CASE NO. ____
IN THE SUPREME COURT OF THE UNITED STATES

JAMES CODDINGTON,

Petitioner,

v.

TOMMY SHARP, Warden, Oklahoma State Penitentiary,

Respondent

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

APPENDIX

Appendix A

Tenth Circuit's opinion in *Coddington v. Sharp*, 959 F.3d 947 (10th Cir. 2020)

pending appeal. The Bishop's inability to hold in-person worship services, and the Church members' inability to attend them, are certainly irreparable injuries. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1008 (10th Cir. 2004) (en banc) (Seymour, J., concurring in relevant part for a majority of the court) ("[T]he violation of one's right to the free exercise of religion necessarily constitutes irreparable harm."), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). The injury here is particularly poignant, given that Pentecost—which the eponymously named Church greatly desires to celebrate—falls on May 31. Indeed, the State explicitly "does not question the sincerity of Plaintiffs' belief that it is essential to gather in person for worship services."

I do not doubt the importance of the public health objectives that the State puts forth, but the State can accomplish those objectives without resorting to its current inflexible and overbroad ban on religious services. The balance of equities, and the public interest, strongly favor requiring the State to honor its constitutional duty to accommodate a critical element of the free exercise of religion—public worship.

For these reasons, I would grant Plaintiffs' request for a preliminary injunction. I respectfully dissent.

James CODDINGTON, Petitioner-Appellant,

v.

Tommy SHARP, Warden, Oklahoma State Penitentiary,* Respondent-Appellee.

No. 16-6295

United States Court of Appeals,
Tenth Circuit.

FILED May 12, 2020

Background: State prisoner was convicted of first-degree murder and first-degree robbery. His convictions were affirmed on appeal, 142 P.3d 437, but not his death sentence, and the matter was remanded for resentencing. On remand, he was sentenced to death and that sentence was affirmed on appeal, 254 P.3d 684. His petition for post-conviction relief was denied, 259 P.3d 833. He petitioned for writ of habeas corpus. The United States District Court for the Western District of Oklahoma, Joe Heaton, Chief Judge, 2016 WL 4991685, denied the petition. Prisoner appealed.

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

(1) prisoner was not entitled to relief on basis that he had been deprived of right to present defense, and

(2) conclusion by state appellate court, that petitioner knowingly and voluntarily waived his *Miranda* rights, was reasonable application of federal law.

Affirmed.

1. Habeas Corpus ⚿842

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a dis-

* Pursuant to Fed. R. App. P. 43(c)(2), Mike Carpenter is replaced by Tommy Sharp as the Warden of the Oklahoma Department of Corrections.

trict court's legal analysis of a state court decision is reviewed de novo when the issues in the petitioner's habeas petition were adjudicated on the merits by the state court. 28 U.S.C.A. § 2254(d).

2. Habeas Corpus ⚿452

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a decision is contrary to federal law if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

3. Habeas Corpus ⚿450.1

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a decision is an unreasonable application of federal law if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d).

4. Habeas Corpus ⚿452

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may only grant habeas relief if there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with the United States Supreme Court's precedents. 28 U.S.C.A. § 2254(d).

5. Habeas Corpus ⚿490(5)

Conclusion by state appellate court, that trial court's decision to exclude expert's testimony, which, in his opinion, petitioner would not have been able to form intent of malice aforethought while experiencing effects of cocaine, did not have substantial and injurious effect or influence in determining jury's verdict convicting him of first-degree murder under Oklahoma law, was reasonable application of federal law, and therefore petitioner was not entitled to relief on his petition for writ of habeas corpus on basis that he had been deprived of right to present defense and his due process rights had been violated. U.S. Const. Amends. 5, 6, 14; 28 U.S.C.A. § 2254(d).

6. Criminal Law ⚿1162

On direct appeal in criminal case, a state appellate court evaluates a state trial court's federal constitutional error for harmlessness; specifically, the court considers whether the state has proven beyond a reasonable doubt that the federal constitutional error was harmless.

7. Habeas Corpus ⚿500.1

When a state court's decision under *Chapman v. California*, 386 U.S. 18, is reviewed by a federal court under Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may not award habeas relief unless the harmlessness determination itself was unreasonable. 28 U.S.C.A. § 2254(d).

8. Habeas Corpus ⚿442

The Antiterrorism and Effective Death Penalty Act (AEDPA) limitation to *Chapman v. California*, 386 U.S. 18, is subsumed by *Brecht v. Abrahamson*, 507 U.S. 619 test for harmlessness, which is used by courts engaging in collateral review; under this test, a petitioner cannot gain relief for a trial court's error unless he can establish that the error had a substantial and injurious effect or influence in determining the jury's verdict, i.e., the petitioner must establish actual prejudice. 28 U.S.C.A. § 2254(d).

9. Habeas Corpus ⚿442

Even if a state law violation cannot be tied to the denial of a specific federal constitutional right, such as the right to

present a defense, it is still reviewed on a petition for habeas corpus to determine whether the violation so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

10. Habeas Corpus ⚿490(3)

Conclusion by state appellate court, that petitioner knowingly and voluntarily waived his *Miranda* rights, was reasonable application of federal law, and therefore petitioner was not entitled to relief on his petition for writ of habeas corpus; among other things, officers did not have to tell petitioner that they wanted to question him about murder, neither delay between petitioner's confession and station-house interrogation nor his drug use were sufficient to render his confession unknowing or involuntary, his prior law enforcement encounters could be considered in its analysis, and his mental faculties were sufficient enough for him to voluntarily and knowingly waive his rights. U.S. Const. Amend. 5; 28 U.S.C.A. § 2254(d).

11. Criminal Law ⚿411.91

Testimony from a custodial interrogation will be suppressed if the prisoner did not knowingly and voluntarily waive his *Miranda* rights. U.S. Const. Amend. 5.

12. Criminal Law ⚿411.92

For a waiver of a suspect's *Miranda* rights to be considered voluntary, knowing, and intelligent, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. U.S. Const. Amend. 5.

13. Criminal Law ⚿411.92

A court engages in a totality of the circumstances approach to determine whether a waiver of a suspect's *Miranda* rights can be considered voluntary, knowing, and intelligent, where no single factor, whether intoxication, exhaustion, or other, is dispositive. U.S. Const. Amend. 5.

14. Criminal Law ⚿411.92

Whether the suspect was aware of each possible subject of questioning is not relevant to the analysis of whether a waiver of a suspect's *Miranda* rights can be considered voluntary, knowing, and intelligent. U.S. Const. Amend. 5.

15. Criminal Law ⚿410.88

The mere fact of drug or alcohol use will not render a confession unknowing or involuntary; drug use will only render a confession unknowing if it rises to the level of substantial impairment. U.S. Const. Amend. 5.

16. Criminal Law ⚿410.88

Drug use will render a confession involuntary under *Miranda* only if the suspect's will was overborne by the circumstances surrounding the giving of a confession. U.S. Const. Amend. 5.

17. Criminal Law ⚿410.88

Intoxication alone will not render a confession involuntary under *Miranda*; the intoxication must rise to the level of "substantial impairment" to render the confession unknowing. U.S. Const. Amend. 5.

18. Criminal Law ⚿410.88

For intoxication to render a confession involuntary under *Miranda*, the circumstances of the confession must show that the suspect's will was overborne. U.S. Const. Amend. 5.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA (D.C. No. 5:11-CV-01457-HE)

John T. Carlson, Ridley, McGreevy & Winocur P.C., Denver, Colorado (Seth A. Day, Hall Estill P.C., Oklahoma City, Oklahoma, with him on the briefs), for Petitioner-Appellant.

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

Before LUCERO, MORITZ, and EID, Circuit Judges.

EID, Circuit Judge.

Petitioner James Coddington seeks collateral review of the Oklahoma Court of Criminal Appeals' (OCCA) resolution of his constitutional challenges to his conviction and sentence. Coddington argues that the trial court deprived him of his constitutional right to present a defense when it refused to allow his expert to testify that he was unable to form the requisite intent for malice murder. He also argues that his confession to the murder should have been suppressed because he did not knowingly and voluntarily waive his *Miranda* rights. The OCCA denied relief, and, applying AEDPA deference, the district court below did the same. For the reasons set forth below, we affirm the district court's denial of Coddington's petition because Coddington has failed to show that the OCCA's rejection of his challenges involved an unreasonable application of federal law. I.

In March of 1997, Coddington, who had a history of cocaine use, relapsed and began using cocaine again. *Coddington v. State*, 142 P.3d 437, 442 (Okla. Crim. App. 2006). He spent approximately $1,000 per day to support his habit. *See id.* Eventually, he ran out of money. *See id.* On March 5, following a three or four-day cocaine binge, he was desperate for cocaine and robbed a convenience store. *See id.* But the money he took from the store was insufficient, so later that day he went over to Al Hale's house. *See id.* Hale and Coddington were friends, and Coddington knew that Hale usually kept large sums of cash (on March 5, Hale had over $24,000 in cash in his home). *See id.*

Coddington did not immediately ask Hale for money—he watched TV with him for a couple hours. *See id.* At some point though, Coddington asked Hale if he could borrow some money. *See id.* According to Coddington, Hale could tell that Coddington had "relapsed on drugs." 2003 Tr. VI at 47. He refused Coddington's request, told him to go back to treatment, and then asked him to leave. *Id.* at 48. Coddington began to leave. *Id.* But after noticing a hammer on the counter when he walked through the kitchen toward the door, Coddington stopped. State Ex. 89 at 14. Hale then went into the kitchen and "pushed * [Coddington] and told [him] to get out." 2003 Tr. VI at 76. Coddington then grabbed the hammer and hit Hale in the head, causing him to fall. *Id.* at 69. When Hale was lying face-down on the ground, Coddington hit him several more times in the back of the head. *Id.* at 69–70. He then took the money that Hale had on his person ($525) and, believing Hale was dead, left the house. State Ex. 89 at 15.

Coddington was mistaken; Hale was not dead. *See id.* at 443. Hale's son, Ron, discovered his father later that day. *See id.* There was "blood and blood spatter everywhere." *Id.* "Hale was lying in his bed, soaked in blood, still breathing but unable to speak." *Id.* Hale had moved from the

* Coddington told the police that Hale pushed him, but he did not volunteer this information in his trial testimony. State Ex. 89 at 15; 2003 Tr. VI at 49.

kitchen to his bedroom. *See id.* Hale was rushed to a hospital, where he died 24 hours later. *See id.* The autopsy showed he died from blunt-force trauma to the head. *See id.*

After Coddington left Hale's house, Coddington immediately bought more cocaine and continued committing crimes to finance his purchases. He robbed five more convenience stores. *See id.* at 442. When he eventually got back home, he threw the hammer in a creek behind his apartment. *See id.* at 455.

Two days later, the police arrested Coddington at his apartment. *See id.* at 443. When the police arrived, Coddington began voluntarily making statements. *See id.* at 447. Realizing that Coddington may have been starting to confess, the police officers read him his *Miranda* rights. *See id.* Coddington waived his *Miranda* rights and continued making statements to officers. *See id.* About two to three hours after he initially waived his rights outside of his apartment, the police officers interrogated him at the station. *See id.* At the station, the officers reminded Coddington of his waiver from a few hours earlier, and Coddington stated he remembered waiving his rights. *See id.* Coddington then confessed to the convenience store robberies and to murdering Hale. *See id.* at 443.

At the station, Coddington was able to recall the murder in detail. *See* State Ex. 89 at 13–21 (Transcript of Police Station Interview); *see also* 2003 Tr. VI 47–48, 62–63. He recalled the clothes he wore, that he and Hale conversed for a couple hours, that they watched TV, that he had gone to Hale's home to ask for money, that Hale refused his request for money, that Hale then asked him to leave, and that he struck Hale with a claw hammer as Hale was showing him out. *See* State Ex. 89 at 14–15. He also remembered specific details about the hammer—that it had a chrome handle with a rubber grip. *See id.* at 20. He remembered how many times he struck Hale. *See id.* at 15. He remembered how much money he took from Hale's person and the denominations of the bills. *See id.* at 18. Finally, he stated that he did not call the police when he left Hale's home because he did not want to get caught. *See Coddington*, 142 P.3d at 443.

The state charged Coddington with multiple armed robberies, murder, and robbery with a dangerous weapon. Coddington pleaded guilty to six armed robberies and proceeded to trial on the murder and robbery with a dangerous weapon charges. Prior to trial, the court resolved two motions *in limine* relevant to this petition. First, the court considered the state's motion to exclude Coddington's expert's testimony on whether Coddington was able to form intent. *See id.* at 448–51. Coddington proffered that his expert—Dr. Smith—would have testified that his cocaine use leading up to and during the murder rendered him unable to form malice aforethought. *See id.* at 448–51. The state moved to have this portion of Dr. Smith's testimony excluded, and the trial judge granted the motion. *See id.*

Second, the court considered Coddington's motion to suppress his confession. *See id.* at 446–48. Coddington believed that he did not knowingly or voluntarily waive his *Miranda* rights. *See id.* The court did not agree and denied the motion. *See id.*

The case proceeded to trial. At the guilt phase of trial, the jury convicted Coddington of first-degree murder and robbery with a dangerous weapon. *See id.* at 442. At the sentencing phase, the jury found the existence of two aggravating circumstances and sentenced Coddington to death. *See id.* Coddington appealed his conviction and sentence to the OCCA. *See id.* Among other things, he challenged the pretrial rulings (1) denying his motion to

suppress his confession and (2) excluding a portion of Dr. Smith's testimony. *See id.* at 446–51. The OCCA first concluded that Coddington's confession was sufficiently knowing and voluntary, but it agreed with Coddington that the trial court erred by restricting Dr. Smith's testimony. *See id.* The OCCA summarily determined that this amounted to a constitutional error and applied *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), to determine whether the error was harmless beyond a reasonable doubt. *See id.* at 448–51. The OCCA determined that the evidence that Coddington acted with malice aforethought was overwhelming. *See id.* at 451. Accordingly, it held that "Dr. Smith's expert opinion on the ultimate issue of whether Coddington could form the requisite malice would not have made a difference in the jury's determination of guilt." *Id.*

The OCCA similarly rejected Coddington's other guilt-phase arguments and affirmed his conviction. It did, however, find that reversible error occurred at the sentencing phase. *See id.* at 461.† It therefore vacated Coddington's death sentence and remanded for resentencing. *See id.* At resentencing, the jury found the existence of aggravating circumstances and again sentenced Coddington to death. *Coddington v. State*, 254 P.3d 684, 693 (Okla. Crim. App. 2011). The OCCA affirmed, *see id.* at 718, and the United States Supreme Court denied certiorari, *see Coddington v. Oklahoma*, 565 U.S. 1040, 132 S.Ct. 588, 181 L.Ed.2d 432 (2011). Coddington then filed a petition for post-conviction relief with the OCCA. *Coddington v. State*, 259 P.3d 833 (Okla. Crim. App. 2011). The OCCA denied the petition. *See id.* at 840. Subsequently, Coddington filed a 28 U.S.C. § 2254 petition. *Coddington v. Royal*, No. CIV-11-1457-HE, 2016 WL 4991685 (W.D. Okla. Sept. 15, 2016).

In his § 2254 petition, Coddington raised nine grounds for relief. *See id.* at *1. The district court denied relief on all of them. *See id.* We granted a Certificate of Appealability (COA) as to the first and second grounds: (1) whether the OCCA unreasonably applied federal law when it held that the exclusion of Dr. Smith's testimony was harmless, and (2) whether the OCCA unreasonably applied federal law when it affirmed the lower court's decision that Coddington's waiver of his *Miranda* rights was knowing and voluntary.

II.

[1] Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the standard under which we review the district court's disposition of a state petitioner's habeas petition depends on how the claim at issue was resolved in the state court. *Byrd v. Workman*, 645 F.3d 1159, 1165 (10th Cir. 2011). Here, because the issues in Coddington's habeas petition were already adjudicated on the merits by the OCCA, "we review the district court's legal analysis of the state court decision de novo." *Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013). We therefore—like the district court before us—review the OCCA decision under the AEDPA deference standards.

The AEDPA, 28 U.S.C. § 2254(d), provides that:

† The OCCA found that the trial court made two reversible errors during the sentencing phase. The first was that the court did not allow Coddington to play a video tape of his mother's testimony, but instead only allowed Coddington to show the jury a written transcript of it. The trial court's second error was its allowance of a confusingly-worded jury instruction that potentially misled the jury about the significance of various testimony from Coddington's family members. *Coddington,* 142 P.3d at 460–61.

> 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.

[2–4] A decision is contrary to federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Valdez v. Bravo*, 373 F.3d 1093, 1096 (10th Cir. 2004) (quotations omitted) (alterations in original). Relatedly, a decision is an unreasonable application of federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (same). Finally, a federal court may only grant habeas relief if "there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents." *Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014) (quotations omitted).

III.

[5] In his first claim for relief, Coddington argues that the trial court deprived him of his constitutional right to present a defense when it refused to allow his expert to testify that he was unable to form the requisite intent for malice murder, and that the OCCA wrongfully concluded that the trial court's error was harmless. We affirm the district court's denial of this claim, concluding that the OCCA did not unreasonably apply *Chapman* in holding that the exclusion of a portion of Dr. Smith's testimony was harmless.

A.

[6–8] On direct appeal, a state appellate court evaluates a state trial court's federal constitutional error for harmlessness. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Specifically, the court considers whether the state has proven beyond a reasonable doubt that the federal constitutional error was harmless. *See id.* When a state court's *Chapman* decision is reviewed by a federal court under AEDPA, "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself was unreasonable*." *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 2199, 192 L.Ed.2d 323 (2015) (emphasis in original). This AEDPA limitation to *Chapman* is subsumed by the *Brecht* test for harmlessness, which is used by courts engaging in collateral review. *Id.* Under this test, a petitioner cannot gain relief for a trial court's error unless he can establish that the error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quotations omitted). In other words, the petitioner must establish actual prejudice. *See id.* Coddington must therefore "show that he was actually prejudiced by" the trial court's failure to admit the expert's testimony, "a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the [OCCA's] deci-

sion that [the error] . . . met the *Chapman* standard of harmlessness." *Davis*, 135 S. Ct. at 2199.

The *Brecht* test for harmlessness also applies to Coddington's claim that the trial court's rejection of Dr. Smith's testimony separately amounted to a violation of due process. Any constitutional due process violations are likewise reviewed for harmlessness. *See Patton v. Mullin*, 425 F.3d 788, 800 (10th Cir. 2005) (applying *Brecht* harmlessness analysis to petitioner's allegation of due process violation at trial).‡

B.

As a preliminary matter, the state argues that Coddington has not shown the existence of a constitutional error sufficient to trigger *Chapman/Brecht*. *See* Resp.'s Br. at 16 ("[T]he application of the *Brecht* harmless error standard presupposes the existence of an actual federal constitutional error."). It contends that expert testimony on the ultimate issue of intent is generally not allowed in the federal system because it is prohibited by Federal Rule of Evidence 704. *See* Fed. R. Evid. 704(b) ("In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."). Additionally, it notes that multiple federal courts—including the Tenth Circuit—have upheld Rule 704 in the face of constitutional challenges because testimony on the ultimate issue of intent is not actually evidence. *See id.* at 17 (citing *United States v. Austin*, 981 F.2d 1163, 1165 (10th Cir. 1992)). Under those precedents, the testimony Coddington sought to have admitted was not evidence at all. *See, e.g.*, *Austin*, 981 F.2d at 1165. So, the argument goes, Coddington's constitutional right to present a defense was not violated, and the analysis should end there.

[9] We disagree. Even if a state law violation cannot be tied to the denial of a specific federal constitutional right (such as the right to present a defense), it is still reviewed to determine whether the violation "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Romano v. Oklahoma*, 512 U.S. 1, 12, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). And whether we analyze Coddington's claim as a violation of a specific constitutional right or as a violation of constitutional due process, we still must determine whether the alleged error was harmless. *See Patton*, 425 F.3d at 800 ("[A]ny trial errors will be deemed harmless unless they had a substantial and injurious effect or influence in determining the verdict. . . . If we are in grave doubt as to

‡ We have previously stated that ''once a showing of fundamental unfairness is made, a petitioner is entitled to habeas relief without an assessment of harmless error.'' *Spears v. Mullin*, 343 F.3d 1215, 1229 n.9 (10th Cir. 2003). We based this statement on our belief that the fundamental unfairness inquiry ''essentially duplicate[s] the function of harmless error review.'' *Id.* (alteration in original) (quotations omitted). The Supreme Court, however, has commented that ''the *Chapman* harmless-error standard is more demanding than the 'fundamental fairness' inquiry of the Due Process Clause.'' *Greer v. Miller*, 483 U.S. 756, 765 n.7, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987). One standard that is less demanding than another cannot ''duplicate'' the more demanding standard. Accordingly, we decline to follow this court's earlier holding in *Spears* that would preclude harmlessness review when a due process violation is found on habeas review. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 303–04 (2016) (noting that, while earlier horizontal precedent nearly always controls, an exception exists if that decision was ''clearly contrary to a then-standing vertical precedent'').

the harmlessness of an error, the habeas petitioner must prevail.").

Because we ultimately conclude that the trial court's error in excluding a portion of Dr. Smith's testimony was harmless, *see infra*, we need not determine whether the error committed by the trial court amounted to a violation of a specific constitutional right or a more general constitutional due process violation. Instead, we "assume, without deciding, that the error[ ] [Coddington] identifies . . . [is] of constitutional magnitude." *Malone v. Carpenter*, 911 F.3d 1022, 1032 n.1 (10th Cir. 2018) (rejecting state's argument that habeas relief was not available because there was no constitutional violation).

C.

The OCCA concluded that, even if Dr. Smith had been permitted to testify on intent, the jury would have still found malice aforethought. *See Coddington*, 142 P.3d at 451. Coddington argues that the OCCA's harmlessness determination was unreasonable because, while he was allowed to present substantial testimony about the effects of cocaine use, none of the evidence went to whether he was able to form the requisite intent. *See* Pet'r Br. at 17–26. After reviewing the state court record, we do not find that the exclusion had a substantial and injurious effect on the jury's verdict. First, though he was unable to present testimony explicitly asserting that his cocaine use might have precluded his ability to form malice aforethought, Coddington was permitted to present copious testimony on how his cocaine use negatively affected his rationality and self-awareness. Second, it was disputed as to whether Coddington was even intoxicated at the time of the murder. And third, the excluded testimony would have been heavily contradicted by other evidence in the record indicating that Coddington not only was capable of self-awareness, but that he indeed hit Hale with the deliberate intent "to take away [his] life." *See* Criminal Appeal Original Record (C.A.O.R.) I at 88 (jury instruction defining "malice aforethought").

1.

Even without Dr. Smith's excluded testimony, the jury considered evidence regarding Coddington's cocaine use and the ill-effects of such use on his brain. Dr. Smith told the jury that he had diagnosed Coddington with cocaine dependency. *See* 2003 Tr. V at 81. He then told the jury that cocaine affects the "thinking part of the brain," i.e., the cortex and frontal lobes. *See id.* at 81–82. He also told the jury that the cortex is what "makes you aware of yourself and what you're doing and your ethics and your judgment and how to make decisions and therefore how to behave." *Id.* at 82. He showed the jury a PET-scan of a drug-addict's brain to give the jury a visual representation of how drug use can cause brain damage. *See id.* at 83. He further told the jury that cocaine use can cause paranoia and agitation. *See id.* at 88.

Dr. Smith then applied these general statements about cocaine use to Coddington in particular. He noted that Coddington's cocaine use "had a marked effect on [Coddington's] brain function" the day of the murder. *See id.* at 92.

> It made him -- it had multiple effects on his brain function. His paranoia, his fearfulness, his belief he was being followed and watched constantly, his desperation to get more cocaine, his overresponsiveness to stimulation of any kind, including touching. So I think it markedly affected his ability to exercise reasonable judgment and control.

Id. Dr. Smith also told the jury that Coddington's cocaine binge likely made these

effects even worse. Specifically, it likely made it "difficult for [Coddington] to control his behavior." *See* 2003 Tr. VI at 5. He testified that, to a reasonable degree of medical certainty, Coddington was not thinking reasonably or rationally. *See id.* at 6.[§]

In addition to Dr. Smith's comprehensive testimony, Coddington himself testified that he never intended to kill Hale. He also stated that the murder basically just happened: "the next thing I know he was laying on the floor and I had hit him with [the hammer]." *Id.* at 48. Also, Coddington's counsel repeatedly argued that Coddington's cocaine use and addiction rendered him incapable of forming the requisite intent. Counsel referred to the killing as "mindless" and having occurred "in the middle of a drug-inspired frenzy." *Id.* at 150–51. In fact, in closing, Coddington's counsel explicitly told the jury that Coddington's "cocaine intoxication rendered him at the moment of truth incapable of forming malice aforethought." *Id.* at 161.

2.

With or without the excluded portion, the jury might have disregarded Dr. Smith's testimony altogether if it found that Coddington was not "intoxicated" at the time of the murder. Coddington offered Dr. Smith's testimony to support his intoxication defense, which applies where the defendant's "mental powers" were so "overcome with intoxication" that it would have been "*impossible* [for him] to form the special state of mind known as malice aforethought." C.A.O.R. I at 106 (Jury Instruction 39) (emphasis added). But Dr. Smith's testimony focused less on how a person behaves while intoxicated from cocaine and more on how repeated cocaine use can damage a person's brain. He explained that cocaine can impair a person's judgment and self-awareness by damaging their pre-frontal cortex. He described these effects not necessarily as cocaine intoxication, but instead as "cocaine dependency." 2003 Tr. V at 81. And it is unclear whether the jury would have equated such chronic effects of cocaine with the "intoxication" language existing in the pertinent jury instruction.

With the above said, the jury considered evidence that Coddington likely was not "high" at the time of the murder. Dr. Smith informed the jury that the "high" from cocaine can last anywhere from several minutes to several hours. *Id.* at 94. On numerous occasions, Dr. Smith described the effects of cocaine as "momentary." *Id.* at 64, 66. His testimony further suggested that *smoking*—which was Coddington's typical method of ingestion—crack cocaine typically resulted in a "quicker" high. *Id.* at 63. With that said, Coddington was at Hale's house for roughly two to three hours before he murdered Hale. Therefore, for Coddington to have been intoxicated with cocaine at the time of the murder, he likely would have either had to have smoked cocaine while at Hale's house, or potentially immediately before arriving there.

