited above, OCCA found that the evidence that the murder was especially heinous, atrocious, or cruel, to be wholly insufficient.

These findings are in accord with the Tenth Circuit's holding that for the "especially heinous, atrocious, or cruel" aggravator to be constitutionally supported, "the evidence must support anguish that goes beyond 'that

which necessarily accompanies the underlying killing.'" *Hamilton v. Mullin*, 436 F.3d 1181, 1195 (10th Cir. 2006) (citing *Jones v. Gibson,* 206 F.3d 946, 953 (10th Cir. 2000)). And, the district courts have followed suit. In *Nuckols v. Reynolds*, 970 F.Supp. 885 (W.D. Okla. 1983), the federal district court found that the evidence did not support a constitutionally narrowed construction of the aggravator even though the decedent suffered a severe beating and attempted to get up after the first blow from a ball peen hammer. A similar conclusion was reached by the Tenth Circuit in *Thomas v. Gibson,* 218 F.3d 1213, 1227 (10th Cir. 2000), where the evidence was insufficient to determine whether the victim was conscious during a severe beating, strangulation, and stabbing.

Here, the Oklahoma court's approach of finding "serious physical abuse" on the basis of Brenda Andrew's unbelievable 911 call and on the fact that Rob Andrew was gripping a bag of aluminum cans when he died, simply does not comport with the narrowing process that the Constitution requires. Further, compounding the departure from controlling authorities was the court's notation of additional "facts" to support the vague definitions for the "especially heinous, atrocious, or cruel" aggravator, including that Rob Andrew knew his attacker and had time to reflect on the cruel state of affairs. While the OCCA was satisfied that its finding of "serious physical abuse" was supported by the jury's determination, the jury never knew of the requirement of conscious suffering. *See* Ground Eleven, *infra*. Thus, the court's statement that its theory of the evidence supported the jury's finding is purely speculative. Without direct evidence of conscious

suffering and additional acts of gratuitous violence beyond the shooting itself, it is impossible to have any confidence in the jury's application of this problematic aggravator.

In the end, the State's evidence failed to prove beyond a reasonable doubt that Rob Andrew suffered either torture or serious physical abuse prior to his death. Rob Andrew was killed with two blasts from a shotgun, dying where he fell within minutes of being shot. There were no additional acts, no gratuitous violence, which bring this murder into the exceptional category of an "especially heinous, atrocious, or cruel" murder. Even if Andrew experienced "some conscious physical suffering," he was clearly not tortured, and there was no physical abuse beyond that accomplished with all murders. *See Cudjo,* 925 P.2d at 901-02 ("the aggravator 'applie[s] only to that class of murders which is most egregious.' [T]he manner of [ ] killing did not involve any acts of injury or cruelty beyond the scope of the act of killing itself."). Thus, it was a reasonable hypothesis based upon the facts presented that Mr. Andrew died within minutes of being shot, and that his murder, while tragic, was not the "most egregious" kind of murder that would set it apart from other murders. Mr. Pavatt's death sentence must be vacated, as the evidence relating to the only other aggravator found is completely different than that relevant to whether the murder was "especially heinous, atrocious, or cruel." *Brown v. Sanders,* 546 U.S. 212, 126 S. Ct. 884, 163 L.Ed.2d 723 (2006)

Appendix N

GROUND ELEVEN

FAILURE TO PROVIDE AN ADEQUATE INSTRUCTION THAT INFORMS THE JURY THAT IT MUST FIND "CONSCIOUS PHYSICAL SUFFERING" AS A FACT BEYOND A REASONABLE DOUBT BEFORE CONCLUDING THAT A MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" DEPRIVES PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE SENTENCING DETERMINATION, AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

The OCCA concluded that the evidence at Mr. Pavatt's trial "tended" to show that Rob Andrew suffered serious physical abuse and that he was conscious for several minutes prior to death. However, there is no assurance that the jury reached a similar conclusion beyond a reasonable doubt. The jury had no guidance from the trial court that "conscious physical suffering" was a required element of the aggravating circumstance "especially heinous, atrocious, or cruel." In fact, the jury was given no instruction defining what is required for "serious physical abuse" to exist. And, without a narrowing instruction to sufficiently channel the sentencer's discretion, there is a grave risk of

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APPENDIX O — EXCERPTS OF FIRST APPLICATION FOR POST-CONVICTION RELIEF IN THE OKLAHOMA COURT OF CRIMINAL APPEALS, FILED APRIL 17, 2006