And whether Coddington had indeed smoked cocaine while—or immediately before—visiting Hale was in dispute during the trial. Coddington testified at trial that he smoked cocaine in Hale's bathroom dur-

§ Coddington also contends that the OCCA's opinion is internally inconsistent. He says that the OCCA acknowledged that Dr. Smith's excluded testimony would have lowered the degree of murder. *See* Pet'r Br. at 18. This assertion is factually inaccurate. The OCCA stated that Dr. Smith's testimony would have lowered the degree of murder *if the jury believed it*. *See Coddington,* 142 P.3d at 451. The OCCA then went on to explain that the jury would not have believed it. *See id.*

ing the visit. 2003 Tr. VI at 47. And Dr. Smith testified that Coddington had allegedly smoked cocaine sometime before arriving at Hale's house. *Id.* at 29. However, this testimony contrasts with Coddington's original confession during which he described the murder and surrounding events in detail, yet never alleged that he had smoked crack cocaine in Hale's bathroom. *Id.* at 55; State Ex. 89.

Moreover, in contrast to the above testimony, other evidence showed that it was implausible for Coddington to have possessed and smoked cocaine at those alleged times. By Coddington's own admission, after conducting a robbery or a burglary, he would immediately use the stolen money to buy cocaine, and "as soon as [he] bought that cocaine [he] smoked it up." *Id.* at 56. "And when [he] got to wanting another fix [he] went and got some money and did the same thing." *Id.* On the day of the murder, which occurred sometime between 6:00pm and 7:00pm, the last time Coddington had stolen money was at 2:30am when he robbed a convenience store. *Id.*** These admissions from Coddington suggest that the last time he would have smoked cocaine on the day of the murder was likely early in the morning after his last robbery, and that it would have been uncharacteristic of him to have retained enough cocaine to smoke it in the evening. And the fact that Coddington—again, by his own admission—quickly after the murder bought more cocaine with the money he took from Hale's wallet further suggests that Coddington had already run out of the narcotic by that time and was desperate for more. *See id.* at 78.

The jury therefore considered evidence suggesting that Coddington likely did not ingest cocaine immediately before or during his visit with Hale, and that the effects of any cocaine he smoked earlier in the day likely would have receded by the time of the murder. Considering this evidence, the jury could have found that Dr. Smith's excluded testimony—about Coddington's alleged inability to form the requisite intent while under the influence of cocaine—was irrelevant altogether.

3.

Even if the jury believed that Coddington was under the influence of cocaine—from either a "high" or other cocaine-related effects—at the time of the murder, it still likely would have found Coddington was capable of forming the requisite intent of malice aforethought. Coddington testified that though he decided to take the cash from Hale's pocket, he deliberately refrained from taking Hale's diamond ring because he "couldn't do that." State Ex. 89 at 15. Therefore, if Coddington was indeed "high" at the time of the murder, his actions immediately thereafter showed that he was nonetheless capable of self-awareness during that period. Additionally, while allegedly "high on cocaine," Coddington successfully robbed three venues and intentionally began targeting gas stations because they were more likely to carry cash. 2003 Tr. VI 58, 80; State Ex. 89 at 4–

** In his trial testimony, which took place over six years after the murder, Coddington said he did not remember whether he committed any robberies between the time he robbed the 7-11 at 2:30am and the time of the murder. 2003 Tr. VI at 56. However, during his interrogation two days after the murder, he indicated that he did not conduct another robbery until *after* the murder. Ex. 8 at 5, 20 (asserting that his first robbery—the 7-11—took place on Tuesday night, while his second robbery—the Texaco—took place on Wednesday night after the murder). Further, Coddington pleaded guilty to six robberies, the first of which was the 7-11 at 2:50am on March 5, and the second of which was the Texaco at 1:15am on March 6. C.A.O.R. I at 12–13.

7, 9, 11. And during one of these robberies, Coddington devised a scheme in which he first scoped-out the venue while pretending to buy a soft drink, then—after ensuring the store was empty—returned with a knife so that he could rob the clerk. *Id.* at 57.

Further, the available evidence showed not only that Coddington was capable of self-awareness at the time of the murder, but that he indeed had formed malice aforethought when killing Hale. We agree with the OCCA that "the circumstances surrounding [t]his murder suggest it was committed with intent. Coddington attacked Hale after Hale refused to give him money for drugs. He hit Hale with the hammer three times; Hale had defensive wounds, and there was significant blood spatter." *Coddington*, 142 P.3d at 455–56. Not only did Coddington hit Hale so hard that he made Hale fall over, but he continued to pound the back of Hale's head with the hammer while Hale was lying face-down on the floor. 2003 Tr. VI at 69–70. The repetition and force with which Coddington struck Hale, along with evidence suggesting that Hale tried to defend himself, could support a finding that Coddington had formed "the deliberate intention to take away the life of a human being." C.A.O.R. I at 88 (jury instruction defining "malice aforethought").

4.

In sum, we conclude that Coddington was not prejudiced by the trial court's decision to exclude Dr. Smith's testimony that, in his opinion, Coddington "would not have been able to form the intent of malice aforethought" while "experiencing the effects of the cocaine." 2003 Tr. V at 81. Despite the exclusion, the jury still heard evidence about how cocaine could have made Coddington unaware of what he was doing. And even with the excluded testimony, the jury still would have had to grapple with whether Coddington was indeed intoxicated at the time of the murder. Regardless, Dr. Smith's excluded testimony would have been contradicted by evidence showing not only that Coddington was capable of self-awareness at the time of the murder, but that he repeatedly hit Hale with the intent to deliberately take away his life. Given this, we simply cannot conclude that no "fairminded jurist could agree with the [OCCA's] decision that," beyond a reasonable doubt, Dr. Smith's testimony regarding intent would not have made a difference in the outcome of the trial.†† *Davis*, 135 S. Ct. at 2199. Put another way, we do not find that the exclusion "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710.

IV.

[10] In his second claim for relief, Coddington argues that his confession to the murder should have been suppressed because he did not knowingly and voluntarily waive his *Miranda* rights. We find that the OCCA did not unreasonably apply federal law in concluding that Coddington's waiver was both knowing and voluntary. Neither the delay between Coddington's confession and the station-house interrogation, nor Coddington's drug use, were sufficient to

†† As noted above, the district court concluded that the OCCA's determination was not unreasonable. In the alternative, it held that even if the exclusion of Dr. Smith's testimony was not harmless, the jury would have still convicted Coddington of first degree felony murder (because it convicted him of robbery with a dangerous weapon). *See Coddington,* 2016 WL 4991685, at *6. Because we conclude the OCCA's determination was not unreasonable, we do not address the district court's alternate holding.

render his confession unknowing or involuntary.

A.

[11, 12] Testimony from a custodial interrogation will be suppressed if the prisoner did not knowingly and voluntarily waive his *Miranda* rights. *See Patterson v. Illinois*, 487 U.S. 285, 292, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *see also Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This "inquiry has two distinct dimensions." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Id.

[13–16] "We engage in a totality of the circumstances approach, where no single factor—whether intoxication, exhaustion, or other—is dispositive." *United States v. Burson*, 531 F.3d 1254, 1258 (10th Cir. 2008). However, one circumstance that is *not* relevant to our analysis is whether the suspect was aware of each possible subject of questioning. *See Colorado v. Spring*, 479 U.S. 564, 577, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) ("[A] suspect's awareness of all the possible subjects of questioning in advance of interrogation is *not relevant* to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." (emphasis added)). Additionally, "[t]he mere fact of drug or alcohol use will not" render a confession unknowing or involuntary. *Burson*, 531 F.3d at 1258. Drug use will only render a confession unknowing if it rises "to the level of substantial impairment." *Id.* ("The defendant must produce evidence showing his condition was such that it rose to the level of substantial impairment [because] . . . [o]nly then could we conclude the government has failed to prove the defendant possessed full awareness of both the nature of his rights and the consequences of waiving them."). Likewise, drug use will render a confession involuntary only if the suspect's "will was overborne by the circumstances surrounding the giving of a confession." *United States v. Smith*, 606 F.3d 1270, 1276–77 (10th Cir. 2010) (quotations omitted).

B.

Coddington advances several arguments for why his waiver was unknowing and involuntary. *See* Pet'r Br. at 30–39. First, he contends that the officers misled him about the nature of their questioning. Specifically, Coddington believes that the officers told him that they wanted to question him about the robberies, when they clearly intended to also question him about Hale's murder. Coddington's argument is unconvincing. "[A] suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Spring*, 479 U.S. at 577, 107 S.Ct. 851. The OCCA's rejection of this argument, therefore, was a reasonable application of federal law. *See Coddington*, 142 P.3d at 448 (citing *Spring*, 479 U.S. at 573, 577, 107 S.Ct. 851 to conclude trial court properly admitted Coddington's confession).

Second, Coddington argues that the interrogation at the police station occurred 2.5 to 3 hours after the officers initially read him his *Miranda* rights at his home. He believes that this time gap between his waiver and the interrogation rendered his

confession unknowing. This argument overlooks key facts. First, before the police officers interrogated Coddington at the police station, they asked him if he remembered being advised of—and subsequently waiving—his *Miranda* rights several hours earlier; and Coddington replied in the affirmative. *Id.* at 447; State Ex. 89 at 1–2. This court has found that such a reminder under similar circumstances was adequate. *See Burson*, 531 F.3d at 1259 (concluding the defendant "knew his constitutional rights" where the interrogating officer "asked [the defendant] if he remembered the *Miranda* warning he was given at the time of his arrest less than two hours earlier" and the defendant "responded affirmatively"). Second, Coddington had previous encounters with law enforcement and was familiar with his *Miranda* rights. The Tenth Circuit has previously held that a suspect's knowledge of *Miranda* rights from previous encounters with law enforcement is an appropriate consideration in determining whether a later waiver is voluntary. *Smith v. Mullin*, 379 F.3d 919, 934 (10th Cir. 2004). Accordingly, it was proper for the OCCA to consider Coddington's previous law enforcement encounters in its analysis. *Coddington*, 142 P.3d at 448 ("[F]rom his prior contacts with law enforcement and prior convictions, we can assume he was familiar with and understood the concepts encompassed in *Miranda*." (quotations omitted)).

[17, 18] Third, Coddington contends that he could not have knowingly or voluntarily waived his rights because he was intoxicated and sleep-deprived. It is well established that intoxication alone will not render a confession involuntary. The intoxication must rise to the level of "substantial impairment" to render the confession unknowing. *See Burson*, 531 F.3d at 1258, 1260 (finding that the defendant—who was allegedly "exhausted" and under the influence of drugs during an interrogation—voluntarily and knowingly waived his rights where his "mental faculties were sufficient for him to engage in an intelligent, rational dialogue with [the officer]"). Similarly, for intoxication to render a confession involuntary, the circumstances of the confession must show that the suspect's will was overborne. *See Smith*, 606 F.3d at 1276–77.

The OCCA's decision was consistent with these legal principles. Looking first to the knowingness of Coddington's confession, the OCCA observed that "[s]elf-induced intoxication, short of mania, or such an impairment of the will and mind as to make the person confessing unconscious of the meaning of his words, will not render a confession inadmissible, but goes only to the weight to be accorded to it." *Coddington*, 142 P.3d at 448 (quotations omitted). The OCCA then held that Coddington's will was not sufficiently impaired to render his confession inadmissible. *See id.* This was not an unreasonable application of federal law. Coddington was able to recall "specific details about the robberies and Hale's murder, and appeared to understand exactly what was going on." *Id.* This shows that, like the defendant in *Burson*, Coddington's "mental faculties were sufficient" enough for him to voluntarily and knowingly waive his rights. *Burson*, 531 F.3d at 1260.

Coddington also argued before the OCCA, as he does here, that his heightened intoxication is demonstrated by the fact that he confessed to crimes that authorities in Oklahoma were unable to corroborate. However, we agree with the OCCA that this fact on its own "does not show he was so intoxicated that his *Miranda* waiver was not knowingly and voluntarily made." *Id.* Coddington confessed to numerous crimes that Oklahoma *was*

able to verify, and he recalled specific details from those crimes.

Finally, the OCCA did not unreasonably apply federal law in concluding that Coddington's drug use did not render his confession involuntary. *See id.* at 447–48. The totality of the circumstances demonstrate that Coddington was aware of his surroundings and that the officers did not pressure or coerce him into confessing. Accordingly, even if Coddington was intoxicated at the time of the confession, Coddington has not shown that his "will was overborne." *Smith*, 606 F.3d at 1276 (quotation marks omitted).

V.

For the reasons set forth above, we AFFIRM the district court's denial of Coddington's petition for habeas relief.

APTIVE ENVIRONMENTAL, LLC, Plaintiff-Appellee,

v.

TOWN OF CASTLE ROCK, COLORADO, Defendant-Appellant.

International Municipal Lawyers Association; Colorado Municipal League, Amici Curiae.

No. 18-1166

United States Court of Appeals, Tenth Circuit.

FILED May 15, 2020

Background: Seller of pest-control services through door-to-door solicitation filed action alleging that town's ordinance imposing 7:00 p.m. curfew on commercial door-to-door solicitation violated its First Amendment rights and sought injunction against the curfew's enforcement. Following a bench trial, the United States District Court for the District of Colorado, Marcia S. Krieger, Chief Judge, permanently enjoined town from enforcing the curfew. Seller appealed.

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

(1) seller established injury-in-fact required for Article III standing;

(2) causal link existed between ordinance and injury-in-fact, as required for Article III standing;

(3) seller established redressability requirement of Article III standing;

(4) ordinance regulated commercial speech protected by the First Amendment;

(5) town failed to demonstrate that ordinance directly advanced its interest in public safety, and thus that interest did not justify burden on First Amendment rights; and

(6) town failed to demonstrate that ordinance directly advanced its interest in protecting privacy of its citizens, and thus that interest did not justify burden on First Amendment rights.

Affirmed.

Hartz, Circuit Judge, filed concurring opinion.

1. Federal Civil Procedure ⚿103.2, 103.3
Federal Courts ⚿2101

To satisfy Article III's case-or-controversy requirement for federal court jurisdiction, a plaintiff must demonstrate standing by establishing (1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be

Appendix B

District court memorandum opinion denying habeas petition

Coddington v. Royal, 2016 WL 4991685 (W.D. Okla. Sept. 15, 2016)

2016 WL 4991685
Only the Westlaw citation is currently available.
United States District Court, W.D. Oklahoma.

James **CODDINGTON**, Petitioner,

v.

Terry ROYAL, Warden, Oklahoma State Penitentiary, Respondent.[1]

NO. CIV-11-1457-HE
|
Signed 09/15/2016

Attorneys and Law Firms

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Jennifer B. Miller, Oklahoma City, OK, for Respondent.

MEMORANDUM OPINION

JOE HEATON, CHIEF U.S. DISTRICT JUDGE

***1** Petitioner, James Coddington, a state court prisoner, has filed a petition for writ of habeas corpus seeking relief pursuant to 28 U.S.C. § 2254. Doc. 29.[2] Petitioner, who is represented by counsel, is challenging the convictions entered against him in Oklahoma County District Court Case No. CF-97-1500.

Petitioner's first trial was held in 2003. The jury found petitioner guilty of murder in the first degree (malice aforethought) and robbery with a dangerous weapon after former conviction of two or more felony crimes. Petitioner was sentenced to death for the murder. He received a life sentence for the robbery (2003 O.R. VII, 1255-57, 1260-61; 2003 O.R. VIII, 1458-60).[3] In Coddington v. State, 142 P.3d 437 (Okla. Crim. App. 2006), cert. denied, 549 U.S. 1361 (2007), the Oklahoma Court of Criminal Appeals (hereinafter "OCCA") affirmed both of petitioner's convictions and his life sentence for robbery, but finding error in the second stage, it remanded the case for resentencing on the murder conviction.[4]

The resentencing trial was held in 2008. Once again, petitioner was sentenced to death. In support of his sentence, the jury found four aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed to avoid or prevent a lawful arrest or prosecution; (3) petitioner had previously been convicted of a felony involving the use or threat of violence to the person; and (4) the existence of a probability that petitioner will commit criminal acts of violence that would constitute a continuing threat to society (2008 O.R. V, 837-838, 914-16). In Coddington v. State, 254 P.3d 684 (Okla. Crim. App. 2011), cert. denied, 132 S. Ct. 588 (2011), the OCCA affirmed petitioner's death sentence, and in Coddington v. State, 259 P.3d 833 (Okla. Crim. App. 2011), the OCCA denied petitioner's application for post-conviction relief.

Petitioner has presented nine[5] grounds for relief. Respondent has responded to the petition and petitioner has replied. Docs. 39 and 49. In addition to his petition, petitioner has filed motions for discovery and an evidentiary hearing. Docs. 30 and 31. After a thorough review of the entire state court record (which respondent has provided), the pleadings filed in this case, and the applicable law, the court concludes that, for the reasons set forth here, petitioner is not entitled to habeas relief.

I. Facts.

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

> In early March of 1997, [petitioner], a cocaine addict, suffered a relapse and began using cocaine again. He estimated he spent one thousand dollars ($1000.00) a day to support his habit. Within a short time, he was desperate for money and robbed a convenience store on March 5, 1997 to feed his habit. The robbery did not yield enough money, so [Petitioner] went to his friend Al Hale's home to borrow fifty dollars ($50.00).
>
> Hale, then 73 years old, worked with [petitioner] at a Honda Salvage yard. Hale had previously loaned [petitioner] money and had also contributed towards [petitioner's] previous drug treatment. Hale's friends and family knew he kept a large amount of cash at his home. On March 5, 1997, he had over twenty-four thousand dollars ($24,000.00) stashed in his closet.
>
> [Petitioner] went to Hale's home on the afternoon of March 5, 1997 to borrow money, because he had been on a cocaine binge for several days and needed money for more cocaine. [Petitioner] watched television with Hale for an hour or two and then smoked crack cocaine in Hale's bathroom. Hale knew [petitioner] was using cocaine again. Hale refused to give him money and told him to leave. As he was leaving, [Petitioner] saw a claw hammer in Hale's kitchen, grabbed it, turned around and hit Hale at least three times with the hammer. [Petitioner] believed Hale was dead, so he took five hundred twenty-five dollars ($525.00) from his pocket and left. Following the attack on Hale, [petitioner] robbed five more convenience stores to get money for cocaine.
>
> Oklahoma City police detectives arrested [petitioner] on March 7, 1997, outside of his apartment in south Oklahoma City. [Petitioner] told one officer he had been on a cocaine binge. On the way to the police department, [petitioner] tried to choke himself by wrapping the seat belt around his neck. He also stated he wanted to die. At the police station, during an interview with a robbery detective and a homicide detective, [petitioner] confessed to the convenience store robberies and also to the murder of Mr. Hale. He admitted he struck Mr. Hale in the head with a claw hammer and believed Hale was dead when he left. At trial, [petitioner] admitted he murdered Hale. He testified he did not go to Hale's house with the intent to do anything except borrow money to buy more cocaine. He said he did not have a weapon with him, did not intend to rob Hale, and did not intend to kill him.
>
> Ron Hale, the victim's son, discovered Hale after the attack on the evening of March 5, 1997. There was blood and blood spatter everywhere. Hale was lying in his bed, soaked in blood, still breathing but unable to speak. Hale was transported first to Midwest City Hospital and then to Presbyterian Hospital. He died approximately twenty-four hours later. An autopsy showed Hale died from blunt force head trauma. The medical examiner testified he sustained at least three separate blows to the left side of his head, consistent with being hit in the head with a claw hammer. He also testified Hale had defensive wounds.
>
> ***3** [Petitioner] admitted that he did not call the police when he left Hale's house because he did not want to get caught. He also admitted he had prior felony convictions.

Coddington, 142 P.3d at 442-43.

II. Standard of Review.

A. Exhaustion as a Preliminary Consideration.

The exhaustion doctrine, a matter of comity which has long been a part of habeas corpus jurisprudence, requires the court to consider in the first instance whether petitioner has presented his grounds for relief to the OCCA. As the Supreme Court stated in Coleman v. Thompson, 501 U.S. 722, 731 (1991), "in a federal system, the States should have the first opportunity to address

and correct alleged violations of state prisoner's federal rights." The exhaustion doctrine is set forth in 28 U.S.C. § 2254(b). Section 2254(b)(1)(A) prohibits the court from *granting* habeas relief in the absence of exhaustion (although Section 2254(b)(1)(B) sets forth two limited exceptions to this rule), but Section 2254(b)(2) expressly authorizes the court to *deny* habeas relief "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, the court must also examine how the OCCA adjudicated each of petitioner's grounds for relief, i.e., whether the OCCA addressed the merits of petitioner's grounds or declined to consider them based on a state procedural rule. "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that 'is independent of the federal question and adequate to support the judgment.' " Cone v. Bell, 556 U.S. 449, 465 (2009) (quoting Coleman, 501 U.S. at 729). "The doctrine applies to bar federal habeas [relief] 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. Limited Merits Review.

When the OCCA has addressed the merits of one of petitioner's grounds for relief, the court reviews that ground in accordance with the standard of relief set forth in 28 U.S.C. § 2254(d). Pursuant to that section of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), in order for petitioner to obtain relief, he must show that the OCCA's adjudication of his claim either

> (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.

See Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (acknowledging that "[t]he petitioner carries the burden of proof"). The very focus of this statutory provision is the reasonableness of the OCCA's decision. "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 (2007). In other words, "[i]t is not enough that [this] court, in its independent review of the legal question, is left with a firm conviction that the [OCCA] was erroneous." What is required is a showing that the OCCA's decision is "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (internal quotation marks and citation omitted).

***4** The Supreme Court has repeatedly acknowledged that Section 2254(d) " 'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court[,]' " and that "[i]f [it] is difficult to meet, that is because it was meant to be." White v. Wheeler, 577 U.S. ____, 136 S. Ct. 456, 460 (2015) (quoting Burt v. Titlow, 571 U.S. ____, 134 S. Ct. 10, 16 (2013)); Harrington v. Richter, 562 U.S. 86, 102 (2011). Section 2254(d) "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." Richter, 562 U.S. at 102. What remains, then, is a very narrow avenue for relief, one that permits relief only "*where there is no possibility* fairminded jurists could disagree that the [OCCA's] decision conflicts with [the Supreme] Court's precedents." Id. (emphasis added).

> 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. As 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.

Id. at 102-03 (citation omitted).

III. Analysis.

A. Ground IV: Trial Court's Exclusion of Expert Testimony Regarding Petitioner's Inability to Form Malice Aforethought.

In his first ground for relief, petitioner asserts that he was denied his right to present a defense when the trial court improperly limited his expert's testimony. Petitioner raised this claim on direct appeal, and although the OCCA agreed with petitioner that error had occurred, it found the error harmless and denied relief. Coddington, 142 P.3d at 448-51. Petitioner challenges the OCCA's harmless error analysis, asserting that it is an unreasonable application of Chapman v. California, 386 U.S. 18 (1967), and that he is entitled to relief under Fry v. Pliler, 551 U.S. 112 (2007), and Brecht v. Abrahamson, 507 U.S. 619 (1993), because the error had a substantial and injurious effect on the jury's verdict. Respondent, while asserting that AEDPA deference applies to the resolution of this claim, argues that relief must be denied because there is no Supreme Court case on point. In the alternative, respondent argues that petitioner cannot meet the Brecht standard for relief. Applying Brecht, the court denies relief.

Dr. John R. Smith, a psychiatrist, testified in the guilt stage of petitioner's first trial regarding petitioner's cocaine addiction (2003 Tr. V, 52, 81).[6] Dr. Smith advised the jury that cocaine addiction is a brain disease, that cocaine is a highly addictive substance, and that given his history, petitioner was an individual who was vulnerable to addiction (2003 Tr. V, 62-66, 68-69, 71-72, 74-78). Dr. Smith discussed how addiction is treated and how relapses are common (2003 Tr. V, 78-80). He told the jury that cocaine affects all parts of the brain, but particularly how a person thinks (2003 Tr. V, 81-82). Dr. Smith testified that cocaine can cause paranoia, fidgetiness, and anxiety (2003 Tr. V, 88-89). Having reviewed petitioner's videotaped confession with police, it was Dr. Smith's opinion that petitioner was high at that time (2003 Tr. V, 92-93).

Regarding petitioner's mental state on the day of the murder, Dr. Smith testified that petitioner told him that he had smoked a gram of crack cocaine with marijuana and drank some alcohol as well. After discussing the synergistic effect of this combination of intoxicants (2003 Tr. V, 93-94), Dr. Smith testified that petitioner's ability to make decisions on the day of the murder was impacted, as was his ability to control his behavior. Describing petitioner as agitated and overreactive, Dr. Smith stated that petitioner's "ability to delay discharge behaviorally" and "his ability to be thoughtful or think" were "certainly affected" (2003 Tr. VI, 4). Dr. Smith testified regarding the cocaine binge petitioner was on at the time and explained why petitioner's ability to recall the details of the murder was not inconsistent with being under the influence of cocaine (2003 Tr. VI, 5-6). Defense counsel ended direct examination of Dr. Smith with the following question: "So, Dr. Smith, what can you infer to a reasonable degree of medical certainty on the 5th day of March, 1997, in regards to whether [petitioner] was thinking reasonably and rationally?" Dr. Smith replied, "I can think he was not" (2003 Tr. VI, 6).

***5** Although Dr. Smith's testimony clearly weighed in on the issue of whether or not petitioner's cocaine use affected his ability to form the intent to kill, defense counsel advocated for more, and in response to the trial court's ruling limiting Dr. Smith's testimony, made the following offer of proof:

> If permitted to testify as to the effect of [petitioner's] cocaine addiction and his ability to form malice aforethought Dr. Smith would testify that on 5 March in his opinion that to a reasonable degree of medical certainty [petitioner] would not have been able to form the intent of malice aforethought and that he would have been experiencing the effects of the cocaine to such a degree that the brain would be unable to formulate that specific intent ....

(2003 Tr. V, 35-38, 80-81). As noted above, when petitioner argued on direct appeal that the trial court committed error in preventing Dr. Smith from giving this additional testimony, the OCCA agreed. The OCCA found that:

> The normal experiences and qualifications of laymen jurors likely do not provide an understanding of the effects of cocaine intoxication on one's ability to control behavior, to think rationally, and to form an intent to kill. An expert's opinion on the effects of cocaine intoxication would have been helpful to the trier of fact. While Dr. Smith could not, under our case law, tell the jury what result to reach, Dr. Smith could properly have testified that, in his expert medical opinion, [petitioner] would have been unable to form the requisite malice.

....

> Here, [petitioner] raised sufficient evidence for the trial court to instruct the jury on his defense of voluntary intoxication. When a defendant raises the defense of voluntary intoxication, an expert may properly offer his or her opinion on whether the defendant's actions were intentional. Dr. Smith could have properly testified that, in his opinion and based upon his specialized knowledge, he believed [petitioner] would have been unable to form the requisite deliberate intent of malice aforethought. The trial court erred and abused its discretion by sustaining the Motion in Limine and so limiting the expert witness' testimony.

Coddington, 142 P.3d at 449, 450 (citations omitted). Nevertheless, the OCCA determined that the error was harmless beyond a reasonable doubt and denied relief. Id. at 450-51 (citing Chapman, 386 U.S. at 24).

Although the OCCA applied the Chapman harmless error test, this court's review is governed by "the more forgiving standard of review" set forth in Kotteakos v. United States, 328 U.S. 750 (1946), and adopted in Brecht, 507 U.S. at 638, as the appropriate standard to apply to cases on collateral review. Fry, 551 U.S. at 116, 121-22. Under Kotteakos, 328 U.S. at 776, the test is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." The Supreme Court elaborated on the standard as follows:

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

***6** Id. at 765. "By 'grave doubt' [the Supreme Court] mean[s] that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." O'Neal v. McAninch, 513 U.S. 432, 435 (1995) (referring to the term employed in Kotteakos) (parenthesis omitted).

The court concludes that the trial court's error[7] in limiting Dr. Smith's testimony did not have a substantial and injurious effect on the jury's verdict. First and foremost, although Dr. Smith was not allowed to testify to the issue of intent more directly, he did offer extensive testimony on the effects of cocaine addiction, and he was permitted to give the jury his medical opinion regarding petitioner's mental state at the time of the murder. In no uncertain terms, Dr. Smith told the jury that petitioner was not "thinking reasonably and rationally" when he attacked the victim with a hammer (2003 Tr. VI, 6). This testimony, along with the instructions given to the jury regarding the defense of involuntary intoxication (2003 O.R. VII, 1328-32), gave the jury the option to find petitioner not guilty of malice murder. Second, the record reflects that petitioner was charged with two forms of murder in the first degree, malice murder and felony murder (2003 O.R. I, 6-9). Although intent is required to prove malice murder, a murder committed during the commission of a robbery with a dangerous weapon is a general intent crime to which voluntary intoxication affords no defense (2003 O.R. VII, 1316, 1328, 1331, 1333-35). See Hammon v. State, 999 P.2d 1082, 1098 (Okla. Crim. App. 2000) (acknowledging that the voluntary intoxication defense applies only to specific intent crimes and that felony murder/robbery with a dangerous weapon is a general intent crime). It necessarily follows that even if Dr. Smith had been permitted to testify to the ultimate issue of petitioner's intent, and even if the jury had been persuaded by such testimony, the result would have been the same. Having found petitioner guilty of both malice murder and robbery with a dangerous weapon, the court has little doubt that even if the jury found petitioner incapable of forming the intent as required for a malice murder conviction, it would have nevertheless found petitioner guilty of first degree murder, albeit felony murder. For these reasons, the court concludes that the error related to Dr. Smith's testimony did not have a substantial and injurious effect on the jury's verdict and is therefore harmless. Petitioner's Ground IV does not state a basis for relief.

B. Ground V: Admissibility of Petitioner's Videotaped Confession.

In his Ground V, petitioner argues that his videotaped confession should not have been admitted because his Miranda[8] waiver was invalid. Petitioner raised this claim on direct appeal, but the OCCA denied relief. Coddington, 142 P.3d at 446-48. Petitioner

argues that the OCCA's opinion is an unreasonable application of Miranda and Moran v. Burbine, 475 U.S. 412 (1986), as well as an unreasonable determination of the facts. Respondent contends that petitioner must be denied relief because he has failed to meet the AEDPA standard for relief. The court agrees with respondent.

***7** In Miranda, 384 U.S. at 444, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda therefore requires that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. After being advised of these rights, however, the defendant may waive them, "provided the waiver is made voluntarily, knowingly and intelligently." Id. Whether a valid waiver has been effectuated is dependent upon the inquiry of "two distinct dimensions":

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Burbine, 475 U.S. at 421. The OCCA applied this Supreme Court authority in its adjudication of petitioner's claim. Coddington, 142 P.3d at 447. Therefore the question this court must answer is whether the OCCA did so unreasonably. "[I]f all fairminded jurists would agree the [OCCA] was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, some fairminded jurists could possibly agree with the [OCCA], then it was not unreasonable and the writ should be denied." Frost v. Pryor, 749 F.3d 1212, 1225 (10th Cir. 2014).

Petitioner's first contact with law enforcement came two days after the murder when some Oklahoma City Police Officers assigned to the robbery unit confronted petitioner at his apartment complex about his involvement in multiple robberies. While standing outside petitioner's apartment, petitioner told the officers, "You guys have caught me. I did all of those robberies. I should have pulled that knife and made you guys kill me. I'm not going back to prison." These incriminating statements prompted Oklahoma City Police Officer Roger Smart to give petitioner his Miranda rights. Using a standard form, Officer Smart read petitioner his rights. Petitioner acknowledged his understanding of these rights and he told Officer Smart that he desired to waive them. He then signed the waiver of rights portion of the form.[9] Petitioner was questioned about the robberies as they stood outside his apartment. Regarding petitioner's appearance and demeanor at that time, Officer Smart testified that although petitioner was upset, agitated, and repetitive, petitioner did not appear to be drunk or high, that he was appropriately dressed, that he walked normally, and that he was "coherent of his environment." Officer Smart further testified that petitioner's waiver was not the result of any promises or threats (2003 Tr. III, 212-21, 224, 232-35; 2003 Tr. IV, 63-67, 70-78, 87; State's Exhibit 34).

Later, petitioner was taken downtown and interviewed by Oklahoma City Police Officer Glen DeSpain, who like Officer Smart was a part of the robbery unit, and Choctaw Police Officer Wes Weaver, who wanted to talk to petitioner about the murder. This interview was videotaped. Officer DeSpain testified that he did not read petitioner his Miranda rights because he had been told by Officer Smart that petitioner had already waived his Miranda rights. Officer DeSpain was in possession of the waiver petitioner had signed earlier that day, and at the start of the interview, Officer DeSpain asked petitioner if he remembered being advised of his rights. Petitioner responded affirmatively. Officer DeSpain testified that although petitioner was shaking and cried a couple of times during the interview, his demeanor was not out of the ordinary, that he did not appear to be under the influence, and that he was talkative, rational, alert, and coherent. Like Officer Smart, Officer DeSpain also testified that petitioner's interview was not the result of promises or threats. In the course of this interview, petitioner confessed to the murder (2003 Tr. III, 221-22, 245-49; 2003 Tr. V, 7-14; State's Exhibit 88; Court's Exhibit 2).

***8** In his first challenge to the admission of his confession, petitioner contends that his waiver was invalid because he was not advised that the police wanted to talk to him about the murder. Labeling this failure to advise as a misrepresentation, petitioner

argues that his confession should not have been admitted. In addition to his reliance on Miranda and Burbine, petitioner supports this argument with citation to Lynumn v. Illinois, 372 U.S. 528 (1963), and Spano v. New York, 360 U.S. 315 (1959).

Both Lynumn and Spano are inapposite. In Lynumn, 372 U.S. at 534, the Supreme Court found a defendant's confession to be involuntary because it was given only after the police told the defendant that her failure to cooperate would result in the loss of governmental assistance and the custody of her small children. In Spano, 360 U.S. at 317-24, the Supreme Court found a defendant's confession to be involuntary where he endured eight nighttime hours of nonstop questioning by multiple law enforcement officials, all the while refusing to talk on the advice of counsel and confessing only after the police utilized a police cadet, one of the defendant's childhood friends, to play upon the defendant's sympathies. Not only are the circumstances under which petitioner confessed in no way similar to those addressed in Lynumn and Spano, but the Supreme Court's decision in Colorado v. Spring, 479 U.S. 564 (1987), a case upon which the OCCA relied to deny petitioner relief, clearly undercuts petitioner's position.

In Spring, 479 U.S. at 577, the Supreme Court specifically held "that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." With reference to Spring, the OCCA rejected petitioner's argument as follows:

> There is no question that [petitioner] was informed of his Miranda rights and waived them. He exhibited no reluctance in speaking with the detectives about the robberies or the homicide. In fact it was he who volunteered statements about the homicide and initiated the discussion about the homicide.[10] The relevant inquiry is whether the suspect understands the rights at stake and the consequences of waiving them. Colorado v. Spring, 479 U.S. at 573, 107 S.Ct. at 857. His "awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Id., 479 U.S. at 577, 107 S.Ct. at 859.

Coddington, 142 P.3d at 448. Clearly, the OCCA's decision here was not unreasonable.

Next, petitioner asserts that his confession was involuntary due to his mental state. Petitioner argues that because he had been on a cocaine binge, had not eaten in three days, had not slept, confessed to other crimes that could not be substantiated, was physically shaking and suicidal and, because the trial judge believed that he was intoxicated at the time he gave his videotaped confession, the confession should not have been admitted. Because the OCCA found otherwise, petitioner contends that its determination is both an unreasonable application of the law and the facts.

***9** In rejecting this argument, the OCCA held as follows:

> "[S]elf-induced intoxication, short of mania, or such an impairment of the will and mind as to make the person confessing unconscious of the meaning of his words, will not render a confession inadmissible, but goes only to the weight to be accorded to it." [Petitioner] gave specific details about both the robberies and the murder of Mr. Hale, and appeared to understand exactly what was going on. That he also confessed to crimes which could not be corroborated does not show he was so intoxicated that his Miranda waiver was not knowingly and voluntarily made. Further, from his prior contacts with law enforcement and prior convictions, we can assume he was familiar with and understood the "concepts encompassed in Miranda."
>
> [Petitioner] simply has not shown his Miranda rights waiver was not knowingly and voluntarily made. The admission of his confession and the physical evidence derived therefrom did not deprive [petitioner] of his state or federal constitutional rights.

Coddington, 142 P.3d at 448 (citation omitted). For the following reasons, the OCCA's determination is not unreasonable.

Although the trial court did find that petitioner was "in some sort of heightened state of intoxication" when he spoke to Officers DeSpain and Weaver (2003 Tr. IV, 12), the Tenth Circuit has acknowledged that "intoxication does not automatically render a statement involuntary. The test is whether [petitioner's] will was overcome, or whether the statement was freely made." United

States v. Muniz, 1 F.3d 1018, 1022 (10th Cir. 1993) (citations omitted). And despite finding that petitioner was intoxicated, the trial court's ultimate conclusion was that petitioner's will was not overborne by police action:

> I don't think based on what I saw from the videotape that he was threatened, promised, coerced by the police officers in this case. The evidence has been – and I think the state is admitting that he has – or based on what I heard from the testimony yesterday that he did give some statements that could not be borne out by investigation. However, there were other things that did – that were borne out by the investigation. Finding of the hammer, the murder weapon in this case, were [sic] borne out by the investigation.
>
> Simply because he gives some consistent and some inconsistent statements I don't think that the statement was made against his will in response to force, threat, or promise. I was thinking about this. And what's the spirit of Miranda? I mean, the spirit of Miranda is to make sure that the police don't sleep-deprive people, take rubber hoses to them, do things that we as a society just don't think should be done to people.

(2003 Tr. IV, 13). This ruling is consistent with Colorado v. Connelly, 479 U.S. 157 (1986), wherein the Supreme Court held "that coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment." Id. at 167 (internal quotation marks omitted). See also Burbine, 475 U.S. at 421 ("[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.").

***10** Regarding petitioner's laundry list of reasons why his mental state was compromised when he spoke to Officers DeSpain and Weaver, petitioner's argument appears to be that because the OCCA did not ultimately find that these circumstances rendered his confession involuntary, the OCCA unreasonably determined the facts. In this same vein, petitioner additionally asserts that the OCCA unreasonably determined the facts because it (1) relied on the testimony of Officers Smart and DeSpain who testified that he was not intoxicated and (2) focused on the fact that he was intoxicated by his own volition.

A review of the OCCA's opinion reveals that it was well-aware of all of the circumstances surrounding petitioner's confession, including the fact that the trial court held an opinion that contradicted the officers' testimony. While the OCCA noted the officers' testimony (and the undisputed fact that petitioner was *voluntarily* intoxicated), its decision did not rise or fall on these matters. See Grant v. Trammell, 727 F.3d 1006, 1023-24 (10th Cir. 2013) (emphasizing the "based on" language of 28 U.S.C. § 2254(d)(2) and noting that findings which "concerned only subsidiary issues that the OCCA mentioned in passing" would not satisfy it). What the OCCA did conclude was that petitioner's "fatigue and hunger from drug usage [did] not render his waiver of Miranda involuntary[,]" Coddington, 142 P.3d at 448, and this is not an unreasonable determination of the facts.

Petitioner also faults the OCCA for not equating his unsubstantiated admissions to other crimes as evidence of his lack of awareness and for imputing familiarity with the criminal system based on his prior criminal history. Despite petitioner's admissions to criminal activity which the police could not substantiate, the OCCA also noted that petitioner gave the police crime details which were completely accurate (including the murder weapon he used to kill Mr. Hale and where he disposed of it). Id. In light of this mixed bag of accurate and unsubstantiated information, it was not unreasonable for the OCCA to discount the same as it related to petitioner's mental functioning. As for petitioner's prior interaction with the criminal justice system, this is clearly relevant information that the OCCA could consider in determining voluntariness. See Smith v. Mullin, 379 F.3d 919, 934 (10th Cir. 2004) (noting that the petitioner's "prior experience with the criminal justice system ... [meant that] [t]he concepts encompassed by Miranda were not foreign to him").

For the foregoing reasons, the court concludes that petitioner has failed to demonstrate that the OCCA unreasonably denied his Miranda claim. Ground V does not warrant habeas relief.

C. Ground VI: Double Jeopardy.

In Ground VI, petitioner contends that a double jeopardy violation occurred when the state was allowed to pursue the continuing threat aggravator in his resentencing proceeding. Because the jury rejected the continuing threat aggravator in his first trial,

petitioner argues that jeopardy attached and the state was prevented from seeking this aggravator a second time. Petitioner raised this claim in the direct appeal that followed his resentencing. Relying on its decision in Hogan v. State, 139 P.3d 907 (Okla. Crim. App. 2006), wherein the OCCA thoroughly analyzed Supreme Court authority addressing this issue, the OCCA denied petitioner relief. Coddington, 254 P.3d at 706-07. Petitioner contends that the OCCA's Hogan decision, and its application in this case, is an unreasonable application of Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

***11** In Sattazahn, the prosecutor sought the death penalty, but because the jury could not agree as to the defendant's sentence, the trial court imposed a life sentence as required by Pennsylvania law. After the defendant successfully appealed his conviction, the prosecution sought the death penalty again. This time, the defendant was sentenced to death. Id. at 103-05. Although the defendant argued that the double jeopardy clause prevented the prosecution from seeking the death penalty in his retrial proceeding, the Supreme Court disagreed. Examining precedent, including Poland v. Arizona, 476 U.S. 147 (1986), Arizona v. Rumsey, 467 U.S. 203 (1984), and Bullington v. Missouri, 451 U.S. 430 (1981), the Supreme Court stressed that "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.' " Because the jury did not reach a verdict on the issue of punishment in the defendant's first trial, the Supreme Court found that the defendant had not been acquitted of the death penalty and therefore his subsequent sentence of death was valid. Sattazahn, 537 U.S. at 106-09.

With consideration of Sattazahn, as well as Poland, Rumsey, and Bullington, the OCCA has found that when an Oklahoma jury returns a death verdict in a defendant's original trial, double jeopardy concerns are not implicated with respect to the aggravating circumstances. The OCCA has concluded that because the defendant was not acquitted of the death penalty in the first proceeding, the state may pursue a death sentence a second time based on any aggravating circumstances that apply, including those which the jury failed to find in the first proceeding. Hogan, 139 P.3d at 926-30. Petitioner has not shown that the OCCA's determination of this issue is unreasonable. See Romano v. Gibson, 239 F.3d 1156, 1178-79 (10th Cir. 2001) (applying Poland and rejecting a similar argument); Mitchell v. Duckworth, No. CIV-11-429-F, 2016 WL 4033263, at *26-28 (W.D. Okla. July 27, 2016) (finding that the OCCA's decision in Hogan is not unreasonable); Hanson v. Sherrod, No. 10-CV-0113-CVE-TLW, 2013 WL 3307111, at *22-24 (N.D. Okla. July 1, 2013) (concluding that the OCCA did not unreasonably apply Poland based on the reasoning employed in Hogan). Ground VI does not state a basis for relief.

D. Ground VII: Ineffective Assistance of Trial Counsel.

In Ground VII, petitioner challenges the representation he received in his original trial and in his resentencing proceeding. As related to the guilt stage, petitioner asserts that trial counsel could have done more to substantiate his intoxication and, had they done so, his confession (and other evidence) would not have been admitted. Regarding resentencing, petitioner argues that trial counsel should have presented more evidence regarding his intoxication at the time of the crime and should have listed this circumstance as one of his mitigating circumstances. For the following reasons, the court concludes that none of these claims warrant relief.

Procedurally Barred Claims

Petitioner faults both his original trial counsel and his resentencing trial counsel for not presenting a witness (Kenneth "Hippy" Johnson) to testify about petitioner's drug usage before and after the murder. The problem with this claim is that it has never been presented to the OCCA, and if petitioner were to return to state court in order to exhaust it, the OCCA would apply a procedural bar to prevent consideration of its merits. See Okla. Stat. tit. 22, § 1089(D)(8). Under these circumstances, an anticipatory procedural bar applies. See Cole v. Trammell, 755 F.3d 1142, 1169 (10th Cir. 2014) (citing Anderson v. Sirmons, 476 F.3d 1131, 1139-40 n.7 (10th Cir. 2007), and acknowledging the applicability of an anticipatory procedural bar). Petitioner can, however, overcome the application of a procedural bar to this claim if he can satisfy one of two exceptions. Frost, 749 F.3d at 1231.

One exception is cause and prejudice. This exception requires petitioner to demonstrate that some external objective factor, unattributable to him, prevented his compliance with the procedural rule in question. Spears v. Mullin, 343 F.3d 1215, 1255

(10th Cir. 2003). He must also show that the failure resulted in actual prejudice. Thornburg v. Mullin, 422 F.3d 1113, 1141 (10th Cir. 2005). In his reply, petitioner asserts that his default of this claim should be excused due to ineffective assistance of appellate counsel. Reply, p. 10. However, this is insufficient to overcome a procedural bar to this claim. What petitioner must show is why he did not raise this claim in his original post-conviction proceeding, and appellate counsel's actions have no bearing on this issue.[11] Petitioner has therefore failed to satisfy this exception.

***12** The second exception is a fundamental miscarriage of justice. "This exception applies to those who are actually innocent of the crime of conviction and those 'actually innocent' of the death penalty (that is, not eligible for the death penalty under applicable law)." Black v. Workman, 682 F.3d 880, 915 (10th Cir. 2012) (citation omitted). In his reply, petitioner asserts his actual innocence for both the murder and his death sentence. For his conviction, petitioner argues that if his intoxication had been sufficiently proven, his confession and other evidence would not have been admitted against him. As for his sentence, petitioner contends that the same "would have supported the mitigation evidence submitted to the jury and undermined the aggravator of avoid arrest." Reply, pp. 8-10. Neither of these arguments is persuasive.

Actual innocence means factual innocence. Because petitioner's claim of actual innocence is based on evidence he claims trial counsel should have presented in support of his intoxication defense, this goes to legal innocence, not factual innocence. Petitioner, therefore, fails to show a miscarriage of justice on this basis. See Beavers v. Saffle, 216 F.3d 918, 923 (10th Cir. 2000) (finding that the miscarriage of justice exception had not been met where petitioner's contentions were legal arguments regarding his intoxication and self-defense).

Regarding petitioner's assertion that he is actually innocent of the death penalty, this fails as well. "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) (citing Sawyer v. Whitley, 505 U.S. 333, 348 (1992)). See also Black, 682 F.3d at 915-16. As the Supreme Court held in Sawyer, "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." Sawyer, 505 U.S. at 347. "Thus, even if state law considers the outweighing of mitigating circumstances by aggravating circumstances as an 'element' of a capital sentence, it is not an element for purposes of the actual-innocence inquiry." Black, 682 F.3d at 916.

Petitioner's argument is that his mitigation case would have been strengthened if his resentencing trial counsel had presented more evidence of his intoxication. He also claims that this additional evidence would have undermined one of the four aggravating circumstances the jury found. As in Black, this is an evidence-based challenge that "cannot support the actual-innocence exception to procedural bar." Id.

Having failed to show either cause and prejudice or a fundamental miscarriage of justice, petitioner's ineffectiveness challenges based on the absence of Mr. Johnson's testimony from both the guilt and sentencing stages are procedurally barred.

In addition to his claims regarding Mr. Johnson, petitioner presents another claim which is procedurally barred as well. In his original post-conviction application, petitioner alleged that his trial counsel in the resentencing proceeding were ineffective for failing to present testimony from a neuropharmacologist, and that because appellate counsel did not raise this claim of trial counsel ineffectiveness in his resentencing appeal, he was entitled to relief upon a claim of appellate counsel ineffectiveness. Coddington, 259 P.3d at 839. As respondent notes, the OCCA found that the primary claim raised by petitioner in this instance was one based on appellate counsel ineffectiveness, a claim which the OCCA reviewed on the merits and denied relief. Id. (finding that trial counsel's decision not to present this particular witness may have been "sound trial strategy[,]" but that in any event, petitioner had not shown prejudice). As for trial counsel's ineffectiveness, the OCCA's opinion makes clear that even petitioner acknowledged that this claim had been waived. Id. at 835 n.2. Under these circumstances, respondent has argued that this claim is procedurally barred. Response, pp. 55-64.

***13** Because respondent has asserted procedural bar as an affirmative defense, petitioner has the burden of arguing against its application. Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999) ("Once the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner. This must be done, at a minimum, by specific allegations by the petitioner as to the inadequacy of the state procedure."). This he has not done. In his reply, petitioner has responded only to the applicability of a procedural bar to the claims involving Mr. Johnson. Petitioner has made no arguments as to why a procedural bar should not apply to this claim, nor has he attempted to satisfy an exception to its application. Reply, pp. 8-10. Accordingly, the court finds this claim procedurally barred as well.[12]

Claims Adjudicated by the OCCA

Petitioner's two remaining claims were presented to the OCCA in petitioner's resentencing appeal. The OCCA reviewed the merits of these claims and denied relief. Coddington, 254 P.3d at 713-16. Affording the OCCA substantial deference, as required by both the AEDPA and Strickland v. Washington, 466 U.S. 668 (1984), the court concludes that petitioner is not entitled to relief on these claims.

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

As Strickland cautions, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Therefore, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. Within "the wide range of reasonable professional assistance," "[t]here are countless ways to provide effective assistance in any given case[, and] [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id.

As for prejudice, Strickland requires a defendant to show that his counsel's errors and omissions resulted in actual prejudice to him. Id. at 687. In order to make a threshold showing of actual prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

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

> [The AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.

Id. at 102-03 (internal quotation marks and citation omitted). When these limits imposed by the AEDPA intersect with the deference afforded counsel under Strickland, a petitioner's ability to obtain federal habeas relief is even more limited.

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

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

On direct appeal, petitioner asserted that his trial counsel should have done more to educate the resentencing jury about cocaine addiction and about how his cocaine intoxication at the time of the murder affected his actions. He contended that this information should have been presented through Dr. Smith, who testified in his original trial. See Ground IV, supra. Although petitioner acknowledged that trial counsel had presented another expert in mitigation, he asserted that his testimony was more general and therefore not as good as what could have been presented through Dr. Smith. Petitioner argued that this evidence was crucial to counter the state's assertions that the murder was especially heinous, atrocious, or cruel and that it was committed to avoid arrest or prosecution. Petitioner also asserted that it was classic mitigation evidence that reduced his moral culpability for the murder. *Brief of Appellant, Case No. D-2008-655, at 66-69.* Petitioner makes these arguments here as well, asserting that the OCCA's denial of this claim is contrary to or an unreasonable application of Supreme Court law.[13]

***15** In denying petitioner relief, the OCCA compared the testimony given by Dr. Smith in the first stage of petitioner's original trial with the testimony given by Dr. William Ruwe, the neuropsychologist presented by trial counsel at resentencing. The OCCA found that Dr. Ruwe's testimony was similar in many respects to Dr. Smith's, and that given the nature and focus of the resentencing proceeding, it was reasonable strategy for trial counsel to rely upon Dr. Ruwe's expertise in the presentation of the mitigation case.

> Smith's testimony was presented during the first stage of the first trial, not in mitigation. He reviewed [petitioner's] records, including a neuropsychological examination, a competency evaluation, hair analysis, Children's Hospital and other medical records, drug treatment, DHS and school records, family history, legal history, [petitioner's] statement to police, and the medical examiner and police reports. He also interviewed [petitioner]. Smith's testimony focused on the chemical, physical and psychological effects of cocaine and alcohol on the brain. He discussed the ways in which these substances affected the developing brain. Smith testified that [petitioner] was drug-dependent and addicted to cocaine. He specifically described the effect of cocaine use on various areas of the brain. Smith used [petitioner's] long history of head trauma and injuries, alcohol use, and substance abuse to illustrate the probable effects on [petitioner's] brain development. He testified that [petitioner] was unable to use good judgment, control his behavior, think, or make good decisions.
>
> Ruwe's mitigation testimony was broader than Smith's, but substantially included the evidence Smith gave. Ruwe reviewed the records Smith reviewed, including Smith's own report and testimony, and conducted his own interview of [petitioner]. During his testimony, Ruwe testified as to Smith's findings and conclusions. Ruwe's testimony regarding alcohol and substance addiction was similar to, and in some ways more extensive than, Smith's. Ruwe emphasized the effects of substance

> abuse on the developing brain. Like Smith, he testified about the physical and neuropsychological characteristics of cocaine abuse and addiction on the brain, as well as on brain development. Ruwe discussed at length [petitioner's] probable delay in brain development and deficits in judgment, impulse control and ability to make good decisions. Ruwe explained how these characteristics were affected by [petitioner's] terrible childhood, his history of physical abuse and injuries, his long-term addiction, and his substance abuse shortly before the crime. He explained that these factors combined to ensure that [petitioner] could not make good decisions or use good judgment during his encounter with Hale which led to robbery and murder. Ruwe testified about the ways in which [petitioner's] personality characteristics, influenced by his brain development, were affected by environment. Ruwe's testimony highlighted the ways in which [petitioner's] upbringing and substance abuse reduced his moral culpability.
>
> The record supports our conclusion that counsel's decision not to present Smith's testimony was sound trial strategy. Counsel's focus in the resentencing trial was necessarily different from the trial strategy employed during the first trial. Smith's testimony was offered to show that [petitioner] could not have formed the intent necessary to commit first degree murder. Ruwe's testimony was more expansive, including medical evidence of the effects of cocaine and other substances on [petitioner's] brain, thinking and judgment, and the effects of his entire history and upbringing. Smith's opinion that [petitioner] was too intoxicated to form the intent to commit murder was of minimal relevance in the resentencing trial, which was not concerned with [petitioner's] guilt. The mitigating effect of that testimony was fulfilled by Ruwe's testimony. Counsel's decision to rely on Ruwe's evidence, rather than present Smith's prior testimony, was a viable option and a reasonable strategic decision. "[W]here counsel makes an informed decision to pursue a particular strategy to the exclusion of other strategies, this informed strategic choice is virtually unchallengeable."