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

Oklahoma Co. District Court
Case No. CF-2001-6189

Court of Criminal Appeals
Direct Appeal Case No.
D-2003-1186

Post Conviction Case No.
PCD-2004-25

JAMES DWIGHT PAVATT,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent,

Appendix O

COURT OF CRIMINAL APPEALS FORM 13.11A

ORIGINAL APPLICATION FOR POST-CONVICTION RELIEF—DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

Petitioner, James Dwight Pavatt, through undersigned counsel, submit his application for post-conviction relief under Section 1089 of Title 22. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death

Pursuant to Rule 9.7A(3)(d), 22 O.S. Ch. 18, App., a copy of the Judgment and Sentences and Death Warrant entered by the District Court are filed herewith and attached to this Application as Exhibits 1-2, *Appendix of Exhibits to Original Application For Post-Conviction Relief*

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misconduct on the part of the assistant district attorney throughout an individual trial and allowed by the trial court regardless of whether or not the defense objects is a structural defect and should not be subject to harmless error analysis.

4. Conclusion.

Appellate counsel were ineffective for not sufficiently raising the issue of prosecutorial misconduct. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), *Garrison v. State*, 2004 OK CR 35, 103 P.3d 590. Mr. Pavatt should receive a new trial.

I. Insufficient Evidence to Support the Two Aggravators Alleged by the State and Found by the Jury that the Murder Was Heinous, Atrocious, or Cruel, and that the Murder Was for Remuneration.

1. Heinous, atrocious, or cruel.[25]

Although appellate counsel argued that there was insufficient evidence for the jury to find that Rob Andrew's murder was heinous, atrocious, or cruel for a page in the brief in chief, appellate counsel failed to show this Court why there is insufficient evidence. Appellate counsel were ineffective.

In order for an heinous, atrocious, or cruel aggravator to withstand an insufficiency of evidence challenge, this Court reviews the evidence in the light most favorable to the State and looks to see if there was any competent evidence for the aggravator. *Myers v. State*, 2006 OK CR 12, __¶ 75, __ P.3d __. In this case, there is no competent evidence for the aggravator. Dr. Jeffrey Gofton, the

25. Aplt. Brf., at 47.

medical examiner, testified that either of the two shotgun blasts to Rob Andrew's body would have been fatal within a matter of minutes and that once Rob Andrew was shot, he would have been unconscious. After losing consciousness, Rob Andrew died. (Tr. Vol. X at 2457-2458; 2461-2462, 2466). Rob Andrew's death was recorded as 6:20pm. (Tr. Vol. X at 2433).

In closing argument for the second stage, the prosecution argues that Rob Andrew was conscious and knowing of his impending death. (Tr. Vol. XV at 3741-3742). The prosecution argues that Brenda Andrew while on the phone to 911 states that Rob is alive and breathing and is trying to get him to talk and that Brenda Andrew is shot in between the two 911 calls. (Tr. Vol. XIV Part B at 3611)(Tr. Vol. XV at 3741). Yet, the print out time log of 911 calls,[26] only seven (7) seconds occurred between the two 911 calls. (Exh. 9, Appendix). In addition, the police arrived while Brenda was still on the phone to 911 saying Rob is breathing. State's Exhibit 34 admitted through Joseph Hill, the 911 records custodian showed Brenda called 911 at 6:20pm. The exact time recorded for Rob Andrew's death. (Tr. Vol. X at 2433). Ronald Stump testified he was on the phone with Rob approximately at 6:00pm the night he is murdered until the garage door of Brenda' s house went up sometime after that. Ron Stump and Ron Stump's son were doing a Bible study with Rob while Rob waited in the driveway. (Tr. Vol. VI at 1551-

26. The print out time log for 911 calls shows a call from 6112 Shaftsbury Road at 6:19:44 pm which lasted 2 minutes 36 seconds. It ended at 6:22:19 pm The second call was received at 6:22:26 pm. There were only 7 seconds between the calls. (Exh. 9, Appendix).

1553). Throughout Mr. Pavatt's trial, the State provided the jury with numerous lies of Brenda Andrew including showing that what happened in the garage at 6112 Shaftsbury was inconsistent with the evidence. Brenda Andrew was lying about how Rob Andrew was shot; and yet while she is on the phone to 911, she was telling the truth? Reasonably doubtful, especially in light of the fact that the Medical Examiner said his time of death was at the exact same time Brenda called 911. Rob Andrew was dead within a matter of moments just as the medical examiner testified; and thus, his death was not preceded with torture or serious physical abuse. His death was not heinous, atrocious or cruel.

Just recently, this Court reiterated its prior holdings on the heinous, atrocious, or cruel aggravator in *Myers v. State*, 2006 OK CR 12, ¶ 74 __ P.3d __.

> This Court has limited the heinous, atrocious, or cruel aggravating circumstances to those cases where the State proves beyond a reasonable doubt that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty. *Cheney v. State*, 1995 OK CR 72, ¶ 15, 909 P.2d 74, 80.