***16** Coddington, 254 P.3d at 714-15 (citations omitted). Contrary to petitioner's assertion, there is nothing unreasonable about this determination by the OCCA.

In opening statement, trial counsel told the jury that in order for them to "make a qualified decision about [petitioner's] sentence[,]" they had to know all about him. They had "to know the 24-year-old man that committed this crime, how he became who he was and ... who he is today" (2008 Tr. III, 121). To accomplish this, trial counsel presented eleven witnesses, including Dr. Ruwe. Through these witnesses, trial counsel told the jury about petitioner's tragic upbringing which fostered his addiction to intoxicants. The jury learned that for the two years prior to the murder, however, petitioner had maintained a stable life. He was drug-free, maintained positive relationships (including a friendship with the victim, Mr. Hale), and worked long hours to provide for his fiancé and her children. But petitioner relapsed, and in December 1996, he underwent a 30-day inpatient drug treatment program. When he got out in January 1997, he had some success, but before too long, he was out of control again. He lost his fiancé and their family and he killed his friend while desperately seeking money to maintain his high.

In closing, trial counsel stated, "[Petitioner's] journey through this world is not what any child's journey should be. He lived a dreadful life ..." (2008 Tr. VI, 156). Reviewing the details of petitioner's life, trial counsel reminded the jury of Dr. Ruwe's testimony about how petitioner's history had impacted his development and his battle with addiction, but also how Dr. Ruwe believed that petitioner, having been incarcerated for over a decade, could be a well-behaved prisoner. Trial counsel concluded by asking the jury for a sentence of life without parole and making the final comment: "Let the long and difficult journey that has been in his life end there [prison] where he will live every day with the shame of what we [sic] has done, in fairness, sympathy, and mercy" (2008 Tr. VI, 167-68).

From the foregoing, it is clear that trial counsel employed a reasonable strategy through the presented mitigation case, and that Dr. Ruwe's evaluation of petitioner and his testimony regarding his findings meshed well with it. Accordingly, the court concludes that the OCCA's determination in this instance is reasonable.

Related to this claim, petitioner additionally faults his trial counsel for not including his cocaine impairment at the time of the crime among the mitigating circumstances provided to the jury. The OCCA addressed this claim as well, concluding that the jury was "sufficiently instructed that they could consider [petitioner's] impairment by cocaine addiction in mitigation." Coddington, 254 P.3d at 715. The record supports this determination. Among the twenty-five mitigation circumstances detailed in the jury

instructions, which accurately reflected the mitigation case, the jury was told that petitioner had been neurologically harmed by alcohol and illegal drugs, among other things (2008 O.R. V, 827-31). No relief is warranted here.

***17** Petitioner's final challenge concerns trial counsel's failure to object when the trial judge allegedly left the bench during the playing of a video at the resentencing proceeding. Although petitioner does not request relief for the underlying error, the record reflects that the OCCA fully addressed the issue and denied relief because petitioner failed to show prejudice. Coddington, 254 P.3d at 697-704. In making this determination, the OCCA summarized the facts as follows:

> Taking the evidence in the light most favorable to the defendant, the courtroom was darkened. Jurors were facing the video screen, not the bench, watching a 46–minute long videotape. The videotape was [petitioner's] mother's emotionally affecting testimony in mitigation. The parties, and the trial court, had seen the videotape and it was admitted by agreement. No objections were made, on substantive or any other grounds, during the playing of the tape. During this time, the trial judge may have left the courtroom briefly. The judge's recollection is that, if this happened, it was for a minute or two. A defense intern avers that she timed the judge's absence at five minutes. Although she and second chair defense counsel both say they saw the trial judge leave, neither they nor the first chair counsel objected at the time or made a record of the incident at any other time during the remainder of the trial. There is no evidence suggesting that any juror saw the trial court leave, if he left, or was affected by the sight.

Id. at 703. In denying petitioner relief on the related ineffectiveness claim, the OCCA found that just as the underlying claim failed for a lack of prejudice, so did the Strickland claim. Id. at 715-16. This is not unreasonable. See Hanson v. Sherrod, 797 F.3d 810, 839 (10th Cir. 2015) (refusing to analyze a petitioner's ineffectiveness claim based on trial counsel's failure to object to instances of prosecutorial misconduct where the underlying instances of alleged misconduct were without merit), cert. denied, 136 S. Ct. 2013 (2016). See also Freeman v. Attorney General, 536 F.3d 1225, 1233 (11th Cir. 2008) ("A lawyer cannot be deficient for failing to raise a meritless claim ...."); Snow v. Sirmons, 474 F.3d 693, 724-25 (10th Cir. 2007) (trial counsel was not ineffective for failing to object to certain evidence that the OCCA found admissible); Spears, 343 F.3d at 1249 (trial counsel was not ineffective for failing to object to the giving of a flight instruction where the OCCA found sufficient evidence supporting the instruction).

Having addressed each of the ineffectiveness claims contained in petitioner's Ground VII, the court concludes that no relief is warranted. These claims are either procedurally barred or without merit or both.

E. Ground VIII: Medical Examiner Testimony.

Although petitioner's Ground VIII is labeled as a direct challenge to the admission of evidence which petitioner claims violated his right to confront the witnesses against him, petitioner states that this ground is exhausted because it was presented to the OCCA in the post-conviction application following his resentencing direct appeal. Petition, p. 37. However, in post-conviction, petitioner did not raise an independent confrontation violation. Instead, petitioner raised a layered claim that his appellate counsel was ineffective for not raising an ineffective assistance of trial counsel claim based on trial counsel's failure to object to the admission of the medical examiner's testimony at his resentencing proceeding. *Original Application for Post-Conviction Relief at 40, 59-64*. Because this is the only exhausted claim, the court construes petitioner's Ground VIII in this light and denies relief because petitioner cannot show that the OCCA unreasonably denied him relief on this appellate counsel ineffectiveness claim.[14]

***18** Claims regarding the effectiveness of appellate counsel are governed by Strickland. Milton v. Miller, 744 F.3d 660, 669 (10th Cir. 2014) (citing Smith v. Robbins, 528 U.S. 259, 285 (2000)). 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. Robbins, 528 U.S. at 285-86; Miller v. Mullin, 354 F.3d 1288, 1297 (10th Cir. 2004) (quoting Ellis v. Hargett, 302 F.3d 1182, 1186-87 (10th Cir. 2002)). As previously discussed with respect to petitioner's Ground VII, both Strickland and the AEDPA are highly deferential standards, "and when the two apply in tandem, review is 'doubly' so." Richter, 562 U.S. at 105 (citation omitted).

When an appellate counsel claim concerns omitted issues, Strickland's first prong requires a showing that counsel unreasonably omitted "nonfrivolous issues." Robbins, 528 U.S. at 285. When counsel has filed a brief on the merits, it is difficult to show his incompetence for failing to raise a particular claim. Id. at 288. Appellate counsel does not have an obligation to raise every possible claim irrespective of its merit. In fact, "the hallmark of effective appellate advocacy" is the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail ...." Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). "This has assumed a greater importance in an era when oral argument is strictly limited in most courts–often to as little as 15 minutes–and when page limits on briefs are widely imposed." Jones, 463 U.S. at 752-53.

In denying petitioner relief, the OCCA concluded that because the underlying confrontation claim was harmless, petitioner's appellate counsel claim failed due to a lack of prejudice. In finding the underlying claim to be harmless, the OCCA noted that petitioner had confessed to the murder and that other "witnesses [had] described the crime scene and the victim's wounds in detail." Coddington, 259 P.3d at 839. See United States v. Garcia, 793 F.3d 1194, 1212 (10th Cir. 2015) ("The admission of evidence barred by the Confrontation Clause requires reversal of the conviction unless the admission was harmless beyond a reasonable doubt."). [15] Arguing against this conclusion, petitioner asserts that the testimony was "extremely prejudicial" because Dr. Choi testified that Mr. Hale's wounds would have been painful, a consideration for the finding of the especially heinous, atrocious, or cruel aggravating circumstance. Petition, pp. 38-39.

Petitioner has not shown that the OCCA unreasonably denied him relief on this claim. First, even though Dr. Choi gave testimony regarding the pain Mr. Hale most likely felt, the especially heinous, atrocious, or cruel aggravating circumstance was only one of the four aggravating circumstances which the jury found to support petitioner's death sentence. Second, irrespective of whether or not Dr. Choi conducted the autopsy of Mr. Hale, she clearly had the expertise to give her opinion about the issue of pain after reviewing the autopsy report and the many pictures of Mr. Hale's injuries. And finally, this testimony was not something that was not otherwise obvious and known. The undisputed evidence was that petitioner pounded Mr. Hale's head with a hammer multiple times, but that Mr. Hale did not succumb to his injuries until the following day. When Mr. Hale's son found him several hours after the attack, he was not in the kitchen where petitioner assaulted him, but in his bedroom mumbling and moaning in pain. Under these circumstances, the OCCA reasonably denied petitioner relief because even if appellate counsel had raised a trial counsel ineffectiveness claim based on Dr. Choi's testimony, it would not have affected the outcome of his resentencing appeal.

***19** Ground VIII is denied.

F. Ground IX: Sleepy Juror.

In his Ground IX, petitioner asserts that his constitutional rights were violated by a juror who appeared to be nodding off during testimony in the guilt stage of his original trial. Petitioner faults the trial court for not replacing the juror with an alternate when this conduct was made known. He also faults his trial counsel for failing to seek the juror's removal. Petitioner raised this claim in his first direct appeal. The OCCA denied relief. Coddington, 142 P.3d at 445-46. For the following reasons, the court likewise denies relief.

The facts underlying this claim are undisputed. As set forth by the OCCA in its opinion, the facts are as follows:

> On the first day of witness testimony, during the examination of Scott Cox, defense counsel informed the trial court that Juror Muller appeared to be "nodding off and sleeping. She's about to fall out of her chair." Defense counsel asked the trial court to watch the juror and, at break, to talk to her. Assistant District Attorney Reid also noted the same conduct. The trial court watched the juror and a short while later, the trial court called the attorneys to the bench and stated "[s]he is nodding off ...". At defense counsel's request, the trial court spoke with Juror Muller in chambers. During this colloquy, Juror Muller told the trial court she was feeling strange and "not very well;" she thought it was something to do with her blood sugar. Juror Muller told the trial court she was having difficulty with her vision and walking.

> Juror Muller tested her blood sugar in the presence of the trial court, defense counsel and counsel for the State, and determined it was high. When asked if there was anything she could do to bring it down, she told the trial court exercise was all that she could do.
>
> The trial court allowed the parties to question Juror Muller and her answers revealed she felt she had heard all of the questions asked and answers given, did not think she had missed anything, and felt she could remain on the jury and be alert and attentive. She admitted to defense counsel that, in addition to her sleepiness, she had an upset stomach and a little headache and that it had been "gradually getting worse today."
>
> After the parties questioned Juror Muller, defense counsel asked the trial court to continue to observe her and then to "revisit the issue ... at 1:30" to see how she was feeling. Defense counsel stated, "I think we ought to go on. I mean, let's keep putting witnesses on and if she starts nodding off again then we may have to stop it, Judge....." The trial court again agreed to keep an eye on her.
>
> Following cross-examination of the witness, court recessed for lunch and the jurors were asked to return at 1:30. When the jury returned, the trial court told the parties, "[I]nformally I spoke with Juror Muller. She insists that she's doing just fine." Defense counsel asked the trial court to continue to watch her. The record contains no further specific references to Juror Muller.

***20** Coddington, 142 P.3d at 445 (footnote omitted).

In denying petitioner relief on this claim, the OCCA found that although the trial court had the statutory authority to remove the juror, its failure to do so did not amount to an abuse of discretion. See Okla. Stat. tit. 22, § 601a (permitting the impanelment of additional jurors and authorizing the trial court to replace an ill juror with an alternate). The OCCA arrived at this conclusion by considering the following circumstances: (1) the absence of an objection from defense counsel; (2) the lack of conclusive evidence that the juror had in fact been sleeping; and (3) a silent record which indicated no further issues with this particular juror. Coddington, 142 P.3d at 446. Regarding petitioner's related ineffectiveness claim, the OCCA found as follows:

> While the trial court might properly have removed Juror Muller if the record conclusively showed she was sleeping or was too ill to continue, defense counsel specifically stated the trial "ought to go on" and did not request the trial court to remove her as a matter of trial strategy. In hindsight, it may appear to [petitioner] that his defense counsel's decision to give this juror another chance was not appropriate, but that is not sufficient to meet the test for ineffective assistance of counsel established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court does not evaluate trial strategy in hindsight. Woodruff v. State, 1993 OK CR 7, ¶ 16, 846 P.2d 1124, 1133, cert. denied, 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993). Further, the record does not establish this juror missed any of the testimony due to inattentiveness or illness and [petitioner] has not shown he was prejudiced by his trial counsel's failure to request her removal from the jury.

Id.

In support of his request for relief, Petitioner references three Supreme Court cases: Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976), for the proposition that "[t]he trial judge bears the responsibility of protecting" his right to a fair trial; Furman v. Georgia, 408 U.S. 238 (1972), for the proposition that capital cases require " 'heightened reliability' "; and Strickland. Petition, pp. 46-48. Petitioner has not shown, however, how the OCCA's decision is contrary to or an unreasonable application of any of these cases.

The bottom line is that petitioner's claim lacks a factual basis. As the OCCA found, there is no evidence that the juror was actually sleeping or that she missed any of the presented evidence. Moreover, after the juror was thoroughly questioned about her condition and what affect it might have on her ability to continue her service as a juror, defense counsel, an experienced capital litigator,[16] proposed the following plan of action:

> I move we advise her to tell you if her health condition is not getting better, that you observe her, and then we revisit the issue maybe at 1:30 or something and see how the lady is feeling. I think we ought to go on. I mean, let's keep putting witnesses on

and if she starts nodding off again then we may have to stop it, Judge. But I move that you say, ma'am, tell us if you continue to get worse, maybe have a report on the lunch break, and then maybe revisit it again at 1:30 and we'll see.

***21** (2003 Tr. III, 80-81, 90-100). In accordance with this plan, the trial judge informed the parties after lunch that he had spoken with the juror and "she's doing just fine" (2008 Tr. III, 113-14). The court has no doubt that after this incident, the juror was monitored by all parties, and because the record reflects no further discussion of this issue, it can be assumed that no other incidents arose. There is nothing in this scenario that causes the court to question whether the trial court or petitioner's trial counsel violated petitioner's constitutional rights.[17] The OCCA's determination of the claim is not contrary to or an unreasonable application of Supreme Court law.

G. Ground X: Evidence Supporting the Murder to Avoid Arrest or Prosecution Aggravating Circumstance.

In Ground X, petitioner contends that the murder to avoid arrest or prosecution aggravating circumstance, one of the four aggravating circumstances supporting his death sentence, is not supported by constitutionally sufficient evidence.[18] Petitioner raised this claim in his resentencing appeal. The OCCA addressed the merits and denied relief. Coddington, 254 P.3d at 705-06. Because petitioner has not shown that the OCCA's decision is unreasonable, relief must be denied.

In reviewing petitioner's claim, the OCCA applied the following standard: "whether, in the light most favorable to the State, any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt." Id. at 705. This is the same standard mandated by Lewis v. Jeffers, 497 U.S. 764, 781-83 (1990). As the Supreme Court recognized in Jeffers, "[l]ike 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 v. Virginia, 443 U.S. 307, 319 (1979)). Thus, this 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 v. Mullin, 415 F.3d 1215, 1232 (10th Cir. 2005)). This standard of review is highly deferential to the jury's verdict, but when a layer of AEDPA deference is added to it, petitioner's ability to obtain relief is all the more difficult. See Hooks v. Workman, 689 F.3d 1148, 1166 (10th Cir. 2012) ("We call this standard of review 'deference squared.' ") (citation omitted).

***22** When reviewing the evidentiary sufficiency of an aggravating circumstance, the court looks to Oklahoma substantive law to determine the aggravator's defined parameters. Hamilton v. Mullin, 436 F.3d 1181, 1194 (10th Cir. 2006). With respect to the murder to avoid arrest or prosecution aggravating circumstance, Oklahoma law requires the prosecution to show that petitioner "committed a predicate crime, separate from [the] murder, and killed to ... avoid arrest or prosecution for that predicate crime." Coddington, 254 P.3d at 705. " '[A] defendant's intent is critical to a determination of whether he killed to avoid arrest or prosecution.' " Id. at 706 (quoting Wackerly v. State, 12 P.3d 1, 14 (Okla. Crim. App. 2000)). In petitioner's case, the state alleged robbery as the predicate crime. The state contended that petitioner killed Mr. Hale to avoid arrest for taking $525 from him. Coddington, 254 P.3d at 705.

In denying petitioner relief, the OCCA addressed petitioner's concerns and held as follows:

> [Petitioner] argues that his testimony from the first trial cannot support this aggravating circumstance. He testified that he left Hale's house without calling police because he did not want to get caught, and agreed that he wanted to avoid arrest or prosecution. He also testified, and told police, that he hit Hale with the hammer first, and grabbed the cash from Hale's pocket just before he left. [Petitioner] said he thought Hale was dead when he left the scene. [Petitioner] argues that taken together these statements do not provide sufficient proof of a predicate crime. He claims this merely reflects how [he] felt when he left the scene of the murder, but does not show that he killed Hale to avoid being caught for robbery. He insists that robbery cannot be the predicate crime because he had already hit Hale before he robbed him. In similar circumstances, this Court found that a murder occurring contemporaneously with a robbery was nevertheless distinct from it, because evidence showed the defendant intended to rob the victim and was prepared to kill to get the money he sought. Wackerly v. State, 2000 OK CR 15, ¶¶ 40–41, 12 P.3d 1, 14. Evidence here also shows that [petitioner], who was in the middle of a string of robberies at the time of the crime, went to Hale's house to borrow money, intended to get money, attacked Hale after Hale refused to

> loan him money, and robbed him before leaving. Sufficient evidence supports a conclusion beyond a reasonable doubt that [petitioner] committed the predicate crime of robbery.
>
> Sufficient evidence also supports a conclusion beyond a reasonable doubt that [petitioner] killed Hale to avoid arrest or prosecution for the robbery. "[A] defendant's intent is critical to a determination of whether he killed to avoid arrest or prosecution." Wackerly, 2000 OK CR 15, ¶ 42, 12 P.3d at 14. Ample evidence showed that Hale knew [petitioner] well and could identify him. [Petitioner's] statements to police, as well as his testimony at his first trial, show that he wanted to avoid being caught for this robbery. This was supported by evidence that [petitioner] also attempted to avoid being arrested for the other robberies he committed during this same period of time. Direct and circumstantial evidence support the jury's finding of this aggravating circumstance. Wackerly, 2000 OK CR 15, ¶ 43, 12 P.3d at 14–15.

Coddington, 254 P.3d at 705-06. Petitioner makes these same arguments here.

The crux of petitioner's claim is that there was no predicate crime. He argues that because he came to Mr. Hale's home for a loan and without any criminal intent, and because he did not take Mr. Hale's money until after he killed him, the evidence supporting the avoid arrest aggravator is not only insufficient but totally absent. Downplaying the damaging statements he made during his own testimony, petitioner asserts that "[his] words do not establish he committed the murder to avoid arrest and prosecution, ... [but only that] he did not call the police after the murder because he did not want to be arrested." Petition, p. 50. Petitioner argues that how he felt and why he left the scene after the murder are irrelevant.

***23** Ultimately, what petitioner asks this court to do is to invalidate the jury's verdict and the OCCA's decision because his version of the events shows that the robbery was nothing more than an afterthought. This the court cannot do. In addition to the fact that this court must be doubly deferential in its review of this claim, the Jeffers/Jackson standard by which petitioner's claim is evaluated is viewed not in the light most favorable to petitioner, but " 'in the light most favorable to the prosecution ....' " Jeffers, 497 U.S. at 781 (quoting Jackson, 443 U.S. at 319). Despite petitioner's claims that he had no intent to rob or kill Mr. Hale, the evidence was sufficient for the jury to find otherwise. When petitioner came to Mr. Hale's home, he was on a mission for money to buy more cocaine and he had already robbed at least one business for that purpose. Even if petitioner went to see Mr. Hale in hopes of getting a loan, and even if the jury believed this, a rationale trier of fact could have still found that when Mr. Hale refused to give him money, petitioner went to his backup plan. The fact that petitioner left his knife in the car (the knife he used to rob several businesses before and after Mr. Hale's murder) does not make this finding any less rational. The evidence showed that Mr. Hale was an elderly person who was not in the best of health, whereas petitioner was a young man of twenty-four. Petitioner did not need a weapon to get Mr. Hale's money. However, if petitioner had done that, simply assaulted Mr. Hale to get money, Mr. Hale could have survived and called the police, easily identifying petitioner as the perpetrator. So by killing Mr. Hale, with more than one strike of a hammer to his head, the jury could rationally find that petitioner killed Mr. Hale to avoid arrest or prosecution. Ground X does not state a basis for relief.

H. Ground XI: Roper[19] and Evidence of Juvenile Offenses Presented in Support of the Continuing Threat Aggravating Circumstance.

Petitioner's Ground XI is a challenge to the state's use of his juvenile offenses to support the continuing threat aggravator. Petitioner contends, as he did in his resentencing appeal, that this is prohibited by the Supreme Court's decision in Roper.[20] Relying on its decision in Mitchell v. State, 235 P.3d 640 (Okla. Crim. App. 2010), the OCCA denied relief on this claim. Coddington, 254 P.3d at 707. Because petitioner has not shown that the OCCA's decision is contrary to or an unreasonable application of Roper, he has not demonstrated his entitlement to relief.

In Roper, 543 U.S. at 578, the Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." In denying petitioner relief, the OCCA relied on its decision in Mitchell wherein it addressed this issue as a case of first impression. Coddington, 254 P.3d at 707. In Mitchell, the OCCA held as follows:

> This Court has consistently held that evidence of unadjudicated bad acts, non-violent bad acts and juvenile offenses are admissible in a capital case to prove a defendant constitutes a continuing threat to society. Nothing in the language of Roper suggests that the State is prohibited from relying on prior juvenile adjudications to support an aggravating circumstance.

Mitchell, 235 P.3d at 659 (citation omitted). Faulting the OCCA for this interpretation of Roper, petitioner contends that "Roper *should* operate to preclude the use of juvenile adjudications to support aggravating factors in a capital sentencing proceeding." Petition, p. 55 (emphasis added).

Roper does not address the use of juvenile adjudications in capital proceedings, and petitioner's argument that it should be so applied is not a basis for habeas relief. The OCCA's decision cannot be deemed unreasonable because it failed to extend the principles espoused in Roper. The OCCA's decision is measured against Supreme Court holdings, not general legal principles that may be extracted from them, and those holdings are to be narrowly construed. Fairchild v. Trammell, 784 F.3d 702, 710 (10th Cir. 2015). The OCCA's decision is not contrary to or an unreasonable application of Roper. See Mitchell, 2016 WL 4033263, at *7-8 (rejecting this same claim); Dodd v. Workman, No. CIV-06-140-D, 2011 WL 3299101, at *57-58 (W.D. Okla. Aug. 2, 2011) (rejecting a similar Roper claim), rev'd on other grounds, Dodd v. Trammell, 753 F.3d 971 (10th Cir. 2013).

I. Ground XII: Juror Misconduct.

***24** In his final ground, petitioner asserts that he is entitled to relief because two jurors in his first trial lied during voir dire. Like his Ground VIII, petitioner states that this issue is exhausted because it was presented to the OCCA in the post-conviction application following his resentencing appeal. Petition, p. 59. On post-conviction, petitioner claimed that his appellate counsel in his first direct appeal was ineffective for failing to investigate these jurors. The OCCA addressed the merits of the appellate counsel claim and denied relief. The OCCA procedurally barred the underlying substantive issue. Coddington, 259 P.3d at 835-37.

Petitioner's underlying claim concerns Jurors Berry and Doyle. In discussing the issue of addiction with the prospective jurors, defense counsel asked Juror Berry for her thoughts. In her response, Juror Berry included a statement that she'd "never had any personal experiences with anybody on drugs" (2003 Tr. II, 131). Because Juror Berry's father died in a drug/alcohol related accident of his own making, petitioner asserts that Juror Berry's statement was "an outright attempt to conceal [her] prejudices against drug and alcohol abusers." Petition, pp. 60, 61-62. As for Juror Doyle, petitioner asserts that he also hid his drug/alcohol prejudices when he failed to disclose prior DUIs. Petition, pp. 58-59. Petitioner argues that had this information been made known at trial, these jurors would have been subject to removal for cause.

In denying petitioner relief, the OCCA repeatedly stressed the claim it was deciding:

> The issue raised ... is not whether any or all of these six jurors were less than candid in their responses; nor is it whether trial counsel, had she known of these misrepresentations, would have challenged any of these jurors for cause or through a peremptory challenge. The issue before the Court is whether appellate counsel's failure to investigate these jurors and raise any issues resulting from that investigation on direct appeal, raises a substantial likelihood that the result of the proceeding would have been different. In conducting this review, this Court is focusing on [petitioner's] conviction as the outcome which would have been affected by different actions on appellate counsel's part.
>
> [Petitioner] apparently fails to understand these limitations. In addition to claiming ineffective assistance of appellate counsel in this proposition, he claims that he was denied his right to fully conduct *voir dire*, and his right to an impartial jury, by what he characterizes as material omissions in the responses of three (and particularly two) of the six jurors. This is not the question before the Court. These substantive issues have been waived.
>
> ....
>
> We repeat, whether the responses were inaccurate or whether trial counsel might have used peremptory challenges based on this information is not the issue before the Court.

Coddington, 259 P.3d at 836, 837.[21] Acknowledging the high standard imposed by Strickland, the OCCA noted that "[a]ppellate counsel need not raise every non-frivolous issue" and "[a] strong presumption exists that, where counsel focuses on some issues to the exclusion of others, this reflects a strategic decision rather than neglect." Id. at 835-36 (citing Richter, 562 U.S. at 109 and Jones, 463 U.S. at 753-54). In addition, because appellate counsel had succeeded in getting petitioner's death sentence reversed and remanded for a new sentencing, the OCCA found that "[g]iven this evidence of effective representation, it will be difficult for [petitioner] to show that appellate counsel's performance was deficient." Coddington, 259 P.3d at 836. Ultimately, the OCCA denied relief for two reasons: (1) because appellate counsel has no duty to investigate jurors; and (2) because petitioner failed to demonstrate that the jurors in question had "any bias or partiality for or against [his] case or [him]." Id. at 836-37. Petitioner has not shown that this determination is unreasonable.

***25** The sum of petitioner's argument is one of prejudice. He claims that the jurors' errors are so grave that he simply must be granted relief. This argument fails on multiple grounds. First, the AEDPA standard of review precludes it. In addition to the expansive deference that must be afforded the OCCA's determination, relief is required only if the OCCA's decision amounts to an extreme malfunction of the criminal justice system. See Davis v. Ayala, 576 U.S. ____, 135 S. Ct. 2187, 2202 (2015) ("The role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems.") (internal quotation marks and citation omitted). This cannot be said of the OCCA's opinion. Second, the Strickland standard, which requires a showing of both deficient performance and prejudice, precludes it. Strickland, 466 U.S. at 687. Although petitioner has presented an argument for prejudice, with regard to deficient performance, petitioner has stated only that a reasonable investigation would have uncovered this juror claim. However, Strickland cautions against this type of hindsight distortion, while recognizing that "[t]here are countless ways to provide effective assistance in any given case." Id. at 689. Petitioner does not argue that appellate counsel should have somehow been alerted to a potential claim, nor does he make any assertion that juror investigations are required in every appeal. In addition, petitioner has not even offered up a critique of appellate counsel's brief in an effort to show that this juror claim was more worthy than the claims that were presented. As the OCCA noted, since appellate counsel was able to obtain sentencing relief, petitioner would be hard pressed to even make this argument.

And finally, even petitioner's prejudice argument fails to demonstrate his entitlement to relief. The OCCA found that petitioner had failed to show that Jurors Berry and Doyle had any bias or partiality to either side based on their drug/alcohol experiences. While petitioner has inferred that their experiences would have made them unsympathetic jurors, one can just as easily infer that their experiences made them sympathetic jurors. In addition, the court notes that petitioner's support for his claim regarding Juror Berry is in the form of a hearsay affidavit which is inherently unreliable, see Neill v. Gibson, 278 F.3d 1044, 1056 (10th Cir. 2001) (finding no abuse of discretion in refusing to consider hearsay affidavits by investigators), and as for Juror Doyle, the record does not support petitioner's contention that he was dishonest when he failed to respond to the trial court's inquiry about ever being in a court of law or coming before a judge as a witness or a party (2003 Tr. I, 108). Based on the evidence petitioner has provided, Juror Berry did have two prior DUI arrests, but his convictions were the result of bond forfeitures due to his failure to appear. Petition, pp. 58-59. So when the trial court asked if he had ever been in a court of law or before a judge, Juror Berry was not dishonest in remaining silent. The question posed would not necessarily have prompted any disclosure of his prior DUI arrests.

Under these circumstances, it was reasonable for the OCCA to conclude that "[a]ppellate counsel was not ineffective for failing to investigate jurors' backgrounds." Coddington, 259 P.3d at 837. See McDonough Power Equipment, Inc., v. Greenwood, 464 U.S. 548, 556 (1984) (holding that in order to obtain a new trial, a petitioner "must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause"). As for the underlying claim, it is, as the OCCA found, procedurally barred because appellate counsel ineffectiveness does not excuse petitioner's default.

IV. Motions for Discovery and Evidentiary Hearing.

Petitioner has filed a motion for discovery as well as a motion for an evidentiary hearing. Docs. 30 and 31. The court concludes that both should be denied.

In order to conduct discovery, Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts requires petitioner to show good cause. In Bracy v. Gramley, 520 U.S. 899, 908-09 (1997), the Supreme Court acknowledged that "good cause" requires a pleading of specific allegations showing a petitioner's entitlement to relief if the facts are fully developed.

Petitioner's discovery request is extensive. He requests any information known to the trial court or the court clerk regarding any communications with the jurors; the prosecution's entire file; all information concerning Jurors Berry and Doyle; all information related to his intoxication at the time of the crime and his confession; and any exculpatory material. He also requests that he be allowed to depose Jurors Berry, Doyle, and Muller; law enforcement officers Smart, DeSpain, and Weaver; and Kenneth Johnson. Although petitioner makes reference to the medical examiner who performed the autopsy of the victim, the court notes that he makes no request related to him.

***26** Regarding his intoxication, petitioner seeks more information from the law enforcement officers who interacted with him the day he was arrested and confessed. However, as respondent has pointed out, petitioner was afforded a hearing on the voluntariness of his confession. At that hearing, and in the first trial, both Smart and DeSpain testified and were subject to cross-examination by petitioner. As for Weaver, he testified at the resentencing proceeding and was subject to cross-examination by petitioner at that time. Doc. 41 at 2. Petitioner has not shown what further information could be gathered from these individuals. In addition, regarding Mr. Johnson, petitioner has not shown how deposing him would lead to information supporting a claim for relief. In Ground VII, petitioner has alleged that his trial counsel was ineffective for failing to present Mr. Johnson for testimony, and he has supported this claim with a transcript of an interview which was apparently conducted at the time of trial and contained in trial counsel's files. Petitioner's Exhibit 13. However, petitioner has not shown what additional information could be gained from a deposition of Mr. Johnson, nor has he shown how the same would support a relief on a claim this court has determined to be procedurally barred.

Petitioner's Grounds IX and XII involve three jurors who sat on the jury in petitioner's original trial in 2003. In Ground IX, petitioner has complained about Juror Muller's sleeping during the trial, and in Ground XII, petitioner has asserted that Jurors Berry and Doyle lied during voir dire. With respect to Ground IX, the court has concluded that it lacks factual support; however, what petitioner seeks to discover with respect to Juror Muller does address this deficiency. Petitioner wants to depose Juror Muller to discuss her alertness during trial and her medical condition, but this was all addressed during the trial. Upon questioning by the trial court and the parties, it was discovered that Juror Muller was having trouble with her diabetes that particular morning. However, she did not miss any evidence and by afternoon she was feeling fine (2003 Tr. III, 91-100, 113). Petitioner has not given this court any reason to discount how the matter was handled at trial, nor has he shown how pursuing this issue some thirteen years later will bring about any different result. Regarding Jurors Berry and Doyle, petitioner wants to depose them and discover more information about the extent of their alleged bias. In Ground XII, the court has rejected petitioner's argument that his appellate counsel was ineffective for failing to investigate these jurors and found the underlying juror misconduct claim to be procedurally barred. Petitioner has not shown how further investigation into Jurors Berry and Doyle affects these determinations and/or his entitlement to relief. Therefore, this request is also denied.

In addition to these specific requests, petitioner has made general requests regarding juror communications, the prosecution's file, and exculpatory material. The court denies these requests because they are too broad and unsupported by specific allegations as required by Bracy.

As for an evidentiary hearing, petitioner requests that he be granted one to further develop his Ground V which concerns the admissibility of his videotaped confession. However, the court has denied this ground for relief, concluding that petitioner has failed to show that the OCCA's determination of the issue is an unreasonable determination of law or fact under Section 2254(d). In accordance with Pinholster, 563 U.S. at 181, the court's review of this claim is limited to the record that was before the

OCCA at the time it rendered its decision. Having failed to satisfy Section 2254(d), petitioner is not entitled to an evidentiary hearing on this claim. Jones v. Warrior, 805 F.3d 1213, 1222 (10th Cir. 2015).

V. Conclusion.

Having concluded petitioner's arguments do not establish a right to relief, his petition for writ of habeas corpus is **DENIED**, as are his requests for discovery and an evidentiary hearing. [Doc. Nos. 29, 30 and 31]. Judgment will be enter accordingly.

IT IS SO ORDERED.

Dated this 15th day of September, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4991685

Footnotes

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

2 *Doc. 29 is petitioner's amended petition, which was filed to correct certain scrivener's errors.*

3 *Because petitioner had two direct appeal proceedings (OCCA Case Nos. D-2003-887 and D-2008-655), the state court record contains two sets of the original record. The first original record is eight volumes, and it will be referred to as "2003 O.R." The second original record is six volumes, and it will be referred to as "2008 O.R."*

4 *Because the OCCA granted petitioner relief on direct appeal, his related post-conviction appeal was subsequently dismissed as moot. Order Dismissing Post-Conviction Appeal, Case No. PCD-2003-1029 (Okla. Crim. App. Sept. 28, 2006).*

5 *Petitioner has numbered his grounds for relief as Ground IV through Ground XII.*

6 *The first trial will be referred to as "2003 Tr." and the second trial as "2008 Tr."*

7 *Contrary to respondent's assertion, the court concludes that petitioner's claim is based on his federal constitutional right to present a defense. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (discussing Supreme Court authority related to a criminal defendant's federal constitutional right to a meaningful opportunity to present a complete defense). Thus, a Brecht analysis is appropriate.*

8 *Miranda v. Arizona, 384 U.S. 436 (1966).*

9 *Petitioner also consented to a search of his apartment (State's Exhibit 33).*

10 *Before questioning began, and even before Officer DeSpain talked to petitioner about his earlier waiver, petitioner told Officers DeSpain and Weaver, "You're gonna want the murder weapon, I'm sure ...." Later, petitioner also told them that they "need[ed] to get homicide down [there]" (State's Exhibit 88; Court's Exhibit 2, pp. 2, 12).*

11 *In addition, post-conviction counsel ineffectiveness cannot serve as cause. Coleman, 501 U.S. at 752 (because there is no constitutional right to representation in state post-conviction proceedings, a petitioner " 'bear[s] the risk of attorney error that results in a procedural default' ") (citation omitted).*

12 *In addition, the court concludes that petitioner has failed to demonstrate that this claim has merit. In his petition, petitioner has done little more than make minor, passing references to this claim. Petition, pp. 28, 31. He has not presented any related argument regarding why trial counsel was allegedly ineffective in this instance.*

13 *Although petitioner references Chapman as the relevant Supreme Court case, Petition, pp. 32, 34, it is clear that Strickland is the controlling authority.*

14 *On post-conviction, petitioner challenged only the testimony of Dr. Chai Choi, who testified at the resentencing. Original Application for Post-Conviction Relief at 60 ("The admission of the autopsy sketches, photos, and Dr. Choi's testimony based upon Dr. Parker's and/or Dr. Jordan's report violated [petitioner's] right to confront his accusers under the Sixth and Fourteenth Amendments to the United States Constitution and Article II § 20 of the Oklahoma Constitution."). Therefore, to the extent petitioner challenges the testimony of Dr. Fred Jordan who testified in petitioner's original trial or his appellate counsel's actions in his first direct appeal, these claims are unexhausted and anticipatorily procedurally barred. See Ground VII, supra. As to his claim that his trial counsel at*

resentencing was ineffective for failing to object to Dr. Choi's testimony, the OCCA noted that any such direct challenge was waived. Coddington, 259 P.3d at 838. However, given that this claim is interwoven with his appellate counsel challenge, it is subject to denial on the merits as well.

15 *Addressing petitioner's claim through the lens of harmless error, the OCCA assumed that a confrontation violation occurred. However, "[t]he Supreme Court has never held that the Confrontation Clause applies at capital sentencing." Carter v. Bigelow, 787 F.3d 1269, 1294 (10th Cir. 2015). See also Wilson v. Sirmons, 536 F.3d 1064, 1111 (10th Cir. 2008) (stating "that it is far from clear whether the Confrontation Clause even applies at capital sentencing proceedings") (internal quotation marks omitted) (citation omitted).*

16 *See Fields v. Gibson, 277 F.3d 1203, 1209 (10th Cir. 2002) (referring to defense counsel's supervisory position in the litigation division of the Oklahoma County Public Defender's Office and his status as "the second most experienced death penalty lawyer at the PDO").*

17 *Regarding petitioner's reference to Furman, respondent aptly points out that because petitioner received a new sentencing proceeding, petitioner has no argument that this juror's service denied him a reliable sentencing proceeding. Response, p. 72.*

18 *In footnote 5, petitioner asserts that he has an additional basis for relief. Citing Harrison v. United States, 392 U.S. 219 (1968), petitioner contends that his testimony from his first trial, testimony which as discussed herein lends support to the jury's finding of the avoid arrest aggravator, should not have been admitted at his resentencing. This claim, however, has never been presented to the OCCA. It is therefore unexhausted and subject to an anticipatory procedural bar. See Ground VII, supra. The court additionally concludes that this claim lacks merit because it is based on petitioner's contention that his confession was illegally obtained. Because the court has found otherwise and denied relief on this related claim, see Ground V, supra, petitioner's Harrison claim fails as well.*

19 *Roper v. Simmons, 543 U.S. 551 (2005).*

20 *In footnote 8, petitioner makes the additional claim that his trial counsel was ineffective for not raising an objection at resentencing based on Roper. While asserting that this claim should not be reviewed on the merits, respondent additionally argues that it can be denied on the merits. The court concludes that denial on the merits is the most efficient course. Because Roper does not preclude the admission of juvenile offenses to prove the continuing threat aggravator, the objection would have been overruled even if trial counsel had objected on this basis. Thus, there is no merit to this ineffectiveness claim.*

21 *The OCCA's reference to six jurors includes four jurors challenged by petitioner in his post-conviction claim but not raised here. Petition, pp. 56-57. Also, since appellate counsel was successful in getting petitioner a new sentencing proceeding, the obvious focus for the OCCA would be petitioner's murder conviction. Coddington, 142 P.3d at 462.*

End of Document

Appendix C

Oklahoma Court of Criminal Appeals opinion on direct appeal

Coddington v. State, 142 P.3d 437 (Okla. Crim. App. 2006)

$563.47, within thirty days of the date this opinion becomes final.

¶ 23 **RESPONDENT SUSPENDED FROM THE PRACTICE OF LAW FOR TWO YEARS AND ONE DAY; RESPONDENT ORDERED TO PAY COSTS.**

¶ 24 WATT, C.J., WINCHESTER, V.C.J., HARGRAVE, OPALA, EDMONDSON, TAYLOR and COLBERT, JJ., concur.

¶ 25 KAUGER, J., concurring in result.

Although I agree with the discipline imposed, this proceeding should have been brought under Rule 10.

2006 OK CR 34

James Allen CODDINGTON, Appellant

v.

STATE of Oklahoma, Appellee.

No. D–2003–887.

Court of Criminal Appeals of Oklahoma.

Aug. 16, 2006.

Background: Defendant was convicted by a jury in the District Court, Oklahoma County, Jerry Bass, J., of first degree murder and robbery with a dangerous weapon and he was sentenced to death. Defendant appealed.

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

(1) the prosecutor offered race-neutral reasons for his challenges to four African-American jurors;

(2) the trial court's failure to replace juror, who was sleepy due to a problem with her blood sugar level, did not constitute plain error;

(3) fatigue and hunger from self-induced drug usage did not render defendant's waiver of his *Miranda* rights or his confessions involuntary;

(4) error in prohibiting defense expert from testifying that defendant would have been unable to form the requisite deliberate intent of malice aforethought due to his cocaine addiction was harmless;

(5) admission of a single pre-death photograph of the victim was not an abuse of discretion;

(6) evidence was sufficient to support conviction for first-degree murder;

(7) exclusion of a videotaped statement from defendant's mother violated due process; and

(8) the trial court's decision to instruct the jury on impeachment of witnesses by a former conviction during the sentencing phase of first-degree murder trial constituted plain error.

Affirmed in part; reversed and remanded in part.

Lumpkin, Vice Presiding Judge, filed an opinion concurring in part and dissenting in part.

Lewis, J., filed a specially concurring opinion.

1. Jury ⇨33(5.15)

The prosecutor offered race-neutral reasons for his challenges to four African-American jurors, during first-degree murder prosecution; three of the jurors were excluded since they had previously been prosecuted for a criminal offense, and the fourth juror was excluded because the prosecutor did not believe that he could impose the death penalty. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇨221(4)

A defendant may raise an equal protection challenge to the use of peremptory challenges by showing that the prosecutor used the challenges for the purpose of excluding members of the defendant's own race from the jury panel. U.S.C.A. Const.Amend. 14.

3. Jury ⇨33(5.15)

Under *Batson,* the defendant must first make a prima facie showing that the prosecu-

tor has exercised peremptory challenges on the basis of race; then, the burden shifts to the prosecutor to articulate a race-neutral explanation related to the case for striking the juror in question. U.S.C.A. Const. Amend. 14.

4. Jury ⇐33(5.15)

The race-neutral reason given by the prosecutor for exercising a peremptory challenge need not rise to the level of justifying excusal for cause, but it must be a clear and reasonably specific explanation of his or her legitimate reasons for exercising the challenges. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐1158(3)

The trial court's findings concerning whether a prosecutor exercised peremptory challenges on the basis of race are entitled to great deference, and the Court of Criminal Appeals reviews the record in the light most favorable to the trial court's ruling. U.S.C.A. Const.Amend. 14.

6. Criminal Law ⇐1035(5)
Jury ⇐33(5.15)

The trial court's finding that the prosecutor's use of a peremptory challenge on juror did not establish a pattern of discrimination was not plain error, in first degree murder prosecution; the record did not establish that juror was a woman of minority race. U.S.C.A. Const.Amend. 14.

7. Criminal Law ⇐1035(5)
Jury ⇐149

The trial court's failure to replace juror, who was sleepy due to a problem with her blood sugar level, with an alternate juror did not constitute plain error, during first-degree murder prosecution; defense counsel did not request removal of the juror and asked the court to continue to watch her, the record did not conclusively show that juror slept during trial, juror stated she could continue as an alert and attentive juror, and there was nothing in the record that indicated that her sleepiness due to illness continued after the lunch recess on the first day of testimony. U.S.C.A. Const.Amends. 5, 14; Const. Art. 2, § 19; 22 Okl.St.Ann. § 601a.

8. Criminal Law ⇐868

Juror misconduct must be proven by clear and convincing evidence.

9. Jury ⇐149

A trial judge has inherent power to substitute a juror for good cause.

10. Jury ⇐149

The trial court's discretion to substitute a juror for good cause ought to be exercised with great caution, especially in capital cases.

11. Criminal Law ⇐641.13(2.1)

Trial counsel's failure to request the removal of juror who was sleepy due to a blood sugar problem did not prejudice defendant, during first-degree murder prosecution, and therefore did not constitute ineffective assistance of counsel; the record did not show that juror missed any of the testimony due to inattentiveness or illness. U.S.C.A. Const. Amend. 6.

12. Criminal Law ⇐641.13(1)

The Court of Criminal Appeals does not evaluate trial strategy in hindsight. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐519(3)

The trial court's decision to admit defendant's videotaped in custody extra-judicial confession and let the jury determine whether it was knowingly and voluntarily made was supported by the record, in first-degree murder prosecution; defendant was provided his *Miranda* rights in relation to the robbery investigations and he waived those rights, officers were not required to provide new *Miranda* warnings when defendant volunteered information concerning the homicide, and defendant was not threatened, coerced, or promised anything during the confession. U.S.C.A. Const.Amends. 5, 14.

14. Criminal Law ⇐519(1)

Voluntariness of a confession is judged by examining the totality of the circumstances, including the characteristics of the accused and the details of the interrogation.

15. Criminal Law ⇐517.2(2)

The inquiry concerning the voluntariness of a confession has two aspects: the relinquishment of constitutional rights must be

voluntary in that it was a product of free, deliberate choice, rather than coercion, intimidation or deception; and, the waiver must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it.

16. Criminal Law ⇐412.2(5)

The trial court may properly find a valid waiver of *Miranda* rights where the totality of the circumstances show both an uncoerced choice and the requisite level of comprehension.

17. Criminal Law ⇐517.2(2), 526

Defendant's fatigue and hunger from self-induced drug usage did not render his waiver of his *Miranda* rights or his confessions involuntary, in prosecution for first-degree murder; officers testified that defendant was coherent and rational, and that they did not think that he was under the influence of intoxicants, defendant's prior contacts with law enforcement established his familiarity with the concepts encompassed in *Miranda*, and self-induced intoxication went only to the weight to be accorded to defendant's confession, not the admissibility of the confession.

18. Criminal Law ⇐526

Self-induced intoxication, short of mania, or such an impairment of the will and mind as to make the person confessing unconscious of the meaning of his words, will not render a confession inadmissible, but goes only to the weight to be accorded to it.

19. Criminal Law ⇐474.2

The trial court abused its discretion when it prohibited defense expert from testifying that, in his opinion, defendant would have been unable to form the requisite deliberate intent of malice aforethought due to his cocaine addiction, in prosecution for first-degree murder; the normal experiences of jurors would not likely have provided them with an understanding of the effects of cocaine intoxication on one's ability to control behavior and form intent to kill, defendant presented sufficient evidence to required the court to instruct the jury on the defense of voluntary intoxication, and after defense of voluntary intoxication was raised an expert could give an opinion on whether a defendant's actions were intentional. U.S.C.A. Const.Amends. 5, 6, 14; 12 Okl.St.Ann. § 2704.

20. Criminal Law ⇐470(1)

Any properly qualified expert testifying in accordance with the standards governing admissibility of expert testimony may offer an opinion on the ultimate issue if it would assist the trier of fact.

21. Criminal Law ⇐469, 472

While expert witnesses can suggest the inferences which jurors should draw from the application of specialized knowledge to the facts, opinion testimony which merely tells a jury what result to reach is inadmissible.

22. Criminal Law ⇐471

Where the normal experiences and qualifications of laymen jurors permit them to draw proper conclusions from the facts and circumstances, expert conclusions or opinions are inadmissible.

23. Criminal Law ⇐474.2

When a defendant raises the defense of voluntary intoxication, an expert may properly offer his or her opinion on whether the defendant's actions were intentional.

24. Criminal Law ⇐661

Defendants in criminal trials deserve to have their day in court, to require the State to meet its burden of proof through evidence presented in open court, to tell their stories, and to defend themselves against the crimes of which they have been charged.

25. Constitutional Law ⇐268(10)
Witnesses ⇐2(1)

A defendant's due process right under the Fifth Amendment and to compulsory process under the Sixth Amendment includes the right to present witnesses in his or her own defense. U.S.C.A. Const.Amends. 5, 6.

26. Constitutional Law ⇐268(10)

The right to offer the testimony of witnesses is, in plain terms, the right to present a defense; this right is a fundamental element of due process of law. U.S.C.A. Const. Amends. 5, 6, 14.

27. Criminal Law ⚿1170(1)

Trial court's error in prohibiting defense expert from testifying that, in his opinion, defendant would have been unable to form the requisite deliberate intent of malice aforethought due to his cocaine addiction was harmless, in prosecution for first-degree murder; expert testified extensively about the effects of cocaine addiction and intoxication of the brain, on decision-making, and on behavior. U.S.C.A. Const.Amends. 5, 6, 14.

28. Criminal Law ⚿338(1)

Testimony from victim's son concerning his brain disorder was admissible, in prosecution for first-degree murder; the testimony explained to the jury why the witness had obvious difficulty expressing himself and answering the State's questions. U.S.C.A. Const.Amends. 5, 14.

29. Criminal Law ⚿1036.1(3.1)

Testimony from the victim's son that his brain disorder got worse after victim died did not constitute plain error, in prosecution for first-degree murder; the testimony was not solicited by the State, and no further attention was called to the testimony by the State or the defense.

30. Criminal Law ⚿438(3)

The trial court's admission of a single pre-death photograph of the victim was not an abuse of discretion, and it did not deprive defendant of a fair first-degree murder trial or a fair sentencing proceeding; the trial court required the State to provide a picture depicting only the victim, and the photograph showed the victim's general appearance and condition prior to his death. 12 Okl.St.Ann. § 2403.

31. Statutes ⚿181(1)

The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the statute.

32. Statutes ⚿184, 208

A statute should be given a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.

33. Constitutional Law ⚿197
Criminal Law ⚿438(3)

Application of statute, which allowed the admission of one photograph of a homicide victim when the victim was alive and which was not in effect at the time of defendant's crime, did not violate ex post facto principles; the admission of the single photograph did not change the quantum of evidence necessary for the state to obtain a conviction and it did not subvert the presumption of innocence. U.S.C.A. Const. Art. 1, § 9, cl. 3; Const. Art. 2, § 15; 12 Okl.St.Ann. § 2403.

34. Constitutional Law ⚿197

The prohibition against ex post facto law requires the finding of two elements: that the law was enacted after the conduct to which it is being applied and that the law disadvantages the offender affected by it. U.S.C.A. Const. Art. 1, § 9, cl. 3; Const. Art. 2, § 15.

35. Criminal Law ⚿1035(10)

Trial court's admission of testimony from two emergency medical technicians (EMTs) did not constitute plain error, in prosecution for first-degree murder, despite contention that testimony was cumulative; the EMTs testified as to the details of the crime scene and to the victim's condition. U.S.C.A. Const.Amends. 5, 8, 14.

36. Criminal Law ⚿661, 1153(1)

Admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.

37. Constitutional Law ⚿266(1)
Criminal Law ⚿438(4), 675

Defendant's rights to a fair trial and to due process of law were not violated when the trial court allowed three witnesses to testify about the crime scene and allowed the admission of photographic evidence depicting the information contained in the testimony; the prosecutor laid a brief foundation for the introduction of the photographic evidence, defense counsel did not object to the admission of the photographic evidence, and the

photographs were not cumulative or prejudicial. U.S.C.A. Const.Amends. 5, 14.