Similarly to the *Myers* case, the evidence in this case does not prove beyond a reasonable doubt that Rob Andrew was conscious and suffering in pain after he was shot. In *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 80, this

Court held that evidence necessary to prove the heinous, atrocious, or cruel aggravator encompasses:

> that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty. Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met. As to the extreme mental cruelty prong of this aggravating circumstance, torture creating extreme mental distress must be the result of intentional acts by the defendant. The torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing. Analysis must focus on the acts of the defendant toward the victim and the level of tension created. (footnote cites and internal quotation marks omitted).

In the *Cheney* case, the victim had a protective order against the defendant and the defendant. In addition, the defendant physically struggled with the victim and he had a gun one month before her murder. *Cheney* at 78. This Court found insufficient evidence to prove heinous, atrocious, or cruel aggravator beyond a reasonable doubt. *Id.* at 79.

In contrast, in *Hain v. State*, 1996 OK CR 26, 919 P.2d 1130, 1146, the aggravator of heinous, atrocious, or cruel was upheld when evidence by the medical examiner showed that the victims died from thermal bums and

smoke inhalation. The victims died suffering painful burns while starving for oxygen. *Hain* at 1147.

The Tenth Circuit has held "[w]e have previously stated that the evidence must support anguish that goes beyond 'that which necessarily accompanies the underlying killing.' *Jones v. Gibson*, 206 F.3d 946, 953 (10th Cir.2000)." *Hamilton v. Mullin*, 436 F.3d 1181, 1195 (10th Cir. 2006). Rob Andrew was killed with a shotgun. He was not killed while suffering severe mental anguish because he was about to be killed or because others were about to be killed.[27] "Conscious[ness] ... is the critical inquiry in determining whether a murder was especially heinous, atrocious or cruel." *Spears v. State*, 1995 OK CR 36, 900 P.2d 431, 443. Rob Andrew was only conscious a few minutes, at best, after he was shot. His murder was not heinous, atrocious, or cruel. This aggravator cannot stand against Mr. Pavatt.

2. For remuneration aggravating circumstance.[28]

In addition to the jury improperly finding that Rob Andrew's murder was heinous, atrocious, or cruel, the

27. In *Hamilton v. Mullin*, Mr. Hamilton was convicted of killing four (4) people by shooting them in the back of their heads. The heinous, atrocious, or cruel aggravator was upheld because the individuals were forced to kneel in the back room uncertain of their fate, while each but the first listened to his co-workers being killed. *Hamilton*, 937 P.2d at 1014. Accordingly, [t]he evidence substantially supports the finding of the four aggravators. *Id.* 436 F.3d 1181, 1194-1195 (10th Cir. 2006). (Internal quotations omitted).

28. Aplt. Brf., at 48-50.

jury also concluded that the murder was committed for remuneration. The statute says "[t]he person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;" 21 O.S. § 710.12(3). Although Mr. Pavatt was having an affair with Brenda Andrew, the estranged wife of the victim, and although there was evidence presented suggesting that a life insurance policy worth

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APPENDIX P — EXCERPTS OF BRIEF OF APPELLANT IN THE OKLAHOMA COURT OF CRIMINAL APPEALS, FILED JANUARY 31, 2005

D-2003-1186

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

District Court of Oklahoma County

Case No. CF-2001-6189

JAMES DWIGHT PAVATT,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLANT

***

PROPOSITION XIV

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE.

Appendix P

There was insufficient evidence to support the heinous, atrocious or cruel aggravating circumstance. *See Thomas v. Gibson*, 218 F.3d 1213 (10th Cir. 2000) (Evidence was insufficient to support heinous, atrocious or cruel aggravating circumstance); *Donaldson v. State*, 722 So.2d 177 (Fla. 1998); *Jones v. Gibson*, 206 F.3d 946, 953 (10th Cir. 2001)("We agree with petitioner and the federal district court that the record does not support the Oklahoma Court of Criminal Appeals' finding that the victim pleaded for his life").

The evidence does not support the fact that the murder was "especially" heinous, atrocious or cruel. As defense counsel said during closing argument, "To some degree I suppose all homicides are heinous, atrocious or cruel. I think that's the reason why our legislature has inflicted the term especially to that phrase."

Interestingly, the State attempts to prove the existence of the aggravating circumstance on the basis of the information provided by Brenda Andrew in her 911 call to the police. (Tr. 3763) The medical examiner's testimony was that either of the two wounds could have been fatal. Death occurred in a matter of minutes. The medical examiner could not tell how long Mr. Andrew was conscious. (Tr. 3764)

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