38. Homicide ⚿1139

Evidence was sufficient to support conviction for first-degree murder; defendant confessed that he killed victim by hitting him in the head with a hammer after victim refused to give defendant money for drugs, defendant told officers where to find the hammer, officers found hammer in location where defendant stated it would be, medical examiner testified that victim died from blunt force head trauma, defense expert testified that defendant told him he knew he had done wrong by killing victim, and defendant admitted on cross-examination that he struck victim three times with the hammer even though victim was no threat after the first blow. 21 Okl.St.Ann. § 702.

39. Homicide ⚿530

Malice, the deliberate intention to take the life of another without justification, may be formed in an instant.

40. Criminal Law ⚿1144.13(5), 1159.4(1)

The Court of Criminal Appeals will accept all reasonable inferences and credibility choices that tend to support the verdict.

41. Constitutional Law ⚿270(2)
Sentencing and Punishment ⚿1767, 1789(10)

The trial court's exclusion of a videotaped statement from defendant's mother, during the second stage of first-degree murder prosecution, violated due process, even though a transcript of the deposition was read to the jury, and warranted remand for resentencing; the jury was denied the opportunity to actually see and hear defendant's mother present mitigation evidence and to judge her demeanor and assess her credibility, and statute that contemplated reading preserved examination testimony into the record did not making reading the examination mandatory. U.S.C.A. Const.Amends. 5, 8, 14; Const. Art. 2, § 7; 12 Okl.St.Ann. § 3002; 22 Okl.St.Ann. § 781 et seq.

42. Criminal Law ⚿1158(1)

The Court of Criminal Appeals affords great deference to jurors' determinations of witness credibility due to their unique ability to personally observe the demeanor of the witnesses at trial.

43. Sentencing and Punishment ⚿1757

The sentencer in capital cases should not be precluded from considering any relevant mitigating evidence.

44. Sentencing and Punishment ⚿49

Sympathy is proper for the jury to consider in assessing punishment.

45. Sentencing and Punishment ⚿1757, 1767

Prohibiting the jury in capital sentencing proceeding from viewing videotaped examination of defendant's mother, whose demeanor exhibited distress and sadness she had for her son in a way that the cold reading of a transcript could not portray, was improper.

46. Sentencing and Punishment ⚿1780(3), 1789(3, 10)

The trial court's decision to instruct the jury on impeachment of witnesses by a former conviction during the sentencing phase of first-degree murder trial constituted plain error and warranted vacation of defendant's death sentence and remand for resentencing; defendant relied on several family witnesses and their own troubles with the law and addiction to explain defendant's background, addiction, and criminality, and the instruction might have led the jury to believe the evidence of the witnesses' prior convictions was offered for impeachment purposes and was not offered to explain defendant's background. U.S.C.A. Const.Amends. 5, 8, 14.

47. Criminal Law ⚿641.13(1)

To prevail on a claim of ineffective assistance of counsel, an appellant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) the reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. U.S.C.A. Const. Amend. 6.

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Tamra Spradlin, Tim Wilson, Asst. Public Defenders, Okla. Co. Public Defender's Office, Oklahoma City, OK, attorneys for the defendant at trial.

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

OPINION

C. JOHNSON, Judge.

¶ 1 Appellant, James Allen Coddington, was convicted by a jury in Oklahoma County District Court, Case No. CF 97–1500, of First Degree Murder, in violation of 21 O.S.Supp.1996, § 701.7(A) (Count 1) and of Robbery with a Dangerous Weapon, in violation of 21 O.S.1991, § 801 (Count 2). Jury trial was held before the Honorable Jerry D. Bass, District Judge, on April 21st—May 1st, 2003. On Count 1, the jury found the existence of two aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence,[1] and (2) the murder was especially heinous, atrocious, or cruel.[2] The jury set punishment at death on Count 1 and life imprisonment without the possibility of parole on Count 2. Judgment and Sentence was imposed in accordance with the jury's verdicts.

¶ 2 Coddington gave timely notice of his intent to appeal the convictions and sentences. The record on appeal was completed September 3, 2004. Coddington filed his Brief of Appellant on November 8, 2004, and the State filed the Brief of Appellee on March 8, 2005. Coddington filed a Reply Brief on March 28, 2005. This matter was originally set for oral argument on October 18, 2005. At Coddington's request, oral argument was rescheduled and was subsequently held on November 8, 2005. The parties each filed supplemental authorities on November 18, 2005.

¶ 3 In early March of 1997, Appellant, a cocaine addict, suffered a relapse and began using cocaine again. He estimated he spent one thousand dollars ($1000.00) a day to support his habit. Within a short time, he was desperate for money and robbed a convenience store on March 5, 1997 to feed his habit. The robbery did not yield enough money, so Coddington went to his friend Al Hale's home to borrow fifty dollars ($50.00).

¶ 4 Hale, then 73 years old, worked with Coddington at a Honda Salvage yard. Hale had previously loaned Coddington money and had also contributed towards Coddington's previous drug treatment. Hale's friends and family knew he kept a large amount of cash at his home. On March 5, 1997, he had over twenty-four thousand dollars ($24,000.00) stashed in his closet.

¶ 5 Coddington went to Hale's home on the afternoon of March 5, 1997 to borrow money, because he had been on a cocaine binge for several days and needed money for more cocaine. Coddington watched television with Hale for an hour or two and then smoked crack cocaine in Hale's bathroom. Hale knew Coddington was using cocaine again. Hale refused to give him money and told him to leave. As he was leaving, Coddington saw a claw hammer in Hale's kitchen, grabbed it, turned around and hit Hale at least three times with the hammer. Coddington believed Hale was dead, so he took five hundred twenty-five dollars ($525.00) from his pocket and left. Following the attack on Hale, Coddington robbed five more convenience stores to get money for cocaine.

¶ 6 Oklahoma City police detectives arrested Coddington on March 7, 1997, outside of his apartment in south Oklahoma City. Coddington told one officer he had been on a cocaine binge. On the way to the police department, Coddington tried to choke himself by wrapping the seat belt around his

1. 21 O.S.1991, § 701.12(1)

2. 21 O.S.1991, § 701.12(4)

neck. He also stated he wanted to die. At the police station, during an interview with a robbery detective and a homicide detective, Coddington confessed to the convenience store robberies and also to the murder of Mr. Hale. He admitted he struck Mr. Hale in the head with a claw hammer and believed Hale was dead when he left. At trial, Coddington admitted he murdered Hale. He testified he did not go to Hale's house with the intent to do anything except borrow money to buy more cocaine. He said he did not have a weapon with him, did not intend to rob Hale, and did not intend to kill him.

¶ 7 Ron Hale, the victim's son, discovered Hale after the attack on the evening of March 5, 1997. There was blood and blood spatter everywhere. Hale was lying in his bed, soaked in blood, still breathing but unable to speak. Hale was transported first to Midwest City Hospital and then to Presbyterian Hospital. He died approximately twenty-four hours later. An autopsy showed Hale died from blunt force head trauma. The medical examiner testified he sustained at least three separate blows to the left side of his head, consistent with being hit in the head with a claw hammer. He also testified Hale had defensive wounds.

¶ 8 Coddington admitted that he did not call the police when he left Hale's house because he did not want to get caught. He also admitted he had prior felony convictions.

¶ 9 Other relevant facts will be discussed under the related propositions of error.

JURY ISSUES

[1] ¶ 10 In Proposition Two, Coddington contends he was denied an impartial jury comprised of a fair cross-section of the community when the State exercised five peremptory challenges against minority jurors in violation of his state and federal constitutional rights and in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The State exercised peremptory challenges to exclude four of six African–American jurors from the jury panel of thirty. Coddington claims the State also exercised a peremptory challenge to excuse a woman of "Spanish heritage."

[2–5] ¶ 11 A defendant may raise an equal protection challenge to the use of peremptory challenges by showing that the prosecutor used the challenges for the purpose of excluding members of the defendant's own race from the jury panel. *Batson,* 476 U.S. at 96, 106 S.Ct. at 1723–1724; *see also Powers v. Ohio,* 499 U.S. 400, 415, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991)(extending *Batson* to include race-based exclusions even when the defendant and the potential juror are not of the same race). Under *Batson,* the defendant must first make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Then, the burden shifts to the prosecutor to articulate a race-neutral explanation related to the case for striking the juror in question. The trial court must then determine whether the defendant has carried his burden of proving purposeful determination. *Batson,* 476 U.S. at 98, 106 S.Ct. at 1724. The race-neutral reason given by the prosecutor need not rise to the level of justifying excusal for cause, but it must be a "clear and reasonably specific" explanation of his or her "legitimate reasons" for exercising the challenges. *Id.,* 476 U.S. at 98, *n.* 20, 106 S.Ct. at 1724, n. 20; *see also Neill v. State,* 1994 OK CR 69, ¶ 17, 896 P.2d 537, 546, *cert. denied,* 516 U.S. 1080, 116 S.Ct. 791, 133 L.Ed.2d 740 (1996); *Short v. State,* 1999 OK CR 15, ¶ 12, 980 P.2d 1081, 1091, *cert. denied,* 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (2000). The trial court's findings are entitled to great deference, and we review the record in the light most favorable to the trial court's ruling. *Batson,* 476 U.S. at 98, n. 21, 106 S.Ct. at 1724, n. 21; *Neill, id.; Bland v. State,* 2000 OK CR 11, ¶ 9, 4 P.3d 702, 710–711, *cert. denied,* 531 U.S. 1099, 121 S.Ct. 832, 148 L.Ed.2d 714 (2001).

¶ 12 Defense counsel objected to the prosecutor's exercise of peremptory challenges against African–American jurors, and in response, the State articulated the following reasons for excusing those jurors: the State excused Juror Christian because he had been prosecuted by the Oklahoma County District Attorney's office for embezzlement and had a brother in prison; the prosecutor excused Juror Mann because the prosecutor believed

he could not impose the death penalty and did not believe he truly had a change of heart after taking a walk; the prosecutor excused Juror Graham, because she had previously been prosecuted for embezzlement; the prosecutor excused Juror Mensah, because she had previously been prosecuted for fraud, because her brother was being prosecuted for larceny, and because she acted totally disinterested in what was going on during *voir dire.* Defense counsel did not object to the State's excusal of Juror Equigua, but now asks this Court to consider her removal in its consideration of the State's "pattern" of excusing minority jurors.[3] Defense counsel argued that excusing African–American jurors based upon prior contact with the criminal justice system had a disparate impact on the jury because a higher percentage of that minority population have had contacts with the criminal justice system and there are fewer "non-disenfranchised" African–Americans available for jury service.

¶ 13 The trial court did not specifically rule on the "race-neutral" reasons offered by the State and did not specifically overrule defense counsel's objection to the disparate impact the State's exercise of peremptories had on the jury. However, *voir dire* continued, the alternate jurors were selected, and the record reflects the trial court accepted the prosecutor's stated reasons for removing these minority jurors and did not believe the reasons were pretexts for purposeful discrimination.

¶ 14 The reasons offered by the State for excusing Jurors Christian, Mann, Graham, and Mensah were facially valid and do not reveal an intent to discriminate on the basis of race. *Short v. State,* 1999 OK CR 15, ¶ 15, 980 P.2d at 1092 ("[e]xcusal of a potential juror because of a prior criminal record or because of the criminal records of family members are legitimate reasons for removal"); *Harris v. State,* 2004 OK CR 1, ¶ 21, 84 P.3d 731, 743 (removal of juror because prosecutor believed she was not being truthful was not only race-neutral but plausible). "The critical question in determining whether a prisoner has proved purposeful discrimination . . . is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.' " *Miller–El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *citing Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995). Here, the trial court accepted the prosecutor's reasons for striking the four African–American jurors, and its "decision on the issue of discriminatory intent will not be overturned unless we are convinced that determination is clearly erroneous." *Short,* 1999 OK CR 15, ¶ 17, 980 P.2d at 1092, *citing Hernandez v. New York,* 500 U.S. 352, 369, 111 S.Ct. 1859, 1871–1872, 114 L.Ed.2d 395 (1991).

¶ 15 The record shows the prosecutor also exercised a peremptory challenge against a Caucasian juror because of his past contact with the District Attorney's office or the criminal justice system.[4] At least two African–American jurors were among those finally seated in this case. The record does not suggest the crimes prosecuted in this case were in any way racially motivated. As in *Short,* the record does not show the prosecutor was exercising the State's peremptory challenges to purposefully discriminate and exclude jurors on the basis of race, and the trial court's decision to accept the prosecutor's reasons for excusing the four African–American jurors was not clearly erroneous. *Black v. State,* 2001 OK CR 5, ¶ 31, 21 P.3d 1047, 1061, *denied,* 534 U.S. 1004, 122 S.Ct. 483, 151 L.Ed.2d 396 (2001)(review is only for clear error by the trial court and we review the record in a light most favorable to the trial court's ruling).

[6] ¶ 16 Defense counsel did not object to the prosecutor's exercise of peremptory challenge against Juror Equigua, and the State

3. The record of *voir dire* shows Juror Equigua was divorced and that the name Equigua originated from the "Basque region of Spain." This record does not show this juror was, in fact, a minority juror. It only shows her name originated from another country.

4. The State exercised its second peremptory to excuse Juror McGaugh—a "white male" who was previously prosecuted for DWI and DUI.

was therefore not required to give a race-neutral reason for her excusal. Because no objection was made at trial, our review is for plain error. *Wackerly v. State*, 2000 OK CR 15, ¶ 7, 12 P.3d 1, 7, *cert. denied*, 532 U.S. 1028, 121 S.Ct. 1976, 149 L.Ed.2d 768 (2001). Coddington suggests Juror Equigua's excusal is "probative of a pattern of discrimination." We disagree. Coddington has not made a *prima facie* showing the peremptory challenge against Juror Equigua was made on the basis of race. The record does not establish that Juror Equigua was, in fact, a woman of a minority race. *See f.* 1 *supra.* We find no plain error.

¶ 17 In this case, the prosecutor's exercise of peremptory challenges against African–American jurors because of prior contact with the criminal justice system was a sufficiently, race-neutral reason to survive Coddington's *Batson* objections. The ratio of African–American jurors called at the beginning of *voir dire* (1:6) compared to those who remained and were seated on Coddington's jury (1:5) was about the same. Coddington has not shown he was deprived of a jury composed of a fair cross-section of the community due to the excusal of minority jurors.

¶ 18 On the first day of witness testimony, during the examination of Scott Cox, defense counsel informed the trial court that Juror Muller appeared to be "nodding off and sleeping. She's about to fall out of her chair." Defense counsel asked the trial court to watch the juror and, at break, to talk to her. Assistant District Attorney Reid also noted the same conduct. The trial court watched the juror and a short while later, the trial court called the attorneys to the bench and stated "[s]he is nodding off . . .". At defense counsel's request, the trial court spoke with Juror Muller in chambers. During this colloquy, Juror Muller told the trial court she was feeling strange and "not very well;" she thought it was something to do with her blood sugar. Juror Muller told the trial court she was having difficulty with her vision and walking.[5]

¶ 19 Juror Muller tested her blood sugar in the presence of the trial court, defense counsel and counsel for the State, and determined it was high. When asked if there was anything she could do to bring it down, she told the trial court exercise was all that she could do.

¶ 20 The trial court allowed the parties to question Juror Muller and her answers revealed she felt she had heard all of the questions asked and answers given, did not think she had missed anything, and felt she could remain on the jury and be alert and attentive. She admitted to defense counsel that, in addition to her sleepiness, she had an upset stomach and a little headache and that it had been "gradually getting worse today."

¶ 21 After the parties questioned Juror Muller, defense counsel asked the trial court to continue to observe her and then to "revisit the issue . . . at 1:30" to see how she was feeling. Defense counsel stated, "I think we ought to go on. I mean, let's keep putting witnesses on and if she starts nodding off again then we may have to stop it, Judge. . . . ." The trial court again agreed to keep an eye on her.

¶ 22 Following cross-examination of the witness, court recessed for lunch and the jurors were asked to return at 1:30. When the jury returned, the trial court told the parties, "[I]nformally I spoke with Juror Muller. She insists that she's doing just fine." Defense counsel asked the trial court to continue to watch her. The record contains no further specific references to Juror Muller.

[7] ¶ 23 In Proposition Three, Coddington contends the trial court's failure to replace Juror Muller with an alternate juror deprived him of his right to a fair trial by a jury of twelve. Coddington submits the trial court had the statutory authority to remove a sick juror and to replace that juror with an alternate and suggests his failure to use that

5. Before opening statements, the trial court made the following statement: "Does anybody have any particular medical needs? Sometimes I have people that are diabetics and they have to eat candy or they have to take regular medications. Does anybody have any regular medication or anything that they need to take? Anything at all?" The record reflects no juror responded.

authority *sua sponte* was an abuse of discretion.

¶ 24 A criminal defendant charged with murder is entitled to a trial by a jury composed of twelve people. Okla. Const. art. II, § 19; U.S. Const. amends. VI, XIV. "In a capital murder case in which the jury found guilt and set punishment at death, the participation of a juror who "dosed (sic) during parts of the trial" is an unacceptable degradation of due process which requires reversal." *Spunaugle v. State,* 1997 OK CR 47, ¶ 34, 946 P.2d 246, 253, *overruled on other grounds in Long v. State,* 2003 OK CR 14, ¶ 18, 74 P.3d 105.

[8–10] ¶ 25 Juror misconduct must be proven by clear and convincing evidence. *Spunaugle,* 1997 OK CR 47, ¶ 33, 946 P.2d at 253. "A trial judge has inherent power to substitute a juror for good cause." *Miller v. State,* 2001 OK CR 17, ¶ 23, 29 P.3d 1077, 1082. 22 O.S.2001, § 601a provides for the use of alternate jurors to replace jurors who are sick or who have died; however, the trial court's discretion to substitute jurors is not limited to cases of sickness or death. *Miller,* 2001 OK CR 17, ¶ 23, n. 5, 29 P.3d at 1083. This discretion ought to be exercised with great caution, especially in capital cases. *Id.*

¶ 26 The trial court could have exercised its discretion and properly removed Juror Muller and replaced her with an alternate juror because she was obviously sleepy due to a blood sugar problem. We found the trial court's belief that the juror in *Miller* was ill was a sufficient basis for her dismissal. *Id.,* 2001 OK CR 17, ¶ 26, 29 P.3d at 1083. However, in this case, defense counsel did not request Juror Muller's removal due to illness and did not object when the trial court did not remove her.

¶ 27 The trial court acted within its discretion by keeping Juror Muller on the jury, and no plain error occurred. First, defense counsel specifically *did not* request the trial court to remove Juror Muller; rather, defense counsel stated the trial "ought to go on" and asked the trial court to continue to watch her. Second, the record does not conclusively show Juror Muller was sleeping; she stated she had not missed any of the questions asked or answered and felt she could continue as an alert and attentive juror. Third, nothing further appears in the record which would indicate her sleepiness due to illness continued to be a problem after the lunch recess on the first day of trial testimony.

[11, 12] ¶ 28 Alternatively, Coddington argues his trial counsel was ineffective for failing to request the trial court to remove this juror. While the trial court might properly have removed Juror Muller if the record conclusively showed she was sleeping or was too ill to continue, defense counsel specifically stated the trial "ought to go on" and did not request the trial court to remove her as a matter of trial strategy. In hindsight, it may appear to Coddington that his defense counsel's decision to give this juror another chance was not appropriate, but that is not sufficient to meet the test for ineffective assistance of counsel established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court does not evaluate trial strategy in hindsight. *Woodruff v. State,* 1993 OK CR 7, ¶ 16, 846 P.2d 1124, 1133, cert. denied, 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993). Further, the record does not establish this juror missed any of the testimony due to inattentiveness or illness and Coddington has not shown he was prejudiced by his trial counsel's failure to request her removal from the jury. Proposition Three does not warrant relief.

FIRST STAGE ISSUES

[13] ¶ 29 In Proposition One, Coddington claims his in custody extra judicial confession should not have been admitted, because his waiver of *Miranda*[6] rights was "unknowing and involuntary." First, he argues that because he was read his *Miranda* rights in relation to the robbery investigations, but not in relation to the homicide investigation, his subsequent confession to the homicide was made in violation of his Fifth and Fourteenth Amendment rights against self-incrimination and right to counsel, and in violation of Okla.

6. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Const. art. 2, § 21. Secondly, he argues that he was incapable of knowingly and voluntarily waiving his rights at all, because he was "high, sleep deprived, hungry and suicidal" at the time of the interrogation. Coddington therefore claims the admission of his confession violated his Fifth and Fourteenth Amendment rights under the federal constitution and corresponding provisions of the Oklahoma Constitution.

¶ 30 During a hearing to determine the admissibility of Coddington's statements,[7] former Oklahoma City police officer Smart testified he advised Coddington of his *Miranda* rights after robbery detectives arrested him as a suspect in a string of armed robberies. They were standing outside of Coddington's apartment when Coddington began making voluntary statements. Smart immediately read him his *Miranda* rights. He stated Coddington said he understood his rights, waived them, and continued to make statements. He also signed a search waiver for his apartment. He said Coddington did not appear to be drunk or high on drugs; he walked normally and was coherent of his environment.

¶ 31 Former Oklahoma City police detective Despain interviewed Coddington at the police department a couple of hours later. Despain did not re-advise Coddington of his *Miranda* rights because Coddington had already been read and waived those rights. Coddington told Despain he remembered being so advised. Despain said Coddington did not appear to be under the influence; he was talkative, rational and alert. Despain's interview with Coddington was videotaped.

¶ 32 Coddington does not dispute that he was read his *Miranda* rights or that he waived those rights at the time of his arrest for the armed robberies. In fact, at trial, Coddington admitted that he waived his rights and voluntarily talked to the detectives on this case. Coddington now complains that he was not readvised of those rights when the interrogation turned towards his involvement in the homicide. Because the invocation of one's *Miranda* rights is non-offense specific, Coddington argues the opposite must also be true—a knowing and voluntary waiver of *Miranda* cannot occur unless the suspect is advised of what crime or crimes he is a suspect. In effect, he argues that his waiver of *Miranda* and resulting statement was compelled in violation of the Fifth Amendment, because he waived his rights without being informed he would be questioned about crimes for which he was not arrested.

[14–16] ¶ 33 This argument "strains the meaning of compulsion past the breaking point." *Colorado v. Spring,* 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987). Voluntariness of a confession is judged by examining the totality of the circumstances, including the characteristics of the accused and the details of the interrogation. *Van White v. State,* 1999 OK CR 10, ¶ 45, 990 P.2d 253, 267. The inquiry has two aspects—the relinquishment of the right must be voluntary in that it was a product of free, deliberate choice, rather than coercion, intimidation or deception; and, the waiver must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. *See Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410, 421 (1986). The trial court may properly find a valid waiver of *Miranda* rights where the totality of the circumstances show both an "uncoerced choice and the requisite level of comprehension. . . ." *Id.; see also Lewis v. State,* 1998 OK CR 24, ¶ 34, 970 P.2d 1158, 1170, *cert. denied,* 528 U.S. 892, 120 S.Ct. 218, 145 L.Ed.2d 183 (1999). We have never required the requisite level of comprehension to include being informed of every possible offense about which one might be questioned.

¶ 34 After hearing the officers' testimony at the *in camera* hearing, the trial court watched Coddington's videotaped confession and found Coddington appeared to be "in some sort of heightened state of intoxication." However, the trial court found, based on the videotape, that Coddington was not threatened, coerced or promised anything, and nothing indicated his statements

7. *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) established a defendant's right to an *in camera* hearing on the voluntariness of a confession.

were made against his will. After considering the totality of the circumstances, the trial court admitted the taped confession and the physical evidence derived from it. The question of the voluntariness of Coddington's waiver was a fact question to be resolved by the jury and the trial court instructed the jury accordingly. The trial court's ruling to admit the statement was supported by competent evidence of the voluntary nature of the statement. *Bryan v. State,* 1997 OK CR 15, ¶ 17, 935 P.2d 338, 352, *cert. denied,* 522 U.S. 957, 118 S.Ct. 383, 139 L.Ed.2d 299 (1997).

¶ 35 Officer Smith testified he read *Miranda* warnings to Coddington, and Coddington indicated he understood his rights and waived them. At the beginning of the interview at the police station, Officer Despain said, "Ok (sic), again, I'm Sgt. DeSpain, this is Det. Wes Weaver, uh now I understand uh that Sgt. Smart advised you of your rights earlier and you signed a search waiver." Coddington responded, "Yeah." Sgt. Despain said, "You remember that." Coddington replied, "Yeah." Throughout the interview, Coddington was cooperative and did not appear to be coerced or threatened in any way. Further, after answering questions relating to the burglaries, Coddington said, "Uh, you need to get homicide down here." He then confessed to Hale's murder and willingly provided the detectives with details about the crime. At trial, Coddington testified he was read his rights and voluntarily waived them.

¶ 36 There is no question that Coddington was informed of his *Miranda* rights and waived them. He exhibited no reluctance in speaking with the detectives about the robberies or the homicide. In fact it was he who volunteered statements about the homicide and initiated the discussion about the homicide. The relevant inquiry is whether the suspect understands the rights at stake and the consequences of waiving them. *Colorado v. Spring,* 479 U.S. at 573, 107 S.Ct. at 857. His "awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Id.*, 479 U.S. at 577, 107 S.Ct. at 859. The trial court's decision to admit Coddington's confession and let the jury determine whether it was knowingly and voluntarily made was proper and was supported by the record.

[17] ¶ 37 Coddington also argues he was "incapable of knowingly and voluntarily waiving his rights as he was high, sleep deprived, hungry and suicidal at the time of the interrogation." While the officers who testified at the *Jackson v. Denno* hearing both indicated Coddington appeared coherent and rational and neither thought he was under the influence of intoxicants, the trial court did not agree and specifically found that Coddington appeared to be in some "heightened state of intoxication." Coddington admitted he had been using cocaine for several days and had not eaten or slept. Still, his fatigue and hunger from drug usage do not render his waiver of *Miranda* involuntary.

[18] ¶ 38 "[S]elf-induced intoxication, short of mania, or such an impairment of the will and mind as to make the person confessing unconscious of the meaning of his words, will not render a confession inadmissible, but goes only to the weight to be accorded to it." *Moles v. State,* 1974 OK CR 57, ¶ 6, 520 P.2d 822, 824. Coddington gave specific details about both the robberies and the murder of Mr. Hale, and appeared to understand exactly what was going on. That he also confessed to crimes which could not be corroborated does not show he was so intoxicated that his *Miranda* waiver was not knowingly and voluntarily made. Further, from his prior contacts with law enforcement and prior convictions, we can assume he was familiar with and understood the "concepts encompassed in *Miranda." Smith v. Mullin,* 379 F.3d 919, 934 (10th Cir.2004).

¶ 39 Coddington simply has not shown his *Miranda* rights waiver was not knowingly and voluntarily made. The admission of his confession and the physical evidence derived therefrom did not deprive Coddington of his state or federal constitutional rights. Proposition One is therefore denied.

[19] ¶ 40 In Proposition Four, Coddington argues the trial court's limitations on the testimony of Dr. J.R. Smith deprived him of his Fifth, Sixth, and Fourteenth Amendment

rights to present a defense and confront the State's evidence. Prior to trial, the State filed a Motion in Limine to prohibit the defense expert from testifying that Coddington could not have formed the requisite intent of malice aforethought due to his cocaine intoxication. At trial, prior to the examination of the expert defense witness, the trial court sustained the State's Motion in Limine, "keeping in line with *White v. State*," and instructed defense counsel that its expert could "suggest the inferences the jury should draw from the application of his specialized knowledge ... as long as he refrained from merely telling the jury what result to reach." Following the trial court's ruling, defense counsel argued that *Hooks v. State* and *White v. State*[8] were unconstitutional and violated the "Fourteenth Amendment fundamental fairness clause and equal provisions in the Oklahoma state constitution." The defense made the following offer of proof in response to the trial court's ruling:

> If permitted to testify as to the effect of James Coddington's cocaine addiction and his ability to form malice aforethought Dr. Smith would testify that on 5 March in his opinion that to a reasonable degree of medical certainty James Coddington would not have been able to form the intent of malice aforethought and that he would have been experiencing the effects of the cocaine to such a degree that the brain would be unable to formulate that specific intent and we would propound that question and we would urge the grounds that we have made in the previous record.

[20–22] ¶ 41 Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. 12 O.S.2001, § 2704. "Any properly qualified expert testifying in accordance with the standards governing admissibility of expert testimony may offer an opinion on the ultimate issue if it would assist the trier of fact." *Johnson v. State*, 2004 OK CR 25, ¶ 16, 95 P.3d 1099, 1104. The "otherwise admissible" language of § 2704 must be read in context with 12 O.S.2001, §§ 2403 (amended 2003), 2701, 2702 (amended 2002). *Romano v. State*, 1995 OK CR 74, ¶ 21, 909 P.2d 92, 109, *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996). "While expert witnesses can suggest the inferences which jurors should draw from the application of specialized knowledge to the facts, opinion testimony which merely tells a jury what result to reach is inadmissible." *Id.; see also Hooks v. State*, 1993 OK CR 41, ¶ 13, 862 P.2d 1273, 1278, *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994). "[W]here the normal experiences and qualifications of laymen jurors permit them to draw proper conclusions from the facts and circumstances, expert conclusions or opinions are inadmissible." *Gabus v. Harvey*, 1984 OK 4, ¶ 18, 678 P.2d 253, 255.

¶ 42 The normal experiences and qualifications of laymen jurors likely do not provide an understanding of the effects of cocaine intoxication on one's ability to control behavior, to think rationally, and to form an intent to kill. An expert's opinion on the effects of cocaine intoxication would have been helpful to the trier of fact. While Dr. Smith could not, under our case law, tell the jury what result to reach, Dr. Smith could properly have testified that, in his expert medical opinion, Coddington would have been unable to form the requisite malice. Such testimony would not "simply have told the jury what result to reach." Experts for the State routinely testify to conclusions drawn from their specialized knowledge even on ultimate issues. *See e.g. Lott v. State*, 2004 OK CR 27, ¶¶ 84–88, 98 P.3d 318, 342–343, *cert. denied*, 544 U.S. 950, 125 S.Ct. 1699, 161 L.Ed.2d 528 (2005)(State's expert on sexual assault could properly testify rape was result of non-consensual sex and conclude oral sodomy had occurred based upon her examination of physical evidence); *Abshier v. State*, 2001

8. In *Hooks v. State*, 1993 OK CR 41, ¶ 16, 862 P.2d 1273, 1279, we said that when the defendant attempts to elicit expert testimony on the issue whether he possessed the requisite intent to commit the crime in question, that testimony should be excluded. In *White v. State*, 1998 OK CR 69, ¶¶ 14–15, 973 P.2d 306, 311, where the defendant sought to introduce expert testimony on whether his intoxication affected his mental state and prevented him from forming malice aforethought, we stated such evidence "was not prohibited by *Hooks*" even though it would have embraced an ultimate issue to be decided by the trier of fact.

OK CR 13, ¶ 116, 28 P.3d 579, 604, cert. denied, 535 U.S. 991, 122 S.Ct. 1548, 152 L.Ed.2d 472 (2002), *rev'd on other grounds by Jones v. State,* 2006 OK CR 17, 134 P.3d 150 (State's expert witness could testify that child was conscious and crying during beating from defendant based upon his experience and studies); *Welch v. State,* 2000 OK CR 8, ¶¶ 21–23, 2 P.3d 356, 368–369, *cert. denied,* 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000)(Detective's testimony that victim's death was not self-inflicted or the result of auto-erotic behavior, that her death was not accidental but intentionally inflicted, and her wounds were not consistent with sexual asphyxiation was properly admitted and based upon his specialized knowledge of homicide investigations).

[23] ¶ 43 Here, Coddington raised sufficient evidence for the trial court to instruct the jury on his defense of voluntary intoxication. When a defendant raises the defense of voluntary intoxication, an expert may properly offer his or her opinion on whether the defendant's actions were intentional. *Malicoat v. State,* 2000 OK CR 1, ¶ 11, 992 P.2d 383, 395, *cert. denied,* 531 U.S. 888, 121 S.Ct. 208, 148 L.Ed.2d 146 (2000); *White,* 1998 OK CR 69, ¶ 15, 973 P.2d at 311. Dr. Smith could have properly testified that, in his opinion and based upon his specialized knowledge, he believed Coddington would have been unable to form the requisite deliberate intent of malice aforethought. The trial court erred and abused its discretion by sustaining the Motion in Limine and so limiting the expert witness' testimony. *See Davis v. State,* 2004 OK CR 36, ¶ 30, 103 P.3d 70, 79 (admission of evidence lies within the discretion of the trial court).

¶ 44 Coddington contends the trial court's limitation of Dr. Smith's testimony violated his fundamental right to present a defense, was prejudicial, and warrants reversal of his conviction. The State responds that Coddington's intoxication defense was "meritless," would not have been affected by the proposed testimony, and the limitation on Dr. Smith's testimony was harmless beyond a reasonable doubt. We disagree with the State's position that Coddington's jury was "erroneously instructed" on the defense of voluntary intoxication. The trial court found sufficient evidence of intoxication and also noted the State itself had suggested it. The question is whether the proposed, excluded, testimony would have made a difference; we believe it would not.

¶ 45 Dr. Smith testified about Coddington's family history, his medical history, and his history of drug use. He testified about the properties of cocaine and about the effects of cocaine in general upon the body and the brain. He testified about cocaine addiction, how it happens quickly, and how certain people, like Coddington, are more vulnerable to it. He testified that Coddington was a cocaine addict. He testified how cocaine affects the part of the brain one thinks with, how it affects what one does, one's ethics, one's judgment, how one behaves, and how one makes decisions. Seemingly the only thing his testimony did not cover was how cocaine intoxication might have affected Coddington on March 5, 1997, based upon his examination of Coddington's medical and drug abuse history, upon his observation of the videotaped confession, and based upon his prior experience and studies of cocaine addicts and addiction. On one hand, the jury heard testimony from Dr. Smith which would have been helpful to its consideration of Coddington's voluntary intoxication defense; on the other hand, the absence of the expert's opinion on Coddington's ability to specifically intend to commit the homicide was notable.

[24–26] ¶ 46 "Defendants in criminal trials deserve to have their day in court, to require the State to meet its burden of proof through evidence presented in open court, to tell their stories, and to defend themselves against the crimes of which they have been charged." *Malone v. State,* 2002 OK CR 34, ¶ 5, 58 P.3d 208, 209. A defendant's due process right under the Fifth Amendment and to compulsory process under the Sixth Amendment includes the right to present witnesses in his or her own defense. *United States v. Dowlin,* 408 F.3d 647, 659 (10th Cir.2005); *see also Washington v. Texas,* 388 U.S. 14, 18–19, 87 S.Ct. 1920, 1923, 18 L.E.2d 1019 (1967). "The right to offer the testimony of witnesses ... is in plain terms the right to present a defense.... This right is a

fundamental element of due process of law." *Washington, id.*

¶ 47 To determine whether Coddington was denied this fundamental right, we must first determine whether the trial court erred in excluding the testimony. Then, to establish constitutional error, Coddington must show the evidence was material to the extent its exclusion violated his right to present a defense. *Dowlin, id.* To determine materiality, we examine the entire record and must ask "whether the evidence was of such an exculpatory nature that its exclusion affected the trial's outcome." (citations omitted) *Id.*

¶ 48 The trial court clearly erred by limiting the testimony of Dr. Smith on the issue of Coddington's ability to form malice and Coddington's conviction cannot stand unless we find the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Such testimony, while helpful to the jury and certainly material, was not exculpatory in the sense that it would have exonerated the defendant; but, if believed by the jury, the evidence certainly might have reduced the degree of homicide for which Coddington was convicted.

[27] ¶ 49 The exclusion of Dr. Smith's expert opinion testimony relating to Coddington's specific ability to form the requisite intent for malice murder did not prevent Coddington from putting forth significant evidence relating to cocaine intoxication. Dr. Smith testified extensively about the effects of cocaine addiction and intoxication on the brain, on decision-making and behavior. The evidence in this case was overwhelming, and we find, beyond a reasonable doubt, that Dr. Smith's expert opinion on the ultimate issue of whether Coddington could form the requisite malice would not have made a difference in the jury's determination of guilt. We find the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

[28] ¶ 50 In Proposition Five, Coddington argues he was denied due process, a fair trial and a reliable sentence because improper victim impact evidence was admitted during the first stage of trial. First, he complains that Ron Hale's unsolicited testimony that his brain disorder "got worse" when "my dad died" was irrelevant, prejudicial and constituted improper victim impact evidence. Secondly, he complains that the introduction of a photograph of the deceased while alive was irrelevant, prejudicial, denied him of a reliable sentence, and violated *ex post facto* principles.

¶ 51 During direct examination, because Ron Hale had obvious difficulty answering the prosecutor's questions, the prosecutor asked him if he suffered from a brain disease which made it difficult for him to come up with certain words. Hale answered,

> Yes. It's called Pick's disease. I lose simple words on the left side of my brain and it's because—even things that you say I know what you're talking about, but I can't hardly say them sometimes. Because this went way back in time to the day my dad died and that's when it got worse.

Upon defense counsel's announcement that it would not cross-examine Hale, the witness said, "Okay. I do have something that me and my sister and my brother would like to say down the road if we can ... There's something else I would like to say." Coddington complains this testimony was not only irrelevant and prejudicial but also that it constituted impermissible victim impact evidence. The State responds that the testimony relating to Pick's Disease was necessary to explain the witness' difficulty testifying; the State agrees Hale's last statement was inappropriate, but so innocuous that it did not amount to error warranting relief.

[29] ¶ 52 There was no objection to Hale's testimony and our review is for plain error. *Lott*, 2004 OK CR 27, ¶ 70, 98 P.3d at 340 (failure to object to witness testimony or to cross-examine witness waives all but plain error with regard to witness testimony). While the victim's son's neurological problem was not relevant to or probative of any issue to be proved at trial, the State elicited this testimony to explain to the jury why this witness had obvious difficulty expressing himself and answering the State's questions. We have no problem with its admission. Hale's testimony that his condition got worse after his father died called the jury's atten-

tion to the effect of his father's murder on him. This testimony was not solicited and no further attention was called to it by either the State or the defense. While it is improper for the prosecutor to ask jurors to have sympathy for the victim(s) and improper to introduce victim impact evidence during the first stage of trial, Hale's testimony relating to the aggravation of his disease following the death of his father was not solicited and was not so prejudicial to warrant relief. We find no plain error.[9] Review of this witness's testimony reflects a number of non-responsive and/or confusing answers and it is unlikely the jury was at all affected by Hale's spontaneous, unsolicited statement.

[30] ¶ 53 Coddington also complains the admission of a single, pre-mortem photograph of the victim was irrelevant, prejudicial, denied him of a reliable sentence, and violated *ex post facto* principles. Coddington argues that when the legislature amended Section 2403, it created a *per se* rule of relevancy for pre-mortem photographs in homicide cases.

¶ 54 Title 12 O.S.Supp.2003, § 2403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise. *However, 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.*

(emphasis added). Prior to its amendment in 2002, this Court interpreted the former Section 2403 to favor the admission of relevant evidence, but repeatedly held the admission of pre-mortem photographs of a homicide victim were inadmissible unless the photograph(s) was/were "relevant to some material issue" and its "relevancy outweighs the danger of prejudice to the defendant." *Thornburg v. State,* 1999 OK CR 32, ¶ 23, 985 P.2d 1234, 1244; *see e.g. Tilley v. State,* 1998 OK CR 43, ¶ 32, 963 P.2d 607, 615; *Valdez v. State,* 1995 OK CR 18, ¶ 64, 900 P.2d 363, 381, *cert. denied,* 516 U.S. 967, 116 S.Ct. 425, 133 L.Ed.2d 341 (1995); *Staggs v. State,* 1991 OK CR 4, ¶ 7, 804 P.2d 456, 458; *Cargle v. State,* 1995 OK CR 77, ¶ 82, 909 P.2d 806, 830. In *Hogan v. State,* 2006 OK CR 19, ¶ 60, 139 P.3d 907, this Court recognized that these pre–2002 amendment cases have been superceded by statute.

¶ 55 Coddington argues the placement of the amendatory language in the statutory provision which sets forth the balancing test for the exclusion of otherwise relevant evidence and the use of the words "shall be admissible" suggests the Legislature did not intend for the balancing test to apply to this whole category of evidence. *See Lenion v. State,* 1988 OK CR 230, ¶ 3, 763 P.2d 381, 382 ("shall" is generally considered mandatory and not permissive). By this amendment, the Legislature effectively overruled those cases where this Court required the live photograph to be "relevant to some material issue" and its relevancy to outweigh "the danger of prejudice to the defendant." Coddington proposes that the trial court can no longer exercise its discretion to exclude this whole category of evidence and it will be admitted without regard to its relevance and without regard to whether the evidence would unfairly prejudice the defendant. He argues it violates his statutory rights under the Oklahoma Evidence Code and deprives him of procedural and substantive due process.

[31, 32] ¶ 56 We disagree.

> The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Thomas v. State,* 404 P.2d 71, 73 (Okl.Cr.1965). "A statute should be given a construction

9. We also find trial counsel was not ineffective for failing to object to Hale's unsolicited statements. His decision not to call the jury's attention to the statement could be considered sound trial strategy. *Strickland,* 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)(defendant must be able to overcome the presumption that counsel's actions could not be considered sound trial strategy).

> according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." *Jordan v. State,* 763 P.2d 130, 131 (Okl.Cr.1988).

Wallace v. State, 1996 OK CR 8, ¶ 4, 910 P.2d 1084, 1086. Unlike Oregon and Utah which have similar statutes mandating the admissibility of pre-mortem photographs [10], Oklahoma's amended § 2403 requires admission of an "appropriate" photograph of the homicide victim. The requirement that the photograph be "appropriate" preserves the trial judge's discretion in determining the admissibility of this evidence.[11] If the trial court determines the photograph is not appropriate—that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise—the photograph can and should be excluded. *See* 12 O.S.Supp.2003, § 2403. The amended statute does not deprive a defendant of the statutory principles of admissibility set forth in the Oklahoma Discovery Code.

¶ 57 The pre-mortem photograph of the victim was properly admitted. The photograph the State originally sought to introduce was of the deceased holding a small child, presumably a grandchild. The defense objected that the statute did not contemplate a photograph of anyone but the deceased and objected that the photograph was more prejudicial than probative.[12] The State offered to "cover up" the child with a Post–It note. The trial court ruled the Post–It note cover up was not sufficient and agreed to admit the photograph only after the State redacted the child from the picture. State's Exhibit 87 was thereafter admitted and it pictures only the deceased. The trial court's action in this case demonstrates his exercise of discretion and the application of the probative value/unfair prejudice balancing test allowed by the amended statute.

¶ 58 In *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. The introduction of a single pre-death photograph of the victim was appropriate to show his general appearance and condition prior to his death. It did not inject passion, prejudice, or other arbitrary factors into the sentencing stage more than any other relevant victim impact evidence. We find the trial court did not abuse its discretion when it admitted the photograph, the statute is not unconstitutional on its face or as applied, and Coddington was not deprived of a fair trial or a fair sentencing proceeding as a result of its admission.

[33, 34] ¶ 59 Section 2403, as amended, also does not run afoul of *ex post facto* principles. The prohibition against *ex post facto* law requires the finding of two elements: that the law was enacted after the conduct to which it is being applied and that it must disadvantage the offender affected by it. *Gilson v. State,* 2000 OK CR 14, ¶ 97, 8 P.3d 883, 914, cert. denied, 532 U.S. 962, 121 S.Ct. 1496, 149 L.Ed.2d 381 (2001). In *Neill v. Gibson,* 278 F.3d 1044 (10th Cir.2001), the Tenth Circuit rejected a claim that Oklahoma's victim impact evidence statute violated the *Ex post Facto* and Due Process clauses. In *Neill,* the appellant advanced the same argument as that raised by Coddington—that application of the statute, not in effect at the time of his crime, implicated the

> fourth category of *ex post facto* legislation recognized in *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798)—

10. *See* Or. Rev.Stat. § 41.415 (2001) and UTAH CODE ANN. § 77–38–9(7)(1999).

11. While Oklahoma, Oregon and Utah are among the *few* States which require the admission of pre-mortem victim photographs offered by the prosecution in homicide cases, a majority of States for many years have held such photographs to be admissible when relevant. *See e.g. State v. Broberg,* 342 Md. 544, 556–557, 677 A.2d 602, 607–608 (1996)(citing other jurisdictions upholding admissibility of in-life photographs).

12. Defense counsel also objected that the statute should not apply to Coddington because it was not in effect at the time he committed the offense. (Tr.III 8–9)

> "[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender."

Id. at 1051. Neill relied on *Carmell v. Texas,* 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000), arguing the Supreme Court reaffirmed the fourth category of *Calder* and noting the state court (this Court) rejected his claim below without addressing this category of *ex post facto* violations. Rejecting Neill's claim, the Tenth Circuit said, "Oklahoma's victim impact statute does not change the quantum of evidence necessary for the State to obtain a death sentence, nor does it otherwise subvert the presumption of innocence." *Id.* at 1051, *citing Carmell,* 529 U.S. at 530–34, 120 S.Ct. 1620, and *Thompson v. Missouri,* 171 U.S. 380, 387, 18 S.Ct. 922, 43 L.Ed. 204 (1898). *See also Pennington v. State,* 1995 OK CR 79, ¶¶ 78–80, 913 P.2d 1356, 1372, *cert. denied,* 519 U.S. 841, 117 S.Ct. 121, 136 L.Ed.2d 72 (1996). Further, the "fourth criterion" set forth in *Calder* does not prohibit the application of new evidentiary rules in trials for crimes committed before the evidentiary changes. *See e.g. Collins v. Youngblood,* 497 U.S. 37, 43, f. 3, 110 S.Ct. 2175, 2719, f. 3, 111 L.Ed.2d 30 (1990).

¶ 60 Like victim impact evidence, the admissibility of a single Section 2403 "live photograph" does not change the quantum of evidence necessary for the State to obtain a conviction and also does not subvert the presumption of innocence. Application of the amended Section 2403 in Coddington's case does not violate the *ex post facto* principles set forth in either the federal or our state constitution. U.S. Const. art. I, § 9; Okla. Const. art.II, § 15.

[35] ¶ 61 In Proposition Six, Coddington complains three prosecution witnesses [13] testified to the details of the crime scene and to the victim's condition. He argues the presentation of this cumulative evidence during the first stage of trial unfairly prejudiced him and resulted in an unfair trial and sentencing determination in violation of his Fifth, Eighth, and Fourteenth Amendment rights.

[36] ¶ 62 Trial counsel did not object to the first two witnesses—Hanlon and Archer. Both were first-responder EMTs and each testified about what he saw at the crime scene and described the victim's condition at that time. All but plain error with regard to the cumulative nature of this testimony is waived by trial counsel's failure to object. Admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *See e.g. Williams v. State,* 2001 OK CR 9, ¶ 94, 22 P.3d 702, 724, *cert. denied,* 534 U.S. 1092, 122 S.Ct. 836, 151 L.Ed.2d 716 (2002). Allowing two witnesses to testify about the murder scene and the victim's condition was not an abuse of discretion and we find no plain error.

¶ 63 When counsel did object to the third witness's description of the crime scene, the trial court acknowledged the testimony was somewhat cumulative and instructed the prosecutor to lay a brief foundation for introduction of the photographic evidence. Thereafter, the witness testified sufficiently to lay the foundation for photographic evidence, and certain photographic evidence was admitted.

[37] ¶ 64 Coddington submits the trial court erred by allowing three witnesses to testify about the "same" thing and to allow the admission of photographic evidence depicting the information contained in the testimony. We disagree. When trial counsel objected, the trial court properly instructed the prosecutor to "lay a brief foundation" for the introduction of the photographic evidence. Thereafter, State's Exhibits 1, 3, 4, 23, 28 and 67 were identified and admitted into evidence *without* objection. The photographs were properly admitted during the testimony of Scott Cox and were not so cumulative or prejudicial as to be inadmissible and no error occurred. Accordingly, we will not find Coddington was prejudiced by cumulative testimony, or deprived of his fun-

13. The prosecution witnesses were EMTs Jeff Hanlon and Richard Archer, and police officer Scott Cox.

damental rights to a fair trial and due process of law.

[38] ¶ 65 In Proposition Seven, Coddington contends the State did not present sufficient evidence to sustain his conviction for First Degree Murder. Coddington specifically challenges the sufficiency of the State's proof on the element of malice aforethought. At trial, and now on appeal, Coddington submits he did not intend to kill Hale. He argues that all of the evidence of the element of malice aforethought was circumstantial and suggests that, under the reasonable hypothesis standard, the evidence was insufficient to exclude every reasonable hypothesis but guilt on this element.

¶ 66 In *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559, we abandoned the "reasonable hypothesis" test and adopted a unified standard of review for direct and circumstantial evidence in claims of insufficient evidence. Prior to *Easlick*, we looked to the evidence as a whole in determining which standard of review to apply—not just the type of evidence offered in support of a single element. *Bland*, 2000 OK CR 11, ¶ 23, 4 P.3d at 713; *see also Davis v. State*, 2004 OK CR 36, ¶ 27, 103 P.3d 70, 79. Accordingly, we will review Coddington's claim challenging the sufficiency of the evidence by determining whether, in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203–204; *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559.

¶ 67 Hale's neighbors, Jeff Pence and Nathan Kirkpatrick, each testified he saw a gray Honda parked in Hale's driveway in front of the garage between 5:30 and 6:30 p.m. on the day Hale was murdered.[14] Kirkpatrick also testified he saw a white male driving the Honda. Greg Brewer, owner of the Honda Salvage Yard and Coddington's employer, testified that he loaned Coddington a 1984 gray Honda the day before Hale's murder. Former Oklahoma City police detective Robert Smart testified he and several other police officers recovered a "rough-in" hammer from the place where Coddington said it would be—from a creek over the fence just west of Coddington's apartment. Former Oklahoma City police officer Glen Despain interviewed Coddington after his arrest at the police station. During the interview, after admitting to his involvement in a string of robberies, Coddington himself turned the conversation towards the homicide. Coddington confessed to killing Hale by hitting him in the head with the hammer. Coddington told officer Despain where the hammer was that he used to kill Hale; officer Despain was also among the officers who recovered the hammer from the location where Coddington said it would be. The Chief Medical Examiner for the State of Oklahoma testified that Hale died from blunt force head trauma—probably three or four blows to the head and also had defensive wounds on his hands. One skull injury suggested a direct blow and was in the shape of a cross.

¶ 68 At trial, Coddington's expert witness on symptoms of cocaine intoxication and addiction (Dr. Smith) said Coddington told him he knew he had done wrong by killing, admitted he hit Hale three or four times and took money from him when he realized what he had done. Dr. Smith testified he was able to describe the attack in great detail; he knew what clothes he wore, the denominations of bills he removed from Hale's pocket, and what part of the hammer he hit Hale with.

¶ 69 Coddington testified and admitted he went to Hale's house around 5:00 p.m. on March 5, 1997, intending to borrow money from Hale to buy more cocaine. He watched television with Hale for one and a half to two hours and smoked cocaine in Hale's bathroom during that time. Coddington testified Hale knew he was using, asked him what was wrong, and told him to get back into treatment. When Coddington asked Hale to borrow some money, he refused and told Coddington to leave. Coddington testified as he approached the door with Hale behind him, he saw a hammer on the dishwasher, grabbed it and hit Hale with the weapon.

14. Pence testified he saw the Honda parked there around 5:50 p.m.; Kirkpatrick testified he saw the car parked there between 5:30 and 6:30 p.m.

Although Coddington testified he did not go there intending to kill or harm Hale, he admitted on cross-examination that he struck Hale three times even though Hale was no threat after the first blow. He testified he did not call the police because he did not want to get caught.

[39, 40] ¶ 70 The evidence in this case consisted of both circumstantial and direct evidence.[15] While Coddington denied having the intent to kill Hale, the circumstances surrounding his murder suggest it was committed with intent. Coddington attacked Hale after Hale refused to give him money for drugs. He hit Hale with the hammer three times; Hale had defensive wounds, and there was significant blood spatter. Malice, the deliberate intention to take the life of another without justification, may be formed in an instant. *Ullery v. State,* 1999 OK CR 36, ¶ 31, 988 P.2d 332, 347. "A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed." 21 O.S.2001, § 702. This Court will accept all reasonable inferences and credibility choices that tend to support the verdict. *Bland,* 2000 OK CR 11, ¶ 24, 4 P.3d at 713. Here, the jury obviously did not find Coddington's denial of malice to be credible. In a light most favorable to the State, the evidence presented was sufficient for a rational trier of fact to find the essential elements of first degree murder beyond a reasonable doubt. *Spuehler, id.* Proposition Seven does not warrant relief.

SECOND STAGE ISSUES

[41] ¶ 71 In Proposition Eight, Coddington argues he was deprived of the right to a constitutionally sound capital sentencing proceeding when the trial court precluded the admission of the videotaped statement of his mother. Prior to trial, the defense filed an Application to Take Testimony of Out of State Witness. Coddington sought a videotaped statement from his mother, Gayla Hood, to preserve her testimony for the second stage of trial.[16] At the time of the Application, Hood was incarcerated at the Federal Medical Center Penitentiary at Carswell Air Force Base in Fort Worth, Texas, suffering from serious heart problems which made death likely and imminent.

¶ 72 A hearing on the Application was held May 4, 2000. There, defense counsel Spradlin stated

> . . . We wish to preserve her testimony in the event that she does pass away before our trial. And also in the event that if she is still living at the time of our trial, it is entirely possible her physicians would not let her travel because of her illness.
>
> I have verified in the past, by speaking directly with her doctor, that she does, in fact, have a heart condition. She has had several heart attacks, several angioplasties. She has serious heart problems which are prevalent in the family . . . So it is a serious issue at this point.
>
> And she contacted me last week and expressed that she was no longer able to have any further operations. Her condition continued to deteriorate and her doctor informed her that her heart was just giving out.
>
> So . . . what we are asking to do is propound interrogatories . . . provide a set . . . to the prosecution and then they, in turn, would provide their cross-interrogatories to us. Then we would submit those interrogatories to the Court for approval.
>
> And we would like to go to Ft. Worth to the Federal Medical Center at Carswell Air Force Base and take that testimony both by transcription and on videotape.

15. Coddington's own testimony constituted direct evidence of the crime as he admitted killing Hale. *See Hooks v. State,* 2001 OK CR 1, ¶ 8, f. 7, 19 P.3d 294, 305 (a defendant's testimony does not provide direct evidence of a crime unless he includes actual direct evidence of the crime).

16. In support of the Application, Coddington averred Hood was an "essential punishment state (sic) witness," would testify extensively about child abuse suffered by Coddington, suffered from cardiac failure and her condition was inoperable and deteriorating. Accompanying the Application was a Notice filed by defense counsel stating Hood's physician indicated during an interview that Hood was "surviving past any medical reason" and "could and will probably die very soon."

The trial court noted the attorneys had agreed to proceed through interrogatories and take a videotape and transcript of the interrogatories. "And then, at some point in time, if the State objects to the videotape we can argue that." Assistant District Attorney Lou Keel then stated "[t]he only disagreement, sir, we have got pertaining to the manner in which the testimony from this witness would be given to the jury at trial and whether follow-up questions to the interrogatories that are proposed will be appropriate. . . ." The parties agreed to appoint a commissioner to consider the interrogatories to be submitted. Defense counsel filed interrogatories for the witness and provided copies of those interrogatories to the District Attorney. The State did not present any interrogatories prior to the examination.

¶ 73 Gayla Hood was examined by defense counsel and assistant District Attorney Marny Hill on June 8, 2000, at the Federal Medical Center Penitentiary in Ft. Worth, Texas. Judge Bass administered an oath to Hood—that her sworn testimony would be the truth, the whole truth and nothing but the truth—by telephone. Counsel then asked her the questions previously filed of record as interrogatories, and the State's attorney cross-examined her. Her oath and testimony was recorded on videotape.

¶ 74 On the fourth day of trial, the State filed a Motion in Limine to prohibit the defense from playing the videotape and sought an order requiring Hood's testimony be read to the jury if admitted at all. The State also requested the defense be required to redact "unresponsive answers." On the first day of second stage proceedings, Judge Bass heard lengthy arguments on the State's motion. The State, through assistant District Attorney Fern Smith, objected to the admissibility of Hood's testimony because it was "not in compliance with the law" and because it contained statements the State objected to. Defense counsels argued strenuously that Hood's answers to interrogatories had been videotaped pursuant to an agreed procedure, that everyone had notice of the interrogatories, that representatives from both parties were present, that the witness was properly sworn, that the State cross-examined Hood, that both parties knew the intent of the videotape was to preserve Hood's testimony because of her poor health, and that no court reporter was present by agreement of the parties. Defense counsel Wilson also argued that laches precluded the State from such a late objection to the manner in which this testimony was preserved.

¶ 75 While the trial court noted the statutes dealing with conditional examinations of witnesses in criminal cases had "not kept up with the times by any stretch of the imagination," after reviewing the transcript of the May 4, 2000 hearing, it determined there was no agreement to play the videotape during the trial as the State had reserved "its objections to any portions of the admissibility of this statement." After redacting certain responses upon the State's request, defense counsels offered the original videotape, the redacted videotape and the original transcript into evidence and argued there was a "distinction with a difference between reading from a transcript and seeing someone's face and what they actually look like." The trial court admitted the videotapes for purposes of appeal only. Thereafter, Gayla Hood's responses to the interrogatories, recorded on the videotaped statement, were read into the record by defense counsel.

¶ 76 Coddington contends the trial court's decision to prohibit the playing of Hood's videotaped examination in its entirety based on strict adherence to the rules of evidence and to the procedures outlined at 22 O.S. 2001, §§ 781 *et. seq.* deprived him of due process of law and a reliable capital sentencing hearing, in violation of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article II, § 7 of the Oklahoma Constitution. At a minimum, Coddington submits the redacted videotape should have been admitted and played for the jury.[17]

¶ 77 We agree. While the videotaped preservation of Hood's testimony did not strictly comply with the procedural require-

17. The videotapes, original and redacted, are contained in the appeal record as Defendant's Exhibits 25A and 25B.

ments set forth in 22 O.S.2001, § 781, *et. seq.,* the record below indicates the State agreed to the procedure to be utilized and only had not agreed on the manner in which it would be presented to the jury.[18] For the State to object almost three years later to the admission of the videotaped examination, because the strict procedures set forth in the statute referenced in the Application to Take Testimony of Out of State Witness were not followed in taking the statement, seems disingenuous. The State knew Coddington wanted and needed to preserve his mother's testimony for second stage mitigation evidence and we are not convinced by the prosecutor's eleventh hour claim that the State was not aware Coddington intended to offer the videotape rather than read the testimony.

¶ 78 Prosecutor Smith's argument that the applicable statutes only allowed for Hood's testimony to be read to the jury was not correct. The statutes referenced in the Application to Take Testimony of Out of State Witness, 22 O.S.2001, § 781 *et. seq.,* were adopted in 1910 and have not been amended since. The language of the statute dealing with how the "deposition" will be presented at trial only contemplates "reading", because there were no videotapes or recording devices in 1910. We note, however, the statute does not mandate the examination be read into the record. *See* 22 O.S.2001, § 793. ("Depositions taken under a commission *may* be read into evidence . . .") As the trial court noted, these statutes have not kept up with the times by any stretch of the imagination.

¶ 79 The legislature has provided for the conditional examination of witnesses other than the non-resident material witnesses referenced in Section 781. Sections 761 through 771 of Title 22 also address depositions or the conditional examination of witnesses. These statutes contemplate those occasions where a witness is about to leave the state, a witness is incarcerated, or a witness is so sick or infirm that one could reasonably believe that the witness will be unable to attend the trial, and provide a mechanism to obtain and preserve the testimony of that witness. The procedures set forth in 22 O.S.2001, §§ 761 *et. seq.* and 781 *et. seq.* both reflect the legislature's intent to provide a mechanism to obtain and preserve important testimony when the witness is or is anticipated to be unavailable at trial.

¶ 80 We note that the State's objection to the videotaped deposition was not based upon a claim that it was not a reliable preservation of the testimony. Rather, the State's objection was to the admissibility of Gayla Hood's testimony at all because the statute referenced in the motion was not followed.

¶ 81 Gayla Hood's videotaped examination should have been admitted. Having reviewed both the videotaped examination and the written examination, we note a compelling difference between seeing the witness testify to this valuable mitigation evidence and hearing someone read her testimony. Regardless of the statutory procedure for "commissions to take testimony outside state," under the facts of this case, the exclusion of the videotaped evidence constituted a violation of the Fourteenth Amendment. The exclusion of the videotaped examination was not based upon unreliability, but upon the strict application of an outdated statute dealing with reliable preserved testimony.

¶ 82 In *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), the Court said "[t]he hearsay rule may not be applied mechanistically to defeat the ends of justice." What happened in this case is similar to the mechanistic application of the rules of evidence the Supreme Court condemned in *Chambers. See e.g. Green v. Georgia,* 442 U.S. 95, 97, 99 S.Ct. 2150, 2151–2152, 60 L.Ed.2d 738 (1979)(exclusion of proffered reliable testimony which was highly relevant constituted a violation of due process and denied petitioner a fair trial on issue of punishment).

¶ 83 In *Warner v. State,* 2001 OK CR 11, ¶ 15, 29 P.3d 569, 575, this Court recognized the importance of a mother's testimony as mitigating evidence in a capital trial. "[T]he Constitution requires individualized sentenc-

18. At the hearing in May of 2000, the assistant prosecutor reserved objections relating to the manner in which the testimony would be given the jury; any objection to "procedure," such as lack of a court reporter or otherwise should have been made at that time.

ing, and mitigation evidence is an important factor in insuring this right." *Warner, id., quoting Fitzgerald v. State,* 1998 OK CR 68, ¶ 41, 972 P.2d 1157, 1173, *citing Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). In *Warner,* we found defense counsel ineffective for failing to follow the statutorily mandated procedure for requesting a continuance in order to secure the defendant's mother's presence for second-stage testimony. *Id.,* 2001 OK CR 11, ¶ 16, 29 P.3d at 575. Because counsel did not comply with the statute, his request for continuance was denied and he was forced to present this valuable mitigation witness's testimony in the form of a five sentence stipulation. *Id.* at ¶ 15, f. 10, 29 P.3d at 575.

¶ 84 In this case, while Coddington was not denied the opportunity to present his mother's testimony in written form, the jury was denied the opportunity to actually see and hear the witness when such nearly live testimony was available. The jury was denied the opportunity to judge this witness's demeanor and assess her credibility.

¶ 85 Courts routinely note the general preference for live testimony. For example, in cases where the declarant is unavailable, former sworn testimony is admitted as a substitute for live testimony because no better version of the evidence exists. *See United States v. Inadi,* 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)(general preference for live testimony noted); *State v. Nobles,* 357 N.C. 433, 437, 584 S.E.2d 765, 769 (N.C.2003)(when two versions of the same evidence are available, longstanding principles of the law of hearsay favor the better evidence). It is apparent from reading the record that the trial court found Hood's examination testimony to be sufficiently reliable and admissible mitigation evidence; it simply did not admit the videotaped examination because the State insisted the statute required it to be read.

¶ 86 The best evidence, in this case, was Hood's videotaped examination, not a reading of her testimony. *See* 12 O.S.2001, § 3002. Videotaped confessions, rather than confessions in written form, are regularly admitted to show the jury the demeanor of a person and the circumstances under which confessions are made. Just as this Court determined in the 1950s that wire recordings and talking motion pictures were so common in use that the verity of their recordings and sounds were established enough to allow recorded confessions to be admissible rather than requiring admissibility of the transcription, *see Williams v. State,* 93 Okla.Crim. 260, 270, 226 P.2d 989, 995 (1951), we now hold that under the conditional examination statutes at issue in this case, set forth at 22 O.S.2001, §§ 781, *et. seq.* and set forth at 22 O.S.2001, §§ 761, *et. seq.,* when the examination of the person is conducted under such circumstances which show the recording is reliable, the actual videotaped examination may be received into evidence and viewed by the jury rather than read to the jury.

> . . . [I]n keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as of inestimable value to triers of fact in reaching accurate conclusions.
>
> "This particular case well illustrates the advantage to be gained by courts' utilizing modern methods of science in ascertaining facts. . . . When a confession is presented by means of a movietone the trial court is enabled to determine more accurately the truth or falsity of such claims and rule accordingly."

Williams, 93 Okla.Crim. at 270, 226 P.2d at 995, *quoting People v. Hayes,* 21 Cal.App.2d 320, 71 P.2d 321, 322.

¶ 87 While the jury heard this important mitigation testimony, it was wrongly prohibited from seeing this valuable witness. The humanizing effect of live testimony in the form of a mother testifying for her son as mitigation evidence in a capital murder trial cannot seriously be disregarded as irrelevant. *See e.g. Solomon v. State,* 49 S.W.3d 356, 366 (Tex.Crim.App.2001)(recognizing humanizing effect of live testimony); *People v. Enis,* 194 Ill.2d 361, 414, 743 N.E.2d 1, 30, 252 Ill.Dec. 427, 456 (Ill.2000)(noting live testimony of the affiants would have had more complete portrayal of the defendant). Coddington knew his mother would be unable to give live testimony on his behalf due to her extremely ill

health and arranged for the next best thing—a videotaped examination while she was alive.

¶ 88 Civil courts in Oklahoma recognize the value of videotaped depositions. *See e.g. B–Star, Inc. v. Polyone Corporation,* 2005 OK 8, ¶ 17, 114 P.3d 1082, 1086 ("This Court understands that video presentation of evidence is a convenient and cost-effective tool."); *see also* 12 O.S.Supp.2004, § 3232(C). "The utilization of videotape is nothing more than an updated visual version of preserving testimony." *Inhofe v. Wiseman,* 1989 OK 41, ¶ 7, 772 P.2d 389, 392. The fact finder "at trial often will gain greater insight from the manner in which an answer is delivered and recorded by audio-visual devices. Moreover, a recording, a video tape, or motion picture of a deposition will *avoid the tedium* that is produced when counsel read lengthy depositions into evidence at trial." *Carson v. Burlington Northern, Inc.,* 52 F.R.D. 492, 493 (D.Neb.1971)(emphasis added), *citing* 8 Wright & Miller, Fed. Practice and Procedure 426 (1970). Here, while the statute contemplated reading the preserved examination testimony into the record, the legislature did not make "reading" the examination mandatory in its conditional examination statutes. 22 O.S.2001, §§ 770, 793 (statutes use the word "may" rather than "shall"). The trial court should have allowed the videotaped examination to be seen and heard by the jury; it was well within the trial court's discretion to allow the jury to experience her testimony in that form. 12 O.S. 2001, § 2402 (all relevant evidence is generally admissible).

[42] ¶ 89 We afford great deference to jurors' determinations of witness credibility due to their unique ability to personally observe the demeanor of the witnesses at trial. *See Scott v. State,* 1995 OK CR 14, ¶ 15, 891 P.2d 1283, 1291; *Stanberry v. State,* 1981 OK CR 156, ¶ 12, 637 P.2d 892, 896. Personal observation of a significant mitigation witness would allow the jury to judge that witness's demeanor and aid in determining that witness's credibility and value as a mitigation witness. The "tedious" reading of Hood's testimony into the record hardly afforded Coddington's jury that opportunity in this case.

[43–45] ¶ 90 The sentencer in capital cases should not be precluded from considering any relevant mitigating evidence. *Skipper v. South Carolina,* 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986). Hood's videotaped examination showed her demeanor—it showed her distress and sadness she had for her son in a way that the cold reading of a transcript could not portray. The witness's demeanor in this case is exactly the type of evidence that might invoke sympathy for a defendant facing the death penalty. Sympathy is proper for the jury to consider in assessing punishment. *See Salazar v. State,* 1998 OK CR 70, ¶ 42, 973 P.2d 315, 328. Prohibiting the jury from receiving evidence in the form likely to invoke sympathy and achieve the purpose of this mitigation witness was improper. *See Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). We cannot determine how the jury would have viewed Hood's testimony if it had actually seen her videotaped examination. However, the potential error would be of constitutional magnitude. The only proper remedy is to remand for a new sentencing hearing with an instruction that the new jury specifically be allowed to see Hood's videotaped examination.

[46] ¶ 91 The error identified in Proposition Fourteen also warrants discussion and contributes to our decision to reverse Coddington's sentence of death and remand for resentencing. In Proposition Fourteen, instructional error in the sentencing phase allowed the jury to disregard relevant mitigating evidence in violation of *Lockett v. Ohio* and its progeny. Upon the State's request, the trial court gave the Oklahoma Uniform Jury Instruction on impeachment of witness by former conviction. *See* OUJI–CR 2d. 9–22. Specifically listed in that instruction were defense witnesses Gayla Hood, Mike Hood, Tommy Coddington, Walter "Duffy" Coddington, Ricky Coddington, and Kathy Johnson. Coddington relied upon these family witnesses and their own troubles with the law and addiction to help explain Coddington's background, addiction, and criminality. Defense counsel did not object to this in-

struction. The trial court's decision to give the impeachment instruction as it related to his family mitigation witnesses effectively recharacterized their testimony as impeachment evidence and precluded the sentencer from properly considering their testimony. We find plain error.

¶ 92 In *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964–65, the Supreme Court concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Here, the purpose the family witnesses during second stage was to show how Coddington came from a bad background where his family members were drug addicts and criminals. Contrary to the State's response, such evidence might be perceived as facts about Coddington's background that would call for a penalty less than death. This instruction might have led the jury to believe the evidence of these witnesses' prior convictions was offered for impeachment purposes and was not offered to explain Coddington's background. To that extent, under the facts presented here, the instruction might have prevented the jury from considering relevant mitigating evidence. *See Williams*, 2001 OK CR 9, ¶ 104, 22 P.3d 702, 726.

¶ 93 In *Williams*, we found any error in the language of the instruction did not have a substantial impact on the outcome of second stage proceedings. *Id.* Here, we cannot so find. This error, in conjunction with the error identified in Proposition Eight, requires Coddington's death sentence be vacated and the case remanded for a new sentencing proceeding.

¶ 94 Because our remand for resentencing renders moot all other challenges to the second stage proceedings, the remaining propositions raising errors alleged to have occurred in the sentencing stage of trial need not be addressed. However, in Proposition Twenty, Coddington argues he received ineffective assistance of counsel in both stages of trial. Because we remand for resentencing, those complaints about counsel's second stage performance are moot. What remains is Coddington's complaints that his attorneys failed to make timely, specific objections, request admonishments or mistrial or take other appropriate action to preserve the issues raised in Propositions Three and Five.

[47] ¶ 95 To prevail on a claim of ineffective assistance of counsel, an appellant must show (1) that counsels' representation fell below an objective standard of reasonableness and (2) the reasonable probability that, but for counsels' errors, the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

¶ 96 Review of this record, in its entirety, shows two well-prepared, competent capital trial litigators represented Coddington. In Proposition Three, we found that trial counsel's failure to request that Juror Muller be removed and replaced by an alternate juror was likely a matter of trial strategy and Coddington had not established his counsel's conduct constituted deficient performance. *Strickland*, *id.*; *Woodruff v. State*, 1993 OK CR 7, ¶ 16, 846 P.2d 1124, 1133, *cert. denied*, 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993) (this Court does not evaluate performance in hindsight). We reviewed the claims relating to Ron Hale raised in Proposition Five for plain error and determined no error warranting relief occurred. Had trial counsel imposed timely objections to the complained of testimony, the trial court might have admonished the jury to disregard the evidence. However, while objections to Hale's testimony might have been sustained and the jury admonished, we do not believe trial counsel's objections would have altered the outcome of the first stage proceedings and Coddington cannot show prejudice. *Humphreys v. State*, 1997 OK CR 59, ¶ 40, 947 P.2d 565, 578 (to show prejudice, an appellant must show a reasonable probability that but for counsel's errors the outcome of the proceeding would have been different). Failure to prove prejudice is fatal to Coddington's ineffective assistance of counsel claim. *Dodd v. State*, 2004 OK CR 31, ¶ 112, 100 P.3d 1017, 1049.

DECISION

¶ 97 For the reasons set forth in this Opinion, Coddington's conviction and sentence for First Degree Robbery, in Oklahoma County District Court, Case No. CF 97–1500 (Count 2) is ***AFFIRMED;*** Coddington's conviction for First Degree Murder (Count 1) is ***AFFIRMED,*** but his sentence of death is ***REVERSED AND REMANDED TO THE DISTRICT COURT FOR RESENTENCING.***

CHAPEL, P.J., and A. JOHNSON, J.: concur.

LUMPKIN, V.P.J.: concurs in part/dissents in part.

LEWIS, J.: specially concurs.

LUMPKIN, Vice–Presiding Judge: Concur in Result/Dissent in Part.

¶ 1 I concur in the results reached in this case, but dissent in part. My vote is based upon the following reasons.

¶ 2 First, I cannot agree with the confusing analysis used concerning proposition four, i.e., expert testimony on the ultimate issue. The opinion's discussion of this issue and paraphrased summaries of *White v. State,* 1998 OK CR 69, 973 P.2d 306 and *Hooks v. State,* 1993 OK CR 41, 862 P.2d 1273 use dangerous wordplay that could dilute the applicable law. Paragraphs 9 through 11 of my specially concurring opinion in *White* provide a more thorough explanation of the applicable rules, rules that fully comply with the American Bar Association Standards for Criminal Justice.

¶ 3 For purpose of clarity, I reiterate here that Standard 7–6.6 of the *American Bar Association Criminal Justice Mental Health Standards* provides that "[o]pinion testimony, whether expert or lay, as to whether or not the defendant was criminally responsible at the time of the offense charged should not be admissible." Furthermore, the commentary to that standard provides that an "expert witness should not be permitted to express opinions on any question requiring a conclusion of law or a moral or social value judgment properly reserved to the court or to the jury." And later, that same commentary indicates that "[t]erms like *premeditation, malice,* and *provocation* have technical legal meanings concerning which mental health or mental retardation professionals can pretend no expertise."

¶ 4 Accordingly, I have no qualms with the trial court's *in limine* ruling that prevented the defense expert from testifying as to Appellant's inability to develop the requisite *mens rea.* That issue was ultimately for the jury to decide. In addition, psychological testimony is totally subjective and not provable with objective evidence. It is educated speculation at best. For that reason, we have previously limited such testimony to educating the jury regarding the nature of the proffered mental health issue from which the jury could then render its decision based on the facts of the crime. In this case, Appellant's ability to remember and relate the facts of the crime carry great weight in disproving that proffered opinion. In addition, Appellant admitted he knew what he had done and it was wrong.

¶ 5 Second, concerning the victim photograph issue raised in proposition five, the Court seems to abandon the clear legislative intent of 12 O.S.Supp.2002, § 2403 by applying the old rule applicable to such photographs, prior to 2002 amendments. The statutory amendment plainly means that a victim's photo is definitely admissible in a criminal homicide prosecution so long as it is an accurate representation of the victim at the time of the death and is not an attempt to play on the sympathy or sentiment of the trier of fact. The plain language of the current statute is clear and the Court should not employ an overall relevance balancing test under the former version of the statute.

¶ 6 Third, I agree with the opinion that the videotape of the mother should have been admitted. But I agree ***only*** because of the agreement of the parties and the fact the State made no objection to the use of the videotape at the time the agreement was made. There is nothing unconstitutional about Oklahoma's statutory method for preserving witness testimony. There may be more modern ways to preserve such testimony, but that does not make the statute unconstitutional. Until the statute is changed we

are bound to follow the statute even if the process is antiquated.

¶ 7 This Court has recently emphasized the importance of following a statutory provision even to the point it can be a structural error in a trial. *See e.g., Golden v. State,* 2006 OK CR 2, 127 P.3d 1150. But now the Court wants to brush away statutory provisions because it has conceived of new ways that might be better. This, of course, leads to inconsistencies. I cannot join in a result-oriented jurisprudence designed to ensure mothers always get to testify. Regardless of who they are, witnesses must comply with rules established by the Legislature. It seems the Court only wants to view statutes with the weight of "structural error" if the use of that view impedes the state.

¶ 8 I agree the Legislature should update our statutes on preserving witness testimony. But until the Legislature does, this Court is without authority to amend statutes. We can only interpret them and determine if they are Constitutional.

¶ 9 Fourth, there is no reason not to impeach family members who are offering mitigating evidence. *See* OUJI–CR 2d. 9–22. We cannot provide a defendant's family members a safe haven that deprives the triers of fact the truth of their own prior illegal activates. It is for the trier of fact to decide the credibility of the witnesses, and the trier of fact must be informed of the witnesses' character to make an informed finding.

LEWIS, Judge, Specially Concurs.

¶ 1 I agree with the State that parts of the testimony by the defendant's mother should have been redacted; however, I concur with the opinion that prohibiting the defendant from playing the videotaped testimony to the jury denied the defendant relevant mitigating evidence.

2006 OK CR 35

Michael Edward HOOPER, Appellant

v.

STATE of Oklahoma, Appellee.

No. D–2004–1098.

Court of Criminal Appeals of Oklahoma.

Aug. 18, 2006.

Background: Following remand for re-sentencing in capital murder prosecution, 314 F.3d 1162, defendant waived his rights to jury trial, presentation of mitigating evidence, and direct appellate review. The District Court, Canadian County, imposed the death penalty on all three counts of first-degree murder. Defendant appealed.

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

(1) defendant was competent, at time of re-sentencing proceedings, to make valid waivers of his rights to jury trial, presentation of mitigating evidence, and direct appellate review;

(2) sufficient evidence supported finding of aggravating circumstance that defendant was a continuing threat to society; and

(3) death sentences were not imposed under influence of passion, prejudice, or any other arbitrary factor, including defendant's own expressed wish to receive the death penalty.

Affirmed; motion to supplement record with extra-record material granted.

Lumpkin, V.P.J., concurred in results, with opinion.

1. Sentencing and Punishment ⇨1641

In case in which capital defendant essentially volunteers for the death penalty by waiving his rights to a jury trial, presentation of mitigating evidence, and direct appellate review, it must be determined whether defendant has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation, or, on the other hand, whether he

Appendix D

Tenth Circuit's order denying panel rehearing/rehearing *en banc*

FILED
United States Court of Appeals
Tenth Circuit

September 29, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES CODDINGTON,

Petitioner - Appellant,

v.

TOMMY SHARP, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 16-6295
(D.C. No. 5:11-CV-01457-HE)
(W.D. Okla.)

ORDER

Before **LUCERO**, **MORITZ**, and **EID**, Circuit Judges.

This matter is before the court on Appellant's *Petition for Panel and En-Banc Rehearing*. The petition for rehearing is denied.

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

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk