

APPENDIX “A”

Opinion and Order (N.D. Okla.)

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

ALONZO CORTEZ JOHNSON,)
Petitioner,)
v.)
JIMMY MARTIN, Warden,¹)
Respondent.)
Case No. 16-CV-433-JED-FHM

OPINION AND ORDER

Before the Court is Alonzo Cortez Johnson's 28 U.S.C. § 2254 habeas corpus petition (Doc. 1). Petitioner challenges his convictions for first degree murder and conspiracy in Tulsa County District Court, Case No. CF-2009-2738. For the reasons below, the Court will deny the petition.

I. Background

This case stems from a murder-for-hire scheme involving five defendants. (Doc. 8 at 10-12).² The original conflict began when victim Neal Sweeney, a fuel supplier, obtained a default judgment against convenience-store owner Mohammed Aziz. (*Id.* at 10-11). Aziz developed an “intense hatred” toward Sweeney and approached Allen Shields to locate a hitman. (*Id.* at 11). Shields referred the matter to his brother Fred, who set a price of \$10,000 for the murder. (Doc. 13-27 at 172). Fred Shields also acted as an intermediary, recruiting Petitioner (his cousin) and a man named Terrico Bethel. (*Id.* at 172-184; *see also* Doc. 13-2 at 44-46). Petitioner purportedly obtained the getaway car and helped coordinate with Aziz, while Bethel shot the victim. (*Id.*). Fred

¹ Petitioner is incarcerated at North Fork Correctional Center (NFCC) in Sayre, Oklahoma. (Doc. 21 at 1). Jimmy Martin, the warden of NFCC, is therefore substituted in place of Joe Albaugh as party respondent. *See* Habeas Corpus Rule 2(a). The Clerk of Court shall note the substitution on the record.

² The Court finds Petitioner's brief (Doc. 8) accurately sets forth certain non-controversial background facts.

Shields was eventually apprehended on a different crime and exposed the conspiracy in an effort to make a deal. (Doc. 8 at 12).

The State charged Petitioner with conspiracy to commit first degree murder (Count 4) and first-degree murder (Count 10). (Doc. 13-42 at 100; *see also* Doc. 8 at 22). The other men faced similar charges. (Doc. 13-42 at 99-102). A jury convicted Fred Shields and Terrico Bethel of, *inter alia*, first degree murder, and both received life sentences. (Doc. 8 at 8, n. 2). Allen Shields faced a conspiracy charge but died by suicide during a pretrial hostage situation. (Doc. 13-27 at 72). Mohammad Aziz pled guilty to solicitation of murder and was sentenced to 35 years imprisonment. (Doc. 8 at 8, n. 2).

Petitioner's jury trial commenced on December 3, 2012. (Doc. 13-24). Defense counsel argued his involvement was minimal or nonexistent, and his co-conspirators' testimony was unreliable. After a multi-week trial, the jury convicted Petitioner of all charges. (Doc. 12-4 at 1). The state court sentenced him to life imprisonment on each count, with the sentences running consecutively. (*Id.*).

Petitioner perfected a direct appeal to the Oklahoma Court of Criminal Appeals (OCCA). By a summary opinion entered July 17, 2014, the OCCA affirmed the conviction and sentence. (Doc. 12-4). Petitioner then sought post-conviction relief, which the OCCA also denied. (Doc. 12-6; *see also* Doc. 12-7). Petitioner filed the instant § 2254 petition (Doc. 1) on July 5, 2016. He identifies seven grounds of error:

- (Ground 1): The prosecutor used peremptory challenges to exclude racial minorities from the jury;
- (Ground 2): The use of recorded statements violated the Confrontation Clause;
- (Ground 3): The evidence was insufficient to sustain a conviction;

(Ground 4): Gruesome photographs and testimony rendered the trial unfair;
(Ground 5): Juror misconduct rendered the trial unfair;
(Ground 6): The evidentiary rulings violated Petitioner's right to present a defense; and
(Ground 7): Cumulative error rendered the trial unfair.

(Doc. 8 at 2-4).

Respondent filed an answer (Doc. 12), along with relevant portions of the state court record (Doc. 13). Respondent concedes, and the Court finds, that Petitioner exhausted his state remedies and the Petition is timely. *See* 28 U.S.C. §§ 2244(d)(1); 2254(b)(1)(A). Petitioner filed a reply brief (Doc. 17) on January 24, 2017, and the matter is ready for a merits review.

II. Discussion

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs this Court's review of petitioner's habeas claims. *See* 28 U.S.C. § 2254. Relief is only available under the AEDPA where the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Further, because the OCCA already adjudicated petitioner's claims, this Court may not grant habeas relief unless he demonstrates that the OCCA's ruling: (1) "resulted in a decision that was contrary to . . . clearly established Federal law as determined by [the] Supreme Court of the United States," 28 U.S.C. § 2254(d)(1);³ (2) "resulted in a decision that . . . involved an unreasonable application of clearly established Federal law," *id.*; or (3) "resulted in a decision

³ As used in § 2254(d)(1), the phrase "clearly established Federal law" means "the governing legal principle or principles" stated in "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)); *see also House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) (explaining that "Supreme Court holdings—the exclusive touchstone for clearly established federal law—must be construed narrowly and consist only of something akin to on-point holdings").

that was based on an unreasonable determination of the facts" in light of the record presented to the state court, *id.* at § 2254(d)(2).

"To determine whether a particular decision is 'contrary to' then-established law, a federal court must consider whether the decision 'applies a rule that contradicts [such] law' and how the decision 'confronts [the] set of facts' that were before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (alterations in original) (quotations omitted). When the state court's decision "identifies the correct governing legal principle in existence at the time, a federal court must assess whether the decision 'unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* (quotations omitted). Significantly, an "unreasonable application of" clearly established federal law under § 2254(d)(1) "must be objectively unreasonable, not merely wrong." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (quotations omitted). "[E]ven clear error will not suffice." *Id.* Likewise, under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). The Court must presume the correctness of the OCCA's factual findings unless petitioner rebuts that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Essentially, the standards set forth in § 2254 are designed to be "difficult to meet," *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and require federal habeas courts to give state court decisions the "benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). A state prisoner ultimately "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

A. Peremptory Challenges (Ground 1)

Petitioner first argues the prosecutor systematically used the State's peremptory challenges to exclude racial minorities from the jury. (Doc. 8 at 13-14). He contends the prosecutor inappropriately challenged prospective minority jurors Dickens, De Wassom, Carranza, Martinez, and Tawil. Petitioner further argues the purported race-neutral explanations for those challenges were pretextual. As support, he cites the state court's refusal to excuse juror Williams, which would have "effectively eliminate[d] all the African-Americans" from the panel. (*Id.* at 14).

Petitioner raised this argument on direct appeal as an equal protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). (Doc. 12-1 at 14). "*Batson* held that the Fourteenth Amendment's Equal Protection Clause prohibits the prosecution's use of peremptory challenges to exclude potential jurors on the basis of their race." *Saiz v. Ortiz*, 392 F.3d 1166, 1171 (10th Cir. 2004). A trial court must apply a three-step burden-shifting framework to assess a Batson challenge:

First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Rice v. Collins, 546 U.S. 333, 338 (2006) (internal citations omitted).

The OCCA considered *Batson* and found that Petitioner failed to establish systematic or purposeful discrimination by the State. (Doc. 12-4 at 3). Specifically, the OCCA agreed that "the State's explanations for excusing each minority jurors were legitimate race-neutral reasons." (*Id.*). Citing *Powers v. Ohio*, 499 U.S. 400, 404 (1991), the OCCA also noted the "trial court erred to the

detriment of the State when it refused to ... excuse an African-American because it would have left the jury without any African-Americans." (*Id.*); *see also Powers*, 499 U.S. at 404 ("Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [his] own race, ... he ... does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria").

Because the OCCA applied *Batson*, relief is only available if it "was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Rice*, 546 U.S. at 338. Habeas courts "must grant the trial courts considerable leeway in applying *Batson*," *Id.* at 343-44 (Breyer, J., concurring), and "defer to the state trial judge's finding of no racial motivation in the 'absence of exceptional circumstances.'" *Black v. Workman*, 682 F.3d 880, 897 (10th Cir. 2012) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)).

Having reviewed the record, the Court finds no exceptional circumstances in this case. The jurors at issue are Dickens, De Wassom, Carranza, Martinez, and Tawil. Dickens is an African-American liberal arts professor who holds a Ph.D. (Doc. 13-24 at 31). The prosecutor explained that in his experience, liberal arts professors are too exacting and liberal. (Doc. 13-25 at 180). The prosecutor went on to excuse De Wassom, Carranza, and Tawil without an immediate objection by the defense. (*Id.* at 179-181). When the prosecutor excused Martinez, defense counsel argued there was a pattern of striking minority jurors. (*Id.* at 181). The state court disagreed, noting that Martinez was hardly involved and Carranza and De Wassom had difficulty with English. (*Id.* at 181-182). The record confirms Carranza and De Wassom spoke English as a second language and that Martinez did not want to be on the jury. (Doc. 13-25 at 11; 44-45; 50). Martinez also stated her brother should not be in jail for driving while intoxicated. (*Id.* at 45). As to Tawil, there was

no specific objection to, or explanation for, his excusal. To the extent the *Batson* inquiry includes Tawil, the record reflects his former attending physician was also a prospective juror, and the prosecutor expressed concern about them participating together. (Doc. 13-25 at 17-18).

Petitioner offers no evidence to controvert this record, aside from noting Dickens was related to police officers and the state court refused to excuse the last African-American juror. This information does not constitute “clear and convincing” evidence of racial motivation. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (finding clear evidence of racial motivation where the prosecutor’s handwritten notes labelled African-American jurors as “B-1, B-2, B-3,” etc.); *Miller-El v. Dretke*, 545 U.S. 231, 253 (2005) (racial motivation existed where prosecutor reshuffled a deck of cards to avoid minorities and posed different questions to people of different ethnicities). Moreover, the Court is not convinced the informal nature of the exchange between defense counsel and the state court justifies relief. Defense counsel objected generally to a pattern, rather than any particular strike. The state court disagreed there was a pattern, and defense counsel dropped the matter without seeking further explanations. (Doc. 13-25 at 179-181). On this record, the Court cannot disturb the OCCA’s application of *Batson*, and Ground 1 fails.

B. Confrontation Clause (Ground 2)

Petitioner raises a Confrontation Clause claim based on the admission of Terrico Bethel’s recorded statements and preliminary hearing testimony by Allen Shields (deceased). (Doc. 8 at 18). Bethel made the statements during a recorded conversation with his cell mate. The recording was redacted to exclude references to Petitioner. However, Petitioner contends he was still implicated when Bethel stated: “[Fred Shields’] kin folk paid me.” (*Id.* at 19). Petitioner further argues he did not have a meaningful opportunity to cross-examine Allen Shields at the preliminary

hearing. (*Id.* at 20-21).

The Confrontation Clause provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....” U.S. Const. amend. VI. Admitting an incriminating statement by a codefendant may violate the Confrontation Clause of the Sixth Amendment. *See Bruton v. United States*, 391 U.S. 123, 131–32 (1968). However, the challenged statement must be “‘testimonial’ in nature, for only statements of this sort cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.” *Davis v. Washington*, 547 U.S. 813, 821 (2006). If the evidence is testimonial, the Confrontation Clause requires that the declarant be unavailable and that defendant had a prior opportunity for cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

1. Allen Shields (Deceased)

The parties agree that Allen Shields was unavailable and his statements are testimonial. However, Petitioner contends he did not have a meaningful opportunity to cross-examine Shields during the preliminary hearing. At the time, Petitioner was only charged with conspiracy to commit murder, rather than murder. (Doc. 8 at 21). He also argues he discovered certain details about Allen Shield’s plea deal, including the allowance of conjugal visits, after the preliminary hearing. (*Id.* at 21-22). The OCCA considered and rejected these arguments under *Crawford*, reasoning that “the discovery of potentially new grounds for impeachment ... did not render the defense’s prior opportunity to cross-examine Shields constitutionally inadequate.” (Doc. 12-4 at 8-9).

This ruling comports with the record and federal law. The right to confrontation affords the opportunity for effective cross-examination, but does not guarantee “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Van*

Arsdall, 475 U.S. 673, 679 (1986). “The touchstone for whether the Confrontation Clause has been satisfied is whether the jury had sufficient information to make a discriminating appraisal of the witness’ motives and bias.” *United States v. Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010).

Here, four different defense attorneys cross-examined Allen Shields at length. (Doc. 13-2 at 86-184). Petitioner’s counsel questioned him about: (1) the plea deal, under which he would receive a ten-year suspended sentence for testimony that resulted in a conviction; (2) his inconsistent statements to police; (3) his other crimes involving drug trafficking, kidnapping, and assault; and (4) his lack of personal knowledge about Petitioner’s involvement in the crime. (*Id.* at 112-141). The jury therefore had ample information to evaluate Allen Shields’ motives and bias, even if they did not know he was also allowed conjugal visits or other jailhouse perks. Moreover, the Court is not convinced the later-added murder charge required a new round of cross-examination. The Confrontation Clause “does not require that the defendant have a similar motive [for cross-examination] at the prior proceeding.” *United States v. Hargrove*, 382 Fed. App’x 765, 778 (10th Cir. 2010). And, in any event, both charges arose from the same nucleus of facts. The Court finds no constitutional violation based on Allen Shields’ preliminary hearing testimony.

2. Terrico Bethel

As to Bethel, the dispute turns on whether the statements are testimonial. Applying *Davis* and *Bruton*, the OCCA suggested they were not, and therefore not subject to the Confrontation Clause. (Doc. 12-4 at 6). The OCCA also analyzed state evidentiary rules and determined the jailhouse recording met the hearsay exception for statements against pecuniary interest (OKLA. STAT. tit. 21, § 12-2804(B)(3)). (*Id.*). Having reviewed the record, the Court agrees. The Tenth Circuit has held that a “recorded statement to [a confidential informant], known to [the speaker]

only as a fellow inmate, is unquestionably nontestimonial.” *United States v. Smalls*, 605 F.3d 765, 778 (10th Cir. 2010). *See also Davis v. Washington*, 547 U.S. 813, 825 (2006) (statements made unwittingly to a Government informant are “clearly nontestimonial”). The OCCA therefore correctly determined Bethel’s statements to his cell mate do not implicate the Confrontation Clause. *See Michigan v. Bryant*, 562 U.S. 344, 354 (2011) (noting Supreme Court precedent “limited the Confrontation Clause’s reach to testimonial statements”).

As to the hearsay analysis, federal courts “may not provide habeas corpus relief on the basis of state court evidentiary rulings unless they rendered the trial … fundamentally unfair.” *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002). There is no evidence of unfairness in this case. Bethel’s statements were admitted under the hearsay exception for statements against penal interest, which is nearly identical Fed. R. Evid. 804(b)(3). As the OCCA pointed out, “Bethel confessed the conspiracy and murder to [his cell mate],” and “the State redacted all of Bethel’s statements that expressly referenced [Petitioner].” (Doc. 12-4 at 6). Further, Petitioner’s own counsel refused to redact Bethel’s statement about receiving payment from Fred Shield’s “kin folk.” During an *in camera* conference, counsel stated “I don’t want that out;” it appears he planned to argue Bethel was discussing different relatives. (Doc. 13-26 at 139). Under these circumstances, the Court cannot find the trial was fundamentally unfair, and Ground 2 fails.

C. Exclusion of Defense Evidence (Ground 6)

The Court will next address Ground 6, which also pertains to the recorded conversation between Bethel and his cellmate. (Doc. 8 at 33). Petitioner now contends that excluding certain statements by Bethel violated his right to present a defense. (*Id.*). He also argues the state court impermissibly limited his cross-examination of a police witness. (*Id.* at 35).

“The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). However, this right is not absolute; “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)); *see also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (defendant’s rights to cross-examine witnesses are “not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process”). As *Holmes* explained: “While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” 547 U.S. at 326.

The challenged statement by Bethel described a house in Tulsa “belong[ing] to a person he was dealing with...” (Doc. 8 at 33; *see also* Doc. 12-1 at 54). Petitioner believes the statement is exculpatory because he (Petitioner) lived in Broken Arrow, not Tulsa. (Doc. 8 at 33). Applying *Crane*, the OCCA explained:

[Petitioner] sought to have his name redacted but to leave in Bethel’s directions to [Petitioner’s] house, which was in-fact Allen Shields’ home. The trial court gave [Petitioner] the option of leaving in both his name and Bethel’s erroneous conclusion as to [Petitioner’s] home or redacting both the name and Bethel’s erroneous conclusion. [Petitioner] chose to have both his name and the erroneous conclusion redacted. We find that [Petitioner’s] request to redact his name but leave the erroneous conclusion would have been confusing, misleading, and not assure the fair and reliable ascertainment of guilt or innocence.

(Doc. 12-4 at 14-15). This ruling is well supported by the record. Defense counsel admitted he knew Bethel was describing Allen Shield’s house in Tulsa. (Doc. 13-26 at 434). Therefore, the statement would likely support the evidence that the men met and conspired at Allen Shields’ home.

(Doc. 13-2 at 42). To the extent defense counsel planned to suggest the house belonged to some unknown third party, who was not associated with Petitioner, the Court agrees the evidence would be misleading.

Petitioner's next argument pertains to the cross-examination of Detective Regalado. (Doc. 8 at 35). Petitioner argues he should have been permitted to admit Regalado's police report to show that Aziz never mentioned Petitioner in Aziz's initial interview. (*Id.*). The OCCA also rejected this claim, finding "[Petitioner] never sought to admit the ... report into evidence." (Doc. 12-5 at 15). The OCCA further suggested the evidence would be cumulative. (*Id.*). The Court agrees. Both Regalado and Aziz admitted that Aziz did not implicate Petitioner until years after the crime. (Doc. 13-27 at 128-129; 199). Petitioner has not demonstrated the OCCA misapplied the facts or law, and Ground 6 fails.

D. Insufficient Evidence (Ground 3)

In Ground 3, Petitioner contends there was insufficient evidence to sustain his convictions for murder and conspiracy. (Doc. 8 at 23). He contends the State failed to prove he actually participated in the crime, and there is no physical evidence linking him to the shooting. (*Id.* at 23-25). Petitioner also points out that most co-conspirators were "flipped" by the State. (*Id.*). The OCCA rejected these arguments, finding "any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt." (Doc. 12-4 at 10). Specifically, the OCCA found sufficient evidence to conclude "[Petitioner] became a party to the conspiracy to murder the victim, committed an overt act in furtherance of that agreement, and was criminally responsible for the victim's unlawful death." (*Id.*).

The OCCA applied the federal due process standard, which requires the State to prove every

element of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). On federal habeas review, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319. “*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.” *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). As the Supreme Court explained:

First, on direct appeal, “it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.” *Cavazos v. Smith*, 565 U.S. 1, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (per curiam). And second, on habeas review, “a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was ‘objectively unreasonable.’” *Ibid.* (quoting *Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Id. The Court looks to state law to determine the substantive elements of the crime, “but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.” *Coleman*, 566 U.S. at 655.

“The elements of a conspiracy [to commit murder] are (1) an agreement to commit the [murder], and (2) an overt act by one or more of the parties in furtherance of the conspiracy, or to effect its purpose.” *McGee v. State*, 127 P.3d 1147, 1149 (Okla. Crim. App. 2005) (citing OKLA. STAT. tit. 21, § 421). To obtain the murder conviction, the State had to show: (1) the unlawful death of a human; (2) caused by the defendant; and (3) with malice aforethought. *See* OKLA. CRIM. JURY INSTRUCTION Nos. 4-61; OKLA. STAT. tit. 21, § 701.7(A). In Oklahoma, persons who aid and abet in the commission of a crime are “equally culpable with other principals.” *Conover v. State*,

933 P.2d 904, 910 (Okla. Crim. App. 1991), *abrogated on other grounds by Bosse v. Oklahoma*, 137 S. Ct. 1 (2016); *see also* OKLA. STAT. tit. 21, § 172. This includes “procur[ing] the crime to be done” and “advis[ing] or encourag[ing] the commission of the crime.” *Glossip v. State*, 157 P.3d 143, 151 (Okla. Crim. App. 2007).

Based on the record, the Court agrees any rational juror could have found the elements of each crime. Aziz - who ordered the murder - testified that Fred Shields accepted the job via his brother Allen Shields and set a price of \$10,000. (Doc. 13-27 at 172). According to Allen Shields, he met Fred Shields and Petitioner at his (Allen’s) home in the days before the murder. (Doc. 13-2 at 42). Allen testified Fred and Petitioner left the house to travel to Muskogee, and Aziz similarly recalled hearing that Fred was going to steal a getaway van from Muskogee. (*Id.* at 44-45; *see also* Doc. 13-27 at 173). Charles Billingsley, who was not a defendant in the case, testified that he helped Petitioner take a white Ford van from the detail shop next to Billingsley’s business. (Doc. 13-28 at 23-32). On the morning of the murder, Allen Shields recalled that Petitioner came to his home. (Doc. 13-2 at 47). According to Allen Shields, Petitioner wanted him to ask Aziz for the money so the passenger riding with Petitioner (Terrico Bethel) could “get the murder done.” (Doc. 13-2 at 49-50). That same day, Aziz recalled Petitioner knocking on the window of his business and saying “watch the news.” (Doc. 13-27 at 175). Petitioner never returned the white van, but Billingsley recalls seeing it on television in connection with the murder. (Doc. 13-28 at 40). Allen Shields testified that after the murder, he collected the first \$5,000 from Aziz and gave it to Petitioner. (Doc. 13-2 at 65-66). These facts are supported by phone records showing various calls between the co-conspirators in the time leading up to the murder. (Docs. 13-34, 13-35).

Petitioner attempts to overcome this evidence by pointing out: (1) Billingsley never knew

what the van was for; (2) Bethel was the actual shooter; (3) there was no evidence regarding the content of various calls and texts between the men; (4) Allen Shields and Aziz testified pursuant to plea deals; and (5) there was no physical evidence linking Petitioner to the murder. (Doc. 8 at 23-26). “[T]he focus of a *Jackson* inquiry is not on what evidence is missing from the record, but whether the evidence in the record, viewed in the light most favorable to the prosecution, is sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt.” *Matthews v. Workman*, 577 F.3d 1175, 1185 (10th Cir. 2009). Here, the testimony of state witnesses and supporting phone records establish Petitioner was part of an agreement to commit murder and took various steps to procure and effect the crime. Habeas relief is unavailable on Ground 3.

E. Crime Scene Evidence (Ground 4)

Petitioner next argues the state court improperly admitted testimony and photographs depicting the crime scene. (Doc. 8 at 27-29). The evidence included a bloody jacket and a photograph depicting blood, tissue, and hair in the victim’s office following the shooting. (*Id.*). The prosecutor also introduced testimony describing human issue, blood, and brain matter found on the walls and blinds of the victim’s office. (*Id.*). In rejecting Ground 4, the OCCA found the trial court did not err in admitting “testimony and photographs depicting the crime scene and nature, extent, and location of the victim’s injury.” (Doc. 12-4 at 9). The opinion cited cases holding that a stipulation as to cause of death does not determine whether the probative value of a photo outweighs any prejudice. (*Id.*).

“Federal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights.” *Spears v. Mullin*, 343 F.3d 1215, 1225 (10th Cir.

2003). “When, as here, habeas petitioners challenge the admission of [graphic] evidence as violative of the Constitution, [the Court] considers whether the admission of evidence so infected the trial with unfairness as to [violate] due process.” *Id.* at 1226 (quotations omitted); *see also Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) (“The essence of our inquiry ... is whether the admission of the photographs rendered the proceedings fundamentally unfair.”).

The Tenth Circuit has rejected fundamental-unfairness arguments where: (1) the graphic evidence supports the testimony by the medical examiner; and (2) the evidence of guilt is strong. *See Wilson v. Sirmons*, 536 F.3d 1064, 1115 (10th Cir. 2008) (“The photographs, while gruesome ... allowed the examiner to show where the baseball bat caused various injuries,” and in any event, the “evidence at the guilt phase was particularly strong”); *Thornburg v. Mullin*, 422 F.3d 1113, 1129 (10th Cir. 2005) (denying habeas relief where photographs corroborated witness accounts and there was strong evidence of guilt); *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) (same). As discussed above, the State presented strong evidence of guilt. (Supra, Section D). The challenged evidence also corroborated testimony that the victim sustained a high velocity gunshot wound when a shooter entered his office, and was discovered with his head against the window. (Doc. 13-25 at 250-254; *see also* Doc. 13-26 at 16-20). On this record, the Court cannot conclude the challenged evidence rendered the trial unfair, and Ground 4 fails.

F. Juror Misconduct (Ground 5)

Ground 5 raises a due process claim based on juror misconduct. Following trial, Juror Peterson contacted the state judge to report that other jurors ridiculed her and pressured her to reach a verdict during deliberations. (Doc. 12-8 at 29). She alleged she voted to convict because she understood the verdict had to unanimous, but she believed Petitioner was convicted because he was

black and refused to testify. (*Id.*). Juror Peterson also provided an affidavit to defense counsel, which also alleged: (1) Juror Williams said “Do you really want him to be walking on the streets? He’s got other charges and won’t be getting out of jail;” and (2) Juror Weldon slept at trial. (*Id.* at 38). After some investigation, Petitioner’s counsel obtained an affidavit from Juror Perez, who also believed a unanimous verdict was required. (*Id.* at 42). Petitioner filed a motion for a new trial, but the state court denied the motion without holding a hearing. (*Id.* at 52).

After considering Ground 5, the OCCA found no error. (Doc. 12-4 at 13). The opinion concluded no hearing was required because Petitioner failed to file his motion within ten days after entry of the criminal judgment, as required by Oklahoma Crim. Rule. 2.1(A)(2). (*Id.*). The OCCA further found no clear and convincing evidence of misconduct, and noted that in any event, jurors are not permitted to impeach their verdicts.” (*Id.* at 14).

The federal constitution guarantees “a tribunal both impartial and mentally competent to afford a hearing.” *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (quotations omitted). However, like Oklahoma law, federal law “prohibit[s] the admission of juror testimony to impeach a jury verdict.” *Tanner v. United States*, 483 U.S. 107, 117 (1987). This includes situations involving illicit drug use, *Tanner*, 483 U.S. at 117, and undisclosed bias regarding the facts of the case, *Warger*, 135 S. Ct. at 529. As *Tanner* noted, “[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.” 483 U.S. 107, 120 (1987). An exception to the no-impeachment rule exists where external, prejudicial information is improperly brought to the jury’s attention. *Wagner*, 135 S. Ct. at 529 (citing Fed. R. Evid. 606(b)).⁴

⁴ In 2017 - after briefing was complete in this case - the Supreme Court established a second exception

In light of clearly established federal law, the Court cannot find that the OCCA's ruling constitutes an "extreme malfunction in the state criminal justice system." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Juror Peterson did not report the reference to Petitioner's "other charges,"⁵ in her original letter to the state court, and in any event, the comment is too vague to conclude extra-record facts prejudiced the outcome at trial. *See, e.g., Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (On juror-misconduct claims, the inquiry is "whether they discussed specific extra-record *facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby.") (emphasis in original). The Court is also not convinced the other alleged misconduct (*i.e.* a juror who sometimes slept), or the lack of hearing, rendered the trial fundamentally unfair. Habeas relief is therefore unavailable on Ground 5.

G. Cumulative Error (Ground 7)

Petitioner finally contends he suffered prejudice from the cumulative effect of all errors addressed in Grounds 1-6. (Doc. 8 at 36). The "[c]umulative error analysis [only] applies [in a habeas proceeding] where there are two or more actual errors." *Moore v. Reynolds*, 153 F.3d 1086,

to the no-impeachment rule for evidence of "racial animus [that] was a significant motivating factor in [the] finding of guilt." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). However, habeas relief is only available based on federal law that was "clearly established at the time of the [state] adjudication." *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (quotations omitted). The Court also notes that even if *Pena-Rodriguez* applied, it would not change the outcome in this case. The only evidence of racial bias appeared in Juror Peterson's letter to the state judge, where she wrote: "I believe they convicted [Petitioner] because he was black and didn't take the stand in his own defense." (Doc. 12-8 at 29). She did not provide any specific averments to support this statement or even raise the issue in her detailed, three-page affidavit. (*Id.* at 37-39). Therefore, the Court cannot disturb the verdict based on *Pena-Rodriguez*.

⁵ The exact question was: "Do you really want him to walking on the streets? He's got other charges and won't be getting out of jail." (Doc. 12-8 at 38).

1113 (10th Cir. 1998). “[I]t does not apply to the cumulative effect of non-errors.” *Id.* Having found no error in Grounds 1 through 6, the Court rejects Petitioner’s cumulative error claim.

In sum, the Court concludes Petitioner’s conviction does not violate federal law. 28 U.S.C. § 2254(a). The Petition is therefore denied.

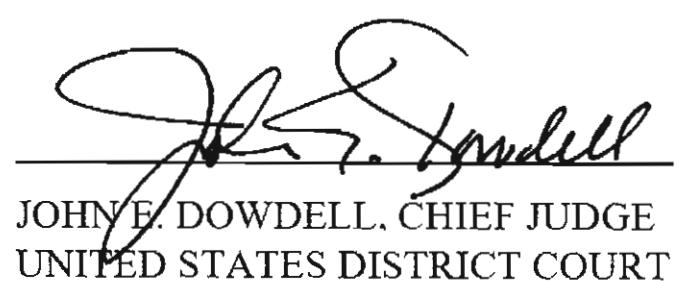
III. Certificate of Appealability

Habeas Corpus Rule 11 requires “[t]he district court [to] . . . issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate may only issue “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When the district court rejects the merits of petitioner’s constitutional claims, he must make this showing by “demonstrat[ing] that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons discussed above, Petitioner has not made the requisite showing on any of his claims. The Court therefore denies a certificate of appealability.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for a writ of habeas corpus (Doc. 1) is denied.
2. A certificate of appealability is denied.
3. A separate judgment will be entered herewith.

ORDERED this 17th day of September, 2019.



JOHN E. DOWDELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX “B”

Judgment (N.D. Okla.)

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

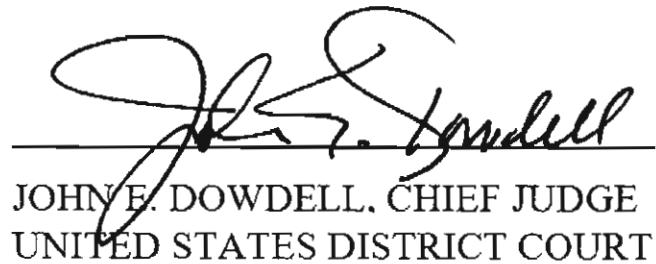
ALONZO CORTEZ JOHNSON,)
Petitioner,)
v.)
JIMMY MARTIN, Warden,) Case No. 16-CV-433-JED-FHM
Respondent.)

JUDGMENT

This matter comes before the Court on Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The issues having been duly considered, and for the reasons in the Opinion and Order filed contemporaneously herewith,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

ORDERED this 17th day of September, 2019.



JOHN E. DOWDELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX “C”

Order Granting Certificate of Appealability (10th Cir.)

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 5, 2020

Christopher M. Wolpert
Clerk of Court

ALONZO CORTEZ JOHNSON,

Petitioner - Appellant,

v.

JIMMY MARTIN, Warden,

Respondent - Appellee.

No. 19-5091
(D.C. No. 4:16-CV-00433-JED-FHM)
(N.D. Okla.)

ORDER

Before BACHARACH, Circuit Judge.

Petitioner Alonzo Cortez Johnson, a state prisoner, filed a 28 U.S.C. § 2254 habeas petition. The district court denied the petition and denied a certificate of appealability (“COA”). Mr. Johnson then filed a motion for a COA and brief in support in this court. Pursuant to Tenth Circuit Rule 22.1(B), the State of Oklahoma has not yet filed a response brief. Following review of the record and the brief filed by counsel, a COA is granted on the following issues:

Issue 1: The State Systematically Used Its Peremptory Challenges to Exclude Racial Minorities from the Jury

Issue 4: The Introduction of Gruesome Testimony and Exhibits Resulted in a Fundamentally Unfair Trial

Issue 5: Juror Misconduct Deprived Johnson of a Fair Trial

Issue 7: The Cumulative Effect of the Errors at Trial Deprived Johnson of a Fundamentally Fair Trial in Violation of his Rights under the Sixth and Fourteenth Amendments to the United States Constitution

Respondent is directed to file a response brief within thirty days of the date of this order. Mr. Johnson may file a reply brief within twenty-one days of service of respondent's brief if he so desires. All briefs shall be filed and served in compliance with Fed. R. App. P. 28 and 31.

Entered for the Court

Robert E. Bacharach
Circuit Judge

From: ca10_ecf_notify@ca10.uscourts.gov
To: [CA10 ECF Intake OKND](#)
Subject: 19-5091 Johnson v. Martin "Order filed" (4:16-CV-00433-JED-FHM)
Date: Wednesday, August 5, 2020 1:34:18 PM

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Tenth Circuit Court of Appeals

Notice of Docket Activity

The following transaction was entered on 08/05/2020 at 12:33:30 PM MDT and filed on 08/05/2020

Case Name: Johnson v. Martin

Case Number: [19-5091](#)

Document(s): [Document\(s\)](#)

Docket Text:

[10760579] Order filed by Judge Bacharach issuing certificate of appealability and directing appellee to file a response brief within 30 days of the date of this order. (Appellee's brief due 09/04/2020 for Jimmy Martin.) Served on 08/05/2020. (See the attachment for the entire order.) [19-5091]

Notice will be electronically mailed to:

Mr. James Lee Hankins: jameshankins@ocdw.com, nitawright73@gmail.com
Ms. Jennifer B. Miller: Jennifer.Miller@oag.ok.gov, fhc.docket@oag.ok.gov

The following document(s) are associated with this transaction:

Document Description: Order granting COA

Original Filename: 19-5091 Order.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1104938855 [Date=08/05/2020] [FileNumber=10760579-0]
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APPENDIX “D”

Published Opinion (10th Cir.)

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

July 2, 2021

Christopher M. Wolpert
Clerk of Court

ALONZO CORTEZ JOHNSON,

Petitioner - Appellant,

v.

No. 19-5091

JIMMY MARTIN, Warden,

Respondent - Appellee.

**Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:16-CV-00433-JED-FHM)**

James L. Hankins, Edmond, Oklahoma, for Petitioner – Appellant.

Tessa Henry, Assistant Attorney General (Mike Hunter, Attorney General, and Julia Pittman, Assistant Attorney General, on the brief), Oklahoma City, Oklahoma, for Respondent – Appellee.

Before **MORITZ**, **SEYMOUR**, and **BRISCOE**, Circuit Judges.

MORITZ, Circuit Judge.

An Oklahoma jury convicted Alonzo Johnson of murder and conspiracy to commit murder. After unsuccessfully challenging his convictions in state court, Johnson filed a 28 U.S.C § 2254 petition seeking federal habeas relief. As relevant here, he asserted that the prosecution exercised its peremptory strikes in a racially

discriminatory manner to exclude minorities from the jury, in violation of his Fourteenth Amendment rights as set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). Johnson also asserted, in relevant part, that gruesome evidence, juror misconduct, and cumulative error rendered his trial fundamentally unfair. The district court denied relief.

For the reasons explained below, we affirm the denial of relief on Johnson's gruesome-evidence, juror-misconduct, and cumulative-error claims. But because we conclude that the Oklahoma Court of Criminal Appeals (OCCA) relied on an unreasonable factual determination and unreasonably applied *Batson* to reject Johnson's *Batson* claim and further determine that Johnson raised a *prima facie* case of discrimination under the first step of *Batson*, we reverse the district court's denial of habeas relief on Johnson's *Batson* claim and remand for further proceedings consistent with this opinion.

Background

Although we will add more facts as needed to our analysis below, we begin by briefly setting the scene.¹ This appeal arises from a murder-for-hire plot involving five individuals: Mohammed Aziz, Allen Shields (Allen), Fred Shields (Fred), Terrico Bethel, and Johnson. The victim was Neal Sweeney, a fuel supplier.

Sweeney's fuel marketing company supplied fuel to convenience stores, including stores owned by Aziz. As a result of a dispute involving Aziz's

¹ We take these undisputed facts from the district court's decision below.

nonpayment of bills, Sweeney obtained a default judgment against Aziz. Aziz, who had “developed an ‘intense hatred’ toward Sweeney,” approached Allen and asked if Allen knew anyone who could kill someone for him. App. 30 (quoting R. vol. 1, 62). Allen spoke to his brother, Fred, about finding someone to do the job. Fred set the price for the murder at \$10,000 and recruited Bethel to carry it out.

Fred also recruited Johnson, a cousin of the Shields brothers. Johnson “purportedly obtained the getaway car and helped coordinate with Aziz.” *Id.* Bethel drove the car to Sweeney’s office and shot Sweeney at close range, in the head. Later, law enforcement apprehended Fred “on a different crime[,] and [he] exposed the conspiracy” to kill Sweeney “in an effort to make a deal.” *Id.* at 30–31.

The State charged Johnson with first-degree murder and conspiracy to commit first-degree murder.² His defense at trial centered on arguments that his involvement in the murder plot was minimal and that his coconspirators’ testimony against him was unreliable (Aziz testified at Johnson’s trial, and the State introduced Allen’s preliminary-hearing testimony). The jury convicted Johnson on both counts. The trial court sentenced him to life imprisonment on each count, to run consecutively.

Johnson filed a direct appeal, raising eighteen issues, and the OCCA affirmed. *Johnson v. State*, No. F-2013-173 (Okla. Crim. App. July 17, 2014) (unpublished) (*Johnson I*). Johnson then sought postconviction relief, which the state trial court

² The other men faced similar charges. A jury convicted Fred and Bethel of first-degree murder, among other things, and both received life sentences. Allen faced a conspiracy charge but died before Johnson’s trial. Aziz pleaded guilty to solicitation of murder and was sentenced to 35 years in prison.

denied. *Johnson v. State*, No. CF-2009-2738 (Tulsa Cnty. Dist. Ct. Oct. 6, 2015) (unpublished) (*Johnson II*). The OCCA affirmed the denial of postconviction relief. *Johnson v. State*, No. PC-2015-923 (Okla. Crim. App. Apr. 7, 2016) (unpublished) (*Johnson III*).

Johnson then filed the § 2254 petition underlying this appeal, raising seven claims. The district court denied the petition and declined to issue a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A). Johnson sought to appeal to this court and filed a combined opening brief and request for a COA. We granted him a partial COA to appeal the district court’s resolution of four of his seven claims: the *Batson* claim, the gruesome-evidence claim, the juror-misconduct claim, and the cumulative-error claim.³ *See* § 2253(c)(3).

Analysis

We review the district court’s legal analysis de novo. *Smith v. Duckworth*, 824 F.3d 1233, 1241–42 (10th Cir. 2016). In so doing, we remain bound by the constraints of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.

³ The COA order does not expressly deny a COA on Johnson’s three remaining claims: (1) that the admission of Bethel’s recorded statements and Allen’s preliminary-hearing testimony violated his rights under the Confrontation Clause, (2) that the evidence was insufficient to support his conviction, and (3) that he was denied the right to present a defense. Perhaps recognizing the partial COA grant as an implicit denial of a COA on his remaining claims, Johnson does not reassert his desire for a COA on these claims in his reply brief. In the interest of clarity, we now expressly deny a COA on these three remaining claims, concluding that reasonable jurists could not debate the district court’s resolution of them. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that to obtain COA, “petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong”).

Id. at 1240–41. AEDPA requires a state prisoner seeking federal habeas relief to show that the state court’s resolution of his or her claims (1) “was contrary to, or involved an unreasonable application of, clearly established [f]ederal law” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate[-]court proceeding.” § 2254(d). The two prongs of § 2254(d) thus impose “a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” *Smith*, 824 F.3d at 1241 (quoting *Burt v. Titlow*, 571 U.S. 12, 19–20 (2013)).

Under § 2254(d)(1), “[w]hether the law is clearly established is *the* threshold question.” *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008). “[W]ithout clearly established federal law, a federal habeas court need not assess whether a state court’s decision was ‘contrary to’ or involved an ‘unreasonable application’ of such law.” *Id.* at 1017 (quoting § 2254(d)(1)). But if such clearly established law exists, a state-court decision is contrary to it if the state court “applies a rule that contradicts the governing law set forth in Supreme Court cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent.” *Smith*, 824 F.3d at 1241 (quoting *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016)). And a state-court decision is an unreasonable application of clearly established federal law if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000).

Under § 2254(d)(2), “[w]e will not conclude a state court’s factual findings are unreasonable ‘merely because we would have reached a different conclusion in the first instance.’” *Smith*, 824 F.3d at 1241 (quoting *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015)). Instead, we “defer to the state court’s factual determinations so long as ‘reasonable minds reviewing the record might disagree about the finding in question.’” *Id.* (quoting *Brumfield*, 576 U.S. at 314). In line with this deference, we presume that a state court’s factual findings are correct, “and the petitioner bears the burden of rebutting that presumption by ‘clear and convincing evidence.’” *Id.* (quoting § 2254(e)(1)).⁴ But “‘deference does not imply abandonment or abdication of judicial review,’ and ‘does not by definition preclude relief.’” *Brumfield*, 576 U.S. at 314 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*)). Accordingly, “if the petitioner can show that ‘the state courts plainly misapprehend[ed] or misstate[d] the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.’” *Smith*, 824 F.3d at 1241 (alterations in original) (quoting *Ryder*, 810 F.3d at 739).

⁴ The Supreme Court has “not yet ‘defined the precise relationship between § 2254(d)(2) and § 2254(e)(1).’” *Brumfield*, 576 U.S. at 322 (quoting *Titlow*, 571 U.S. at 18). Accordingly, it is “not entirely clear whether § 2254(e)(1)’s presumption applies to our § 2254(d)(2) analysis.” *Vreeland v. Zupan*, 906 F.3d 866, 880 n.3 (10th Cir. 2018). But because Johnson “appears to concede it does, we need not resolve this ‘open question’ here. *Id.* (quoting *Sharp v. Rohling*, 793 F.3d 1216, 1228 n.10 (10th Cir. 2015)).

I. ***Batson* Claim**

Johnson—who is African American—argues that the district court erred in denying his claim that the prosecution used its peremptory challenges to systematically exclude racial minorities from the jury in violation of *Batson*. *Batson* held that the “Equal Protection Clause prohibits the prosecution’s use of peremptory challenges to exclude potential jurors on the basis of their race.” *Saiz v. Ortiz*, 392 F.3d 1166, 1171 (10th Cir. 2004). In other words, *Batson* recognized “the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.” 476 U.S. at 85–86.

A trial court faced with a *Batson* challenge must apply a three-step burden-shifting analysis. *See id.* at 96–98. “First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, . . . the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question.” *Rice v. Collins*, 546 U.S. 333, 338 (2006) (citation omitted). “Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination.” *Id.*

A. Additional Facts and Procedural Background

At Johnson’s trial, the prosecutor exercised his first six peremptory challenges in the following order: (1) Dr. Tawil, (2) Mr. Dickens, (3) Ms. Aramburo de Wassom, (4) Ms. Wilson, (5) Ms. Carranza, and (6) Ms. Martinez. When the prosecutor moved to dismiss Mr. Dickens, an African American, from the jury pool,

the trial court asked: “Your race neutral reason?” R. vol. 3, 449. The prosecutor responded: “Judge, he has a Ph.D., [and] we’re concerned about him being a professor of liberal arts. It’s been my practice to not keep those types of educated people, Ph.D.s in liberal arts, on the jury. We think they’re too exacting at times, too liberal.” *Id.* The trial court then stated: “Well, I’ll determine there’s a race[-]neutral reason. There are other prospective African Americans on the jury.” *Id.*

After the prosecutor moved to dismiss Ms. Martinez with his sixth strike, defense counsel stated:

Your honor, I’d like to point out at this point that I think every peremptory challenge . . . so far[,] except Ms. Wilson[,] has been of a minority[:] Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, [Ms. Martinez],⁵ and Mr. Dickens. And there’s a pattern here, Your Honor, of striking all minorities off this jury.⁶

Id. at 450. The trial court responded:

Well, I don’t think that this establishes a pattern. Again, in terms of—Ms. Martinez, I won’t state their reasons for them, but Ms. Martinez was patently—she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here.

Id. at 450–51.

⁵ Defense counsel repeated “Ms. Carranza,” but it appears that he intended to say “Ms. Martinez”: she was the other minority female excused, and the court referred to “Ms. Martinez” in its response to defense counsel. R. vol. 3, 450.

⁶ The record does not reveal the specific race of any of these six jurors except for Mr. Dickens, who the court identified as African American. But when defense counsel identified five of these six jurors as minorities, neither the trial court nor the prosecutor disputed that characterization.

The prosecutor next sought to excuse Ms. Williams, stating—without being prompted by either a defense objection or a question from the trial court—that although Ms. Williams was “African American, . . . [the] race[-]neutral reason for her is she’s a pastor. I think pastors traditionally are very, very forgiving, [and] have trouble with judgment. She’s worked with drug addicts and counseled them in the past[,] showing . . . a propensity towards treatment rather than judgment.” *Id.* at 452. The trial court interrupted this explanation and said, “Well, you would have effectively eliminated all the African Americans[,] and I’m not going to do that.” *Id.*

Later, at sentencing, the trial court stated that it “probably made an error during the voir dire to the detriment . . . of the State when” the prosecutor sought to excuse Ms. Williams. R. vol. 5, 758. Specifically, the trial court explained that it had recently been reminded that the absence of any minorities on the jury “was not a basis to prevent a strike”; instead, “there needed to be a finding that there was either [a] systematic or [a] specific discriminatory practice.” *Id.* at 759. Thus, because the absence of any minorities was the rationale for the trial court’s decision to reject the prosecutor’s peremptory challenge to Ms. Williams, the trial court acknowledged that it “made an error.” *Id.*

Johnson then raised his *Batson* challenge on direct appeal, arguing that the “prosecutor systematically removed minorities from the jury.” R. vol. 1, 181. Rejecting this argument in a single paragraph, the OCCA first stated “the trial court did not abuse its discretion when it found that the State did not engage in systemic or specific discrimination.” *Johnson I*, slip op. at 3. The OCCA then acknowledged the

trial court's error in refusing to allow the prosecutor to excuse Ms. Williams and further noted that "the trial court's determination that the State's explanations for excusing each of the minority jurors were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented." *Id.* Last, the OCCA concluded that Johnson was not entitled to relief because he had "failed to establish purposeful discrimination on the part of the State." *Id.*

Johnson again asserted his *Batson* claim in his state-court application for postconviction relief. Both the state trial court and the OCCA held that because Johnson brought his *Batson* claim on direct appeal, consideration of its merits in postconviction proceedings was barred by res judicata. *Johnson II*, slip op. at 7; *Johnson III*, slip op. at 3.

Reviewing the OCCA's adjudication of this claim, the district court began with the proposition that "[b]ecause the OCCA applied *Batson*, relief is only available if it 'was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge.'" App. 35 (quoting *Collins*, 546 U.S. at 338). Additionally, the district court relied on *Black v. Workman* for the proposition that a habeas court must "defer to the state trial judge's finding of no racial motivation 'in the absence of exceptional circumstances.'" 682 F.3d 880, 897 (10th Cir. 2012) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). The district court then determined that no exceptional circumstances existed here. In so doing, the district court specifically noted the prosecutor's explanation for striking Mr. Dickens (he had a Ph.D.). It also determined that the record supported the explanations provided by the trial court for the dismissal

of the other minority jurors. Accordingly, it found no evidence of racial motivation and declined to “disturb the OCCA’s application of *Batson*.” App. 36.

B. Discussion

On appeal, Johnson contends that the district court erred by mischaracterizing his *Batson* claim as arising under step three of *Batson*. In so doing, Johnson renews the second-step *Batson* argument he raised in his habeas petition. And he further asserts—as required by the barrier imposed by § 2254(d)—that the OCCA (1) unreasonably applied *Batson* in finding the second step satisfied where the trial court, rather than the prosecutor, supplied race-neutral reasons for the strikes at issue and (2) found and relied on an unreasonable fact when it determined that the prosecutor supplied race-neutral reasons for the challenged strikes.

1. The State’s Arguments

Before turning to Johnson’s arguments, we first address and reject two points raised by the State.

i. Procedural Bar

The State suggests in passing⁷ that this court should not consider Johnson’s *Batson* claim because he failed to raise it in his direct appeal to the OCCA. In so

⁷ Specifically, the State devotes two sentences to this argument, asserting that because Johnson “did not make this argument to the OCCA on direct appeal,” it “would be improper” for us to consider it now. Aplee. Br. 19. In support, the State cites only *Sexton v. Beaudreaux*, a case that did not concern procedural bar. 138 S. Ct. 2555, 2560 (2018) (per curiam) (noting in passing that Ninth Circuit erred when it “considered arguments against the state court’s decision that [petitioner] never even made in his state habeas petition”).

doing, the State appears to be asserting a two-part procedural-bar argument:

(1) Johnson did not raise his specific step-two *Batson* argument in his direct appeal, and (2) when he raised it in his application for postconviction relief, the OCCA implicitly rejected it on waiver grounds as an argument that could have been but was not raised on direct appeal. *See Harmon v. Sharp*, 936 F.3d 1044, 1060 (10th Cir. 2019) (noting that “[o]n habeas review, this court does not address issues that have been defaulted in state court on an independent and adequate state procedural ground” (quoting *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir. 1998))); *Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013) (providing that in Oklahoma postconviction proceedings, “issues that were not raised previously on direct appeal, but which could have been raised, are waived”).

We reject this argument because, according to both the state trial court and the OCCA, Johnson *did* raise his *Batson* claim on direct appeal. *See Johnson II*, slip op. at 7; *Johnson III*, slip op. at 3. Indeed, the State acknowledged as much below, noting that (1) Johnson “raised this claim on direct appeal to the OCCA” and “[t]he OCCA addressed the claim on the merits and denied . . . relief,” and (2) Johnson “*also* raised this claim in his post[]conviction proceeding[,] but the OCCA, *noting the claim had been previously raised and addressed in [Johnson]’s direct appeal*, declined to again address the claim as it was ‘barred as res judicata.’” R. vol. 1, 127 & n.7 (emphases added) (quoting *Johnson III*, slip op. at 3). Given that the state courts determined this particular argument was raised on direct appeal, we reject the State’s procedural-bar argument.

ii. Type of *Batson* Error

The State next contends that Johnson is not entitled to habeas relief because he alleges trial-court error at the second step of *Batson*, but the trial court's ruling stopped at the first step of *Batson*. In other words, the State contends that the trial court's response to defense counsel's objection about a pattern of striking minorities amounted to a ruling that defense counsel failed to establish a *prima facie* case of discrimination. Thus, continues the State, the *Batson* inquiry never proceeded to the second step, and no second-step error could have occurred.

Although the State's interpretation may be plausible, we ultimately reject it. Recall that after the State's sixth peremptory challenge, defense counsel objected that "there's a pattern here . . . of striking all minorities off this jury." R. vol. 3, 450. The trial court responded:

Well, I don't think that this establishes a pattern. Again, in terms of—Ms. Martinez, I won't state their reasons for them, but Ms. Martinez was patently—she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here.

Id. at 450–51. In these four sentences, the trial court stated at the beginning and at the end that there was no pattern of discrimination. The State contends that this conclusion, combined with the trial court's decision not to ask the prosecutor for race-neutral reasons, "was an implicit ruling that [Johnson] failed to make a *prima facie* showing that the State's use of peremptory challenges . . . showed a pattern of discrimination." Aplee. Br. 20; *see also Saiz*, 392 F.3d at 1177–78 (noting that "initial obligation under *Batson* [is] to make a *prima facie* showing that the

prosecution’s peremptory strikes were discriminatory” and “infer[ring] from the trial court’s decision not to go on to step two of the *Batson* analysis (asking the prosecution to explain its peremptory strike) that it concluded that [the defendant] had failed to establish a *prima facie* case of discrimination”).

But critically, the State’s proposed interpretation of the trial court’s ruling is contrary to the OCCA’s interpretation. In rejecting Johnson’s *Batson* claim, the OCCA specifically approved the trial court’s procedure at the second (and third) step of *Batson* when it stated the “trial court’s determination that the State’s explanations for excusing each of the minority jurors were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented.” *Johnson I*, slip op. at 3. Because the OCCA treated the trial court’s ruling as going beyond the first step of *Batson*, we reject the State’s proposed interpretation of the trial court’s ruling as limited to *Batson*’s first step.

2. Johnson’s Arguments

Having rejected the State’s overarching arguments in favor of affirming the district court’s denial of habeas relief on Johnson’s *Batson* claim, we now turn to Johnson’s arguments in favor of reversal.

i. The District Court’s Decision

As an initial matter, we agree with Johnson that the district court erred by treating his *Batson* claim as aimed at the third step of *Batson*. Johnson plainly asserted in his habeas petition that the trial court erred at the second step of *Batson* by failing to ask the prosecutor for race-neutral reasons. But to reject his claim, the

district court relied on *Black* and *Snyder*, which addressed challenges to rulings at the third step of the *Batson* analysis. *See Black*, 682 F.3d at 895–96 (noting that “the prosecutor’s explanation satisfied step two of the *Batson* three-step process” and moving on to “determine whether ‘it was unreasonable to credit the prosecutor’s race-neutral explanations’” (quoting *Collins*, 546 U.S. at 338)); *Snyder*, 552 U.S. at 479, 484–85 (considering plausibility of “the prosecution’s two proffered grounds for striking” juror and noting that “the question presented at the third stage of the *Batson* inquiry is ‘whether the defendant has shown purposeful discrimination’” (quoting *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005) (*Miller-El II*) (Thomas, J., dissenting))). Accordingly, in our de novo review of the district court’s legal analysis, we depart from the district court’s step-three analysis and focus specifically on Johnson’s step-two argument. *See Smith*, 824 F.3d at 1241–42.

ii. § 2254(d)

To obtain habeas relief, Johnson must first pass through the barrier imposed by § 2254(d). On this point, Johnson advances arguments under both prongs, asserting that the OCCA denied relief based on an unreasonable application of *Batson* under subsection (d)(1) and an unreasonable determination of the facts under subsection (d)(2). *See* § 2254(d). Recall, again, that the OCCA’s discussion of Johnson’s *Batson* claim spanned only three substantive sentences:

We find that the trial court did not abuse its discretion when it found that the State did not engage in systemic or specific discrimination. Although the trial court erred to the detriment of the State when it refused to permit the prosecutor to excuse an African-American juror because it would have left the jury without any African-Americans, we

find that the trial court's determination that the State's explanations for excusing each of the minority jurors were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented. As [Johnson] ultimately failed to establish purposeful discrimination on the part of the State[,] no relief is required.

Johnson I, slip op. at 3 (emphasis added) (citations omitted). Clearly, in the second of these three sentences, the OCCA expressly approved of the trial court's determination that the prosecutor's "*explanations* for excusing *each* of the minority jurors were legitimate race-neutral *reasons*." *Id.* (emphases added).

But this conclusion is factually incorrect. The record plainly shows that the trial court only determined that *one* explanation offered by the prosecutor for excusing *one* minority juror was a legitimate race-neutral *reason*: it accepted that the prosecutor struck Mr. Dickens because he had a Ph.D. The prosecutor did not offer any reasons for his next set of strikes. Instead, the trial court provided its *own* reasons for the strikes, speculating as to what the prosecutor's reasons might have been. And paradoxically, it did so after declaring that it would not "state [the prosecutor's] reasons." R. vol. 3, 450. The trial court also later rejected the prosecutor's proffered reason for striking Ms. Williams.⁸

Accordingly, Johnson has shown by clear and convincing evidence that the OCCA "plainly misapprehend[ed] or misstate[d] the record" when it purported to

⁸ The trial court eventually concluded that it could have and perhaps should have accepted the prosecutor's reason for striking Ms. Williams. But such belated recognition does not change what happened during jury selection, which was that the trial court rejected the prosecutor's proffered reason and did not allow the prosecutor to strike Ms. Williams.

approve the trial court's acceptance of the prosecutor's multiple race-neutral reasons for his strikes—in reality, the trial court accepted only one such reason from the prosecutor and merely speculated as to the other reasons, which it supplied itself. *Smith*, 824 F.3d at 1241 (alterations in original) (quoting *Ryder*, 810 F.3d at 739); *see also* § 2254(d)(2), (e)(1). The OCCA then relied on this unreasonable factual determination to reject Johnson's *Batson* challenge and find no purposeful discrimination. *See Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011) (emphasizing that “to receive relief under [§ 2254(d)(2)], the petitioner must show that the state court’s adjudication of the claim ‘resulted in a decision that was *based on* an unreasonable determination of the facts in light of the evidence presented’” (quoting § 2254(d)(2))).

Moreover, to the extent that the OCCA considered the trial court's sua sponte speculation about potential race-neutral reasons as part of the *Batson* analysis, doing so was an unreasonable application of *Batson*. The second step of *Batson* specifically requires “[t]he prosecutor . . . [to] articulate a neutral explanation related to the particular case to be tried.” 476 U.S. at 97–98 (emphasis added); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (“As the *Batson* Court explained and as the Court later reiterated, once a *prima facie* case of racial discrimination has been established, *the prosecutor must provide* race-neutral reasons for the strikes.” (emphasis added)). And *Batson* means what it says: the court must ask the prosecutor to provide reasons, rather than merely speculating about what such reasons might be. *See Johnson v. California*, 545 U.S. 162, 172 (2005) (“The inherent uncertainty

present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.”); *Flowers*, 139 S. Ct. at 2244 (“The Court has explained that ‘the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.’” (quoting *Snyder*, 552 U.S. at 477)); *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) (noting that speculation “does not aid our inquiry into the reasons the prosecutor actually harbored” for peremptory strike).

Thus, when a trial court offers its own speculation as to the prosecutor’s reasons for striking minority jurors, it essentially disregards its own core function under *Batson*—to evaluate the reasons offered by the prosecutor, including the prosecutor’s demeanor and other contextual information, in order to determine the prosecutor’s true intent. *See Flowers*, 139 S. Ct. at 2243–44. And in that regard, it matters not a whit that the trial court may have offered perfectly good reasons for striking the minority jurors. As the Ninth Circuit explained in a factually analogous case, “it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken.” *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) (*Paulino I*); *see also id.* at 1089–90 (finding that trial court “clearly contravened” *Batson* when it “offered, *sua sponte*, its speculation as to why the prosecutor may have struck the five potential jurors in question”). Similarly, the Third Circuit faulted a state appellate court for “conflat[ing] steps one and two of the *Batson* analysis in the sense that it identified and then analyzed potential justifications for the challenged strikes—something that

should not occur until step two—in its step[-]one analysis of whether [petitioner] had successfully established a *prima facie* case.” *Hardcastle v. Horn*, 368 F.3d 246, 256 (3d Cir. 2004); *see also id.* at 261 (noting “the *Batson* Court’s emphasis on the subjective intent of the prosecutor”).

In line with these authorities, we hold that the OCCA’s reliance on the trial court’s *sua sponte* speculation about the prosecutor’s reasons was an unreasonable application of *Batson* to Johnson’s claim of discriminatory peremptory strikes. *See Brinson v. Vaughn*, 398 F.3d 225, 233 (3d Cir. 2005) (finding that state court unreasonably applied *Batson* to reject claim of discriminatory strikes where “the trial judge did not follow the three-step process outlined in *Batson*,” including by “not call[ing] upon the prosecutor to state his reasons for the contested strikes”). Simply put, because *Batson* mandates that the prosecutor supply the race-neutral reasons, it was not reasonable for the OCCA to accept the trial court’s speculation about those reasons in lieu of the prosecutor’s actual reasons.

iii. The *Batson* Test

Because the OCCA based its decision on an unreasonable factual finding and also unreasonably applied *Batson*, we review Johnson’s *Batson* claim *de novo*, without deferring to the OCCA. *See Milton v. Miller*, 744 F.3d 660, 670–71 (10th Cir. 2014) (explaining that if petitioner satisfies § 2254(d)(1), federal habeas court reviews petitioner’s claim *de novo*, “rather than deferring to the OCCA’s resolution of that claim”); *Byrd*, 645 F.3d at 1172 (explaining that if petitioner satisfies § 2254(d)(2), we review claim *de novo* and without AEDPA deference).

Under the first step of *Batson*, Johnson “must make out a *prima facie* case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’” *Johnson*, 545 U.S. at 168 (quoting *Batson*, 476 U.S. at 93–94). This step is not “so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination.” *Id.* at 170. On the contrary, “a defendant satisfies the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *Id.* And “the methods by which *prima facie* cases c[an] be proved” are “permissive.” *Id.* at 169 n.5.

Here, to establish an inference of discrimination, Johnson primarily alleges a pattern of discrimination in which the prosecutor used five of his first six peremptory strikes to excuse minority jurors.⁹ And a prosecutor’s pattern of strikes against minority jurors is enough, on its own, to establish a *prima facie* case of discrimination. *See Batson*, 476 U.S. at 97; *Paulino I*, 371 F.3d at 1092 (finding that “the excusal of five out of six black jurors by means of five out of six peremptories” was sufficient “pattern of strikes t[o] raise[] a plausible inference of discrimination”);

⁹ Johnson further supports his position by noting the prosecutor’s later failed attempt to remove Ms. Williams, the last remaining African American, from the jury. Although this attempt might support an inference of discrimination, we do not consider it here because we are concerned with the facts as they existed at the time of Johnson’s objection and before the prosecutor’s attempt to strike Ms. Williams. *See Paulino I*, 371 F.3d at 1091 (evaluating *prima facie* case of discrimination by “looking at the pattern of strikes only at the time of [the] objection”).

Brinson, 398 F.3d at 234–35 (concluding that “[t]he pattern of strikes alleged by the defense is alone sufficient to establish a prima facie case” when prosecutor “used 13 of 14 strikes against African Americans”); *Holloway*, 355 F.3d at 722 (finding prima facie case established when prosecutor used 11 of 12 strikes against African Americans).

Nevertheless, the State contends that there is no inference of discrimination here because Johnson “did not even make a record as to the races” of each of the jurors at issue. Aplee. Br. 21. But as Johnson replies, neither the trial court nor the prosecutor objected to defense counsel’s representation that the prosecutor had used five of six strikes against minorities. On the contrary, the trial court implicitly accepted that representation by responding with its own race-neutral reasons for why the prosecutor might have struck three of the jurors at issue. Moreover, as the State acknowledges, “racial identity between the defendant and the excused prospective juror is not necessary for a *Batson* claim.” *Id.* (emphasis omitted); *see also Powers v. Ohio*, 499 U.S. 400, 416 (1991) (holding that *Batson* does not require racial identity between defendant and prospective juror). Thus, the absence of a record as to the specific racial makeup of the five minority jurors is not fatal to Johnson’s prima facie case of discrimination.

The State further argues that Johnson fails to establish a prima facie case of discrimination because “there were obvious reasons for . . . dismissal that prevented a prima facie showing,” including that two of the excused jurors had difficulty with English and that one did not want to be a juror. Aplee. Br. 21. But even if we can

consider such allegedly obvious reasons in assessing Johnson's prima facie case, those reasons do not significantly undermine Johnson's prima facie case as they did in the cases the State relies on. For example, in *Johnson v. Campbell*, the Ninth Circuit found no prima facie showing of discrimination based in part on "an obvious neutral reason for the challenge." 92 F.3d 951, 953 (9th Cir. 1996). But that "obvious neutral reason" played a significant role in undoing any inference of discrimination because of the weakness of the prima facie case to begin with: the *Batson* challenge involved only a single juror allegedly struck because of his sexual orientation. *Id.* Here, by contrast, Johnson has pointed to a pattern of striking five of six minority prospective jurors.¹⁰ Accordingly, we reject the State's arguments and conclude that the clear pattern of strikes against five of six minority jurors establishes an inference of discrimination.

Thus, Johnson has made a prima facie showing of racial discrimination under *Batson*. See 476 U.S. at 97. Although such a showing "does not necessarily establish racial discrimination," it "is more than sufficient to require a trial court to proceed to step two of the *Batson* procedure." *Brinson*, 398 F.3d at 235. Yet the trial court did not do so, "relying instead on its own speculation as to what might have been the

¹⁰ The State also cites *Capers v. Singletary*, 989 F.2d 442 (11th Cir. 1993), and *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986) (per curiam). We find *Capers* unpersuasive here because it applied *Swain v. Alabama*, 380 U.S. 202 (1965), which *Batson* overruled. See *Capers*, 989 F.2d at 444 & n.2. And the court in *Dennis* did not, contrary to the State's assertion, consider any obvious neutral reasons at the prima facie stage. See 804 F.2d at 1211. It therefore does not support the State's argument on this point.

prosecutor's reasons." *Paulino I*, 371 F.3d at 1092. We therefore conclude that the trial court erred.

iv. Remedy

But this error does not automatically entitle Johnson to habeas relief. Because no court later held an evidentiary hearing, the State has never presented evidence of the prosecutor's actual, nondiscriminatory reasons for striking the five minority jurors. *See id.* In this circumstance, it is not "appropriate to take the extraordinary step of granting habeas corpus relief without first providing the [S]tate with a hearing at which it could offer evidence in support of the challenged strikes." *Hardcastle*, 368 F.3d at 261. Instead, the better path is to remand for an evidentiary hearing to provide the State with "a chance to present evidence in support of its peremptory strikes." *Id.* at 250; *see also Madison v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1333, 1339 (11th Cir. 2012) (*Madison I*) (finding unreasonable application of *Batson* and prima facie case of discrimination; "remand[ing] the case for the district court to complete the final two steps of the *Batson* proceedings").

We therefore reverse the district court's ruling on Johnson's *Batson* claim and remand to the district court for a *Batson* reconstruction hearing. *See Paulino v. Harrison*, 542 F.3d 692, 700 (9th Cir. 2008) (*Paulino II*); *cf. United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (remanding for district court to conduct hearing on prosecutor's reasons for strike where defendant was convicted pre-*Batson* such that "neither the trial court nor the parties were aware of the standards to be used in evaluating the . . . proffered reasons for striking [the juror]"). A *Batson*

reconstruction hearing is “an evidentiary hearing that takes place some[]time after the trial, where the prosecutor testifies to [his or] her actual reasons for striking the venire[]members in question, or the State presents circumstantial evidence of those reasons.” *Paulino II*, 542 F.2d at 1314; *see also Madison v. Comm'r, Ala. Dep't of Corr.*, 761 F.3d 1240, 1249–50 (11th Cir. 2014) (*Madison II*) (explaining that *Batson* reconstruction hearing is proper and not contrary to anything in *Cullen v. Pinholster*, 563 U.S. 170 (2011), “or any other principle of habeas corpus”).

Before conducting such a hearing, the district court should consider whether the passage of over eight years since Johnson’s trial or any other circumstances have made such an inquiry “impossible or unsatisfactory.” *Jordan v. Lefevre*, 206 F.3d 196, 202 (2d Cir. 2000). If the district court concludes that a *Batson* reconstruction hearing is impossible or unsatisfactory, it must grant habeas relief in the form of an order that Johnson be released from custody unless the State grants him a new trial within 120 days from the entry of the district court’s order. *See id.* (noting that if district court decides *Batson* reconstruction hearing is not possible, it should “order that the state grant [petitioner] a new trial”); *Miller-El II*, 545 U.S. at 266 (granting relief on *Batson* claim and “remand[ing] for entry of judgment for petitioner together with orders of appropriate relief”), *decision on remand*, 142 F. App’x 802, 803 (5th Cir. 2005) (unpublished) (remanding to district court to enter order directing petitioner’s release “from custody unless the State grants [him] a new trial within 120 days from the date of the entry of the district court’s order”).

If the district court determines that a *Batson* reconstruction hearing will not be impossible or unsatisfactory, it shall conduct one, thereby providing the State with an opportunity to present evidence as to the prosecutor's race-neutral reasons for the challenged strikes. *See Brinson*, 398 F.3d at 235; *Paulino I*, 371 F.3d at 1092; *Hardcastle*, 368 F.3d at 250; *Jordan*, 206 F.3d at 202; *Madison I*, 677 F.3d at 1339. The district court should then make findings at the third step of *Batson* as to whether the strikes were based on race. *See Brinson*, 398 F.3d at 235; *Paulino II*, 542 F.3d at 702 (holding that even if prosecutor fails to come forward with step-two reason, trial court must complete step three). If the district court concludes that Johnson has not met his ultimate burden of showing purposeful discrimination, it should deny Johnson's claim. But if Johnson can show purposeful discrimination, the district court should grant habeas relief as described above, ordering Johnson released unless retried within a limited period of time.¹¹

¹¹ Although the parties do not discuss as much, there appears to be some dispute about where a *Batson* reconstruction hearing can or should take place. The Second Circuit, without explanation, has said that the district court may either conduct the hearing itself or remand the case to state court via a conditional writ to hold the hearing. *See, e.g., Galarza v. Keane*, 252 F.3d 630, 640–41 (2d Cir. 2001); *Tankleff v. Senkowski*, 135 F.3d 235, 250 (2d Cir. 1998). But at this point, Johnson has established only a *prima facie* case of discrimination. In this situation, we cannot grant a writ of habeas corpus, even conditionally, “because we cannot hold as a matter of law, on the undeveloped record in this case, that [Johnson] is entitled to habeas relief.” *Keller v. Petsock*, 853 F.2d 1122, 1129–30 (3d Cir. 1988); *see also* § 2254(a) (providing that state prisoner may obtain writ in federal court “only on the ground that he [or she] is in custody in violation of the Constitution or laws or treaties of the United States”); *Billiot v. Puckett*, 135 F.3d 311, 316 n.5 (5th Cir. 1998) (explaining “that a federal habeas court cannot ‘remand’ a case to the state courts”; it can only grant writ of habeas corpus, conditionally or otherwise). As such, we agree with the Third Circuit that in these circumstances, § 2254 does not

II. Gruesome Evidence

Johnson next argues that the introduction of gruesome evidence about the murder and crime scene prejudiced him and resulted in a fundamentally unfair trial. At trial, Johnson unsuccessfully objected to the introduction of this evidence, which included: (1) testimony from a witness who explained that she used a jacket to stem the blood from Sweeney’s head while waiting for the paramedics to arrive, as well as a photograph of the jacket; (2) testimony describing the crime scene, including the statement that “there was blood everywhere, and . . . some of [Sweeney’s] brains were on the floor,” R. vol. 3, 548; (3) testimony from a paramedic describing the wound as involving “a lot of hair and blood, [and] also gray matter or brains” and further stating that “there were pieces of both those things, blood clots, gray matter

authorize us “to remand a habeas corpus petition to a state court for an evidentiary hearing.” *Hardcastle*, 368 F.3d at 261 (quoting *Keller*, 853 F.2d at 1129). We further agree that “even if we were able to remand directly to the state court, neither this [c]ourt nor the Supreme Court has held ‘that the state courts should, after having foregone the opportunity to hold an evidentiary hearing and resolve the issue, be given another opportunity to do so.’” *Hardcastle*, 368 F.3d at 261 (quoting *Keller*, 853 F.2d at 1129); *see also Rose v. Lee*, 252 F.3d 676, 688 & n.11, 689–91 (4th Cir. 2001) (finding state court’s adjudication contrary to clearly established federal law but “disagree[ing] with the district court’s conclusion that a federal court lacks authority to conduct an independent review of the claim” and rejecting district court’s remand of claim to state court). Indeed, in at least one case, even the Second Circuit remanded for a *Batson* reconstruction hearing in the district court without mentioning the option of remanding the case to state court. *See Jordan*, 206 F.3d at 202. Moreover, other circuits have simply remanded for *Batson* reconstruction hearings at the district court as a matter of course, without discussing whether to return the case to state court. *See, e.g., Paulino I*, 371 F.3d at 1092; *Madison I*, 677 F.3d at 1339; *Harris v. Haeberlin*, 752 F.3d 1054, 1055 (6th Cir. 2014); *Holder v. Welborn*, 60 F.3d 383, 385 (7th Cir. 1995). Accordingly, we remand to the district court, not the state court.

on the floor, all consistent with a high-velocity type wound,” *id.* at 589; and (4) various photographs of the crime scene, including “an area of blood” and “blood clots and some gray matter seen in [an] area on the floor,” *id.* at 593; “the interior side of the wall [showing] what appears to be human tissues and hair,” *id.* at 636–37; and a telephone and a power strip with red stains that appeared to be blood.

On direct appeal, Johnson argued that the trial court erred in admitting this evidence because it was more prejudicial than probative and violated his right to a fair trial under the Sixth Amendment and to due process under the Fourteenth Amendment. The OCCA did not explicitly address the constitutional aspect of this argument and rejected the claim overall in a single sentence: “[T]he trial court did not abuse its discretion when it admitted the testimony and photographs depicting the crime scene and the nature, extent[,] and location of the victim’s injury.” *Johnson I*, slip op. at 9. In support, the OCCA cited state cases finding no abuse of discretion in admitting crime-scene evidence in similar circumstances. *Id.*

In his habeas petition, Johnson reasserted his constitutional claim that the admission of this evidence “resulted in a fundamentally unfair” trial. R. vol. 1, 81. Specifically, Johnson pointed out both that the State refused defense counsel’s offer to stipulate to the manner of death and that it was undisputed Johnson did not shoot Sweeney. Johnson therefore asserted that this “evidence was unfairly prejudicial, designed by the State to appeal to the emotions of the jury, and resulted in a fundamentally unfair adjudicatory process.” *Id.*

The district court rejected Johnson's claim. It acknowledged that when "habeas petitioners challenge the admission of [graphic] evidence as violative of the Constitution," courts must consider "whether the admission of evidence so infected the trial with unfairness as to [violate] due process." App. 44–45 (alterations in original) (quoting *Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir. 2003)); *see also Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) ("The essence of our inquiry . . . is whether the admission of the photographs rendered the proceedings fundamentally unfair."). And the district court found no unfairness rising to level of a due-process violation here because the evidence described and corroborated the nature of the murder and the State presented strong evidence of Johnson's guilt.

On appeal, Johnson reiterates the argument he made below. In response, the State first argues that this court should decline to consider whether the OCCA's decision was contrary to or an unreasonable application of clearly established federal law because, as a threshold matter, there is no clearly established federal law governing "the admission of allegedly gruesome testimony and photographs." Aplee. Br. 31; *see also House*, 527 F.3d at 1018. Specifically, the State contends that Johnson's citation to *Darden v. Wainwright*, 477 U.S. 168 (1986), "is unconvincing" and fails to provide clearly established federal law. Aplee. Br. 32. In *Darden*, the Supreme Court considered "whether the prosecutors' [admittedly improper] comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). And the State insists that because *Darden* involved

prosecutorial misconduct, rather than evidentiary errors, it “is not an on-point case, and it far from establishes clearly established federal law in regard to this issue.”

Aplee. Br. 32.

In support, the State cites *Estelle v. McGuire*, 502 U.S. 62 (1991). There, having found the challenged evidence to be relevant, the Court stated that it “need not explore further *the apparent assumption* of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence *that is not relevant* to be received in a criminal trial.” *Estelle*, 502 U.S. at 70 (emphases added). But importantly, at the outset of its discussion of this claim, the Court described its overall inquiry as “whether the admission of the evidence violated [petitioner’s] federal constitutional rights.” *Id.* at 68. And Johnson raised the same inquiry in his habeas petition: Did the admission of gruesome crime-scene evidence violate his constitutional right to due process?

Indeed, the Supreme Court has expressly considered whether “the introduction of . . . evidence . . . violated the Due Process Clause of the Fourteenth Amendment” by using the “analytical framework” provided by the prosecutorial-misconduct inquiry in *Donnelly* (which *Darden* followed). *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). We have done the same, even after *House*’s holding clarifying the role of clearly established federal law under AEDPA. Specifically, in *Hooks v. Workman*, we reached the merits of the petitioner’s due-process claim alleging admission of prejudicial and irrelevant evidence without questioning the existence of clearly established federal law. 689 F.3d 1148, 1180 (10th Cir. 2012); *see also id.*

(explaining that petitioner “is entitled to relief only if an alleged state-law error . . . ‘was so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process’” (quoting *Revilla v. Gibson*, 283 F.3d 1203, 1212 (10th Cir. 2002))). And we did so despite noting the absence of clearly established federal law supporting several of the petitioner’s other claims. *See id.* at 1170 (finding no clearly established law requiring OCCA “to account for and apply” particular statistical theory to evidence of petitioner’s IQ score), *id.* at 1175 (noting no clearly established federal law for claim arising from removal of juror for cause). Thus, we reject the State’s argument that Johnson’s claim fails for want of clearly established federal law.

Turning to the merits, Johnson argues the OCCA unreasonably concluded that the admission of the crime-scene evidence did not render the proceedings fundamentally unfair. *See Smallwood*, 191 F.3d at 1275. “[B]ecause a fundamental-fairness analysis is not subject to clearly definable legal elements, when engaged in such an endeavor a federal court must tread gingerly and exercise considerable self-restraint.” *Spears*, 343 F.3d at 1226 (alteration in original) (quoting *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002)). At the same time, “the fundamental-fairness inquiry requires us to look at the effect of the admission of the [evidence] within the context of the entire” trial. *Id.* Doing so requires weighing the relevance of the challenged evidence against its prejudicial value, in light of the other evidence against the petitioner. *See id.*

The OCCA did not explain what the evidence at issue here tended to prove or how its probative value outweighed its prejudicial impact. *See Johnson I*, slip op. at 9. The district court, for its part, concluded that “[t]he challenged evidence . . . corroborated testimony that the victim sustained a high[-]velocity gunshot wound when a shooter entered his office[] and was discovered with his head against the window.” App. 45.

And indeed, to obtain the murder conviction, the State had to show (1) the unlawful death of a human, (2) caused by the defendant, (3) with malice aforethought. *See* Okla. Stat. tit. 21, § 701.7(A). That Johnson was indisputably not the shooter does not change what the State had to prove because an individual who aids and abets in the commission of a crime is “equally culpable with other princip[als].” *Conover v. State*, 933 P.2d 904, 910 (Okla. Crim. App. 1997), *abrogated on other grounds by Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam); *see also Glossip v. State*, 157 P.3d 143, 151 (Okla. Crim. App. 2007) (explaining that aiding and abetting includes “advis[ing] or encourag[ing] the commission of the crime” (quoting *Spears v. State*, 900 P.2d 431, 438 (Okla. Crim. App. 1995))); Okla. Stat. tit. 21, § 172. Thus, to prove that Johnson was guilty of murder, the State had to establish not only Johnson’s involvement in the murder plot, but also the fact of the murder itself.

At least some of the evidence Johnson complains of was relevant to proving the murder, such as the testimony from the paramedic describing the victim’s head wound and the crime scene. Further, at least some of the photographs were relevant

to corroborate the paramedic’s testimony. Thus, this case is similar to *Thornburg v. Mullin*, where the petitioner challenged the admission of “six photographs depicting the charred remains of the victims’ bodies” on the basis “that he had no plans to dispute the manner of death.” 422 F.3d 1113, 1128 (10th Cir. 2005). We declined to grant habeas relief, noting that “[e]ven if [the defendant] did not dispute the manner of death, the [S]tate still bore the burden to convince the jury that its witnesses . . . provided an accurate account of events.” *Id.* at 1129.

Additionally, this case is not like *Spears*, where we found fundamental unfairness and granted habeas relief based on the admission at sentencing in a capital trial of photographs depicting the victim with 50 to 60 stab wounds. 343 F.3d at 1227–28. There, the photographs were not probative to prove conscious physical suffering because uncontradicted evidence showed that the victim died or lost consciousness early in the beating, so “there was no logical connection between the photographs and the proposition they were offered to prove.” *Thornburg*, 422 F.3d at 1129 (distinguishing *Spears*). Here, by contrast, there was a connection between the crime-scene evidence and the murder charge against Johnson.

Moreover, even if some of the challenged evidence was cumulative, that accumulation does not rise to the level of rendering Johnson’s trial fundamentally unfair in violation of due process when considered in light of the strong evidence of Johnson’s guilt. Where evidence against a defendant is strong, the likelihood that erroneously admitted evidence will have an unduly prejudicial impact is lessened.

Compare Wilson v. Sirmons, 536 F.3d 1064, 1115 (10th Cir. 2008) (noting that “the

evidence at the guilt phase was particularly strong” before “conclud[ing] that the admission [of relevant but gruesome photographs] did not make the proceeding fundamentally unfair”), *with Spears*, 343 F.3d at 1228 (granting habeas relief based on prejudicial photographs in part because, in addition to having little to no probative value, they “were the primary aggravating evidence specifically presented at the second stage” and “constitute[d] a major part of the State’s second-stage case”).

Here, the district court summarized the evidence against Johnson as follows:

Aziz—who ordered the murder—testified that [Fred] accepted the job via his brother [Allen] and set a price of \$10,000. According to [Allen], he met [Fred] and [Johnson] at his (Allen’s) home in the days before the murder. Allen testified Fred and [Johnson] left the house to travel to Muskogee, and Aziz similarly recalled hearing that Fred was going to steal a getaway van from Muskogee. Charles Billingsley, who was not a defendant in the case, testified that he helped [Johnson] take a white Ford van from the detail shop next to Billingsley’s business. On the morning of the murder, [Allen] recalled that [Johnson] came to his home. According to [Allen], [Johnson] wanted him to ask Aziz for the money so the passenger riding with [Johnson] (Terrico Bethel) could “get the murder done.” That same day, Aziz recalled [Johnson] knocking on the window of his business and saying[,] “watch the news.” [Johnson] never returned the white van, but Billingsley recalls seeing it on television in connection with the murder. [Allen] testified that after the murder, he collected the first \$5,000 from Aziz and gave it to [Johnson]. These facts are supported by phone records showing various calls between the co[]conspirators in the time leading up to the murder.

App. 43 (citations omitted). This strong evidence of Johnson’s involvement in Sweeney’s murder lessens the impact of possible prejudice flowing from the admission of crime-scene evidence. *Thornburg*, 422 F.3d at 1129. Thus, “[r]eviewing the record under AEDPA’s constraints,” in light of the probative value of the challenged evidence and the strong evidence of Johnson’s guilt, we cannot “conclude

that the OCCA acted contrary to or unreasonably applied federal law in concluding that [its] admission was proper.” *Id.*

III. Juror Misconduct

Next, Johnson argues that the district court erred in denying his juror-misconduct claim. Johnson first raised this claim in a motion for a new trial, which he filed after one of the jurors, Staci Petersen, contacted defense counsel and “advised that she felt forced, intimidated[,] and threatened by the acts of the other jurors into voting guilty.” R. vol. 1, 407. Johnson submitted an affidavit from Petersen along with his motion for a new trial. In that affidavit, Peterson asserted that she voted guilty in part because “[j]uror Faith Williams said, ‘do you really want [Johnson] to be walking on the streets? *He’s got other charges* and won’t be getting out of jail.’” *Id.* at 414–15 (emphasis added). Petersen further declared that the other jurors wrongly informed her a guilty vote on the conspiracy charge necessitated a guilty vote on the murder charge. She also reported that she saw one juror sleeping through the trial.

Johnson attempted to corroborate Petersen’s statements with an affidavit from another juror, Tony Perez, who confirmed Petersen’s intimidation allegations and said that he, too, believed that a guilty vote on the conspiracy charge necessitated a guilty vote on the murder charge. Petersen and Perez also expressed confusion regarding the need for a unanimous decision. But Perez did not mention the comment about Johnson’s other charges.

In addition to her affidavit, Peterson wrote a letter to the trial court in which she reported that she was ridiculed by the other jurors, pressured into voting with the other jurors to convict, and confused about having to come to a unanimous decision. She further said that she believed the jury convicted Johnson because he was African American. This letter did not mention Williams's statement about Johnson's other charges.

Moving for a new trial, Johnson asserted that there was nothing mentioned at trial about other charges pending against him and therefore argued that "the jury panel was tainted by outside information." *Id.* at 411. The trial court denied the motion without a hearing, stating that "[j]urors cannot impeach their verdicts after they have been discharged." *Id.* at 428.

On direct appeal, Johnson argued that this juror misconduct and the trial court's refusal to conduct an evidentiary hearing deprived him of a fair trial. The OCCA rejected these claims. *Johnson I*, slip op. at 13. First, it noted that an evidentiary hearing was not required because Johnson filed his motion outside the ten-day window set forth in Oklahoma Rule of Criminal Procedure 2.1(A)(2). *Id.* And it further found no abuse of discretion in the trial court's decision not to conduct a hearing. *Id.* Second, the OCCA determined that "[t]he trial court properly refused to receive the juror's post[]verdict letter and, later, the two jurors' affidavits asserting allegations concerning the motives, methods, and mental processes by which the jury reached its verdicts because jurors are not permitted to impeach their verdicts." *Id.* at

14. And Johnson “otherwise[] failed to establish juror misconduct by clear and convincing evidence.” *Id.*

In his habeas petition, Johnson argued that the OCCA’s rulings were “an unreasonable application of *Remmer* [v. *United States*, 347 U.S. 227 (1954)].” R. vol. 1, 84. The district court disagreed, explaining that “like Oklahoma law, federal law ‘prohibit[s] the admission of juror testimony to impeach a jury verdict.’” App. 46 (alteration in original) (quoting *Tanner v. United States*, 483 U.S. 107, 117 (1987)); *see also* Okla. Stat. tit. 12, § 2606(B); Fed. R. Evid. 606(b). And it noted that although there was an exception to the no-impeachment rule “where external, prejudicial information is improperly brought to the jury’s attention,” such exception was not available here, where the reference to other charges was vague and where Petersen did not mention the other charges in her letter to the trial court. App. 46.

On appeal, Johnson again argues that the OCCA’s decision is an unreasonable application of *Remmer*. But Johnson misstates *Remmer*’s holding. Without a pinpoint citation, Johnson suggests that *Remmer* stands for the proposition “that no extraneous material is permitted in the jury room during deliberations.” Aplt. Br. 43. Yet the Supreme Court made no such statement in *Remmer*, which did not involve the introduction of extraneous material in the jury room. Instead, it involved private communications with a juror: (1) someone outside of the jury suggested to a juror during trial “that he could profit by bringing in a verdict favorable to petitioner”; and (2) the trial court, the prosecutor, and the FBI investigated this potential bribe situation without informing or including the defense. 347 U.S. at 228; *see also*

Tanner, 483 U.S. at 117 (citing cases where jurors were allowed to testify about “influence by outsiders” and describing *Remmer* as case involving “bribe offered to juror”). Accordingly, we reject the argument that the OCCA unreasonably applied *Remmer* when denying Johnson’s juror-misconduct claim.

Nevertheless, Johnson is generally correct that an exception to the no-impeachment rule exists, such that an evidentiary hearing—including juror testimony—is required “where extrinsic influence or relationships have tainted the deliberations.” *Tanner*, 483 U.S. at 120; *see also* Fed. R. Evid. 606(b)(2)(A) (allowing juror testimony when “extraneous prejudicial information was improperly brought to the jury’s attention”). But as the State persuasively argues, the OCCA did not unreasonably apply any such rule in affirming both the refusal to conduct an evidentiary hearing and the denial of Johnson’s motion for a new trial.

As an initial matter, everything included in Petersen’s letter to the trial court and almost everything included in the jurors’ affidavits is inadmissible juror-impeachment evidence: Petersen and Perez primarily describe Petersen’s mental state as a result of being intimidated by the other jurors and their misunderstandings about the relationship of the two counts and the requirement of unanimity. *See Warger v. Shauers*, 574 U.S. 40, 51 (2014) (explaining that evidence does not fall into exception for extraneous material if it is part of “the general body of experiences that jurors are understood to bring with them to the jury room”); *Tanner*, 483 U.S. at 118 (describing jurors’ failure to understand instructions or mental incompetence as internal matters about which jurors may not testify); *Matthews v. Workman*, 577 F.3d

1175, 1181 (10th Cir. 2009) (noting Oklahoma evidentiary rule that “prohibits jurors from testifying ‘as to the effect of anything upon his or another juror’s mind or emotions as influencing him to assent to or dissent from the verdict’” (quoting *Matthews v. State*, 45 P.3d 907, 914 (Okla. Crim. App. 2002))). And “[t]here is nothing in clearly established Supreme Court law requiring states to take cognizance of evidence excludable under such common evidentiary rules.” *Matthews v. Workman*, 577 F.3d at 1182. Further, “in light of numerous other protections designed to secure an impartial and competent jury . . . the Constitution does not require a post[]verdict hearing in which such evidence is admissible.” *Id.* at 1183.

Critically, the inclusion of the reference to Johnson’s “other charges” does not affect the inadmissibility of this juror-misconduct evidence. R. vol. 1, 414. Such a statement—where the trial included no evidence of Johnson having other charges—arguably falls outside the no-impeachment rule and into its exception for extrinsic influence. *See Warger*, 574 U.S. at 51 (explaining that “information is deemed ‘extraneous’ if it derives from a source ‘external’ to the jury,” including “publicity and information related specifically to the case the jurors are meant to decide” (quoting *Tanner*, 483 U.S. at 117)). But we agree with the district court that this single reference to other charges “is too vague to conclude extra-record facts prejudiced the outcome at trial” or to trigger the need for an evidentiary hearing. App. 47.

We reach this conclusion because when considering whether the jury considered extraneous material, “the inquiry is not whether the jurors . . . discussed

any matters not of record, but whether they discussed *specific extra-record facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby.” *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (emphasis added) (quoting *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 n.5 (2d Cir. 1970)). And as to conducting a hearing, a court confronted with a juror-misconduct claim “‘has wide discretion in deciding how to proceed’ and appropriately denies a hearing when a party presents ‘only thin allegations of jury misconduct.’” *United States v. Brooks*, 569 F.3d 1284, 1288 (10th Cir. 2009) (quoting *United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992)). Thus, we conclude that the OCCA did not unreasonably apply any clearly established federal law when it affirmed the trial court’s decisions to not conduct an evidentiary hearing and to deny Johnson’s motion for a new trial.¹²

¹² Petersen’s letter to the trial court also alleged that the jury voted to convict Johnson because he is African American. For the first time in his reply brief, Johnson argues that this allegation should have triggered an evidentiary hearing and substantive relief. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (holding that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way” so that trial court can “consider the evidence of the juror’s statement and any resulting denial of the jury[-]trial guarantee”). We decline to consider Johnson’s argument because he raises it for the first time in his reply brief. *See United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019). Moreover, *Peña-Rodriguez* was not decided until well after Johnson’s conviction became final; it therefore does not provide clearly established federal law applicable in Johnson’s habeas proceeding. *See House*, 527 F.3d at 1015 (stating that “AEDPA ‘requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state[-]court conviction became final’” (emphasis added) (quoting *Williams*, 529 U.S. at 380)).

IV. Cumulative Error

Last, Johnson argues that the district court erred in denying relief on his cumulative-error claim. He first raised a cumulative-error claim on direct appeal, contending that various errors accumulated to deprive him of a fair trial in violation of his due-process rights. The OCCA rejected this claim. *Johnson I*, slip op. at 18.

In his habeas petition, Johnson argued again that cumulative error rendered his trial fundamentally unfair. The district court rejected this claim because cumulative error only applies “where there are two or more actual errors,” and the district court found none. App. 47 (quoting *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998)).

On appeal, Johnson first argues that AEDPA deference does not apply because the OCCA did not adjudicate his cumulative-error claim on the merits. *See Harris v. Poppell*, 411 F.3d 1189, 1195 (10th Cir. 2005). In support, Johnson points out that although he asserted a cumulative-error claim related to his *trial*, the OCCA ruled only that Johnson “was not denied a fair *sentencing* trial by cumulative error.” *Johnson I*, slip op. at 18 (emphasis added). The State disputes this reading, arguing that “the reference to a ‘sentencing trial’ was merely a typographical error” and pointing out that the OCCA cited in support cases involving claims of cumulative trial error. Aplee. Br. 51 (quoting *Johnson I*, slip op. at 18). We need not resolve this dispute because Johnson’s cumulative-error claim fails even under de novo review.

In arguing that cumulative constitutional errors in his trial deprived him of his due-process right to a fair trial, Johnson seeks to accumulate all six of the substantive

errors alleged in his habeas petition. But as he acknowledges and as the State argues, Johnson cannot accumulate errors for which he does not have a COA. *See Young v. Sirmons*, 551 F.3d 942, 972–73 (10th Cir. 2008). Accordingly, our analysis of Johnson’s cumulative-error claim is limited to the three substantive claims for which he has a COA. And because Johnson has not shown more than one error, he is not entitled to habeas relief on his cumulative-error claim. *See Ellis v. Raemisch*, 872 F.3d 1064, 1090 (10th Cir. 2017) (“[T]here must be more than one error to conduct cumulative-error analysis.”).

Conclusion

For the reasons explained above, we affirm the district court’s denial of habeas relief on Johnson’s gruesome-evidence, juror-misconduct, and cumulative-error claims. But we reverse and remand on Johnson’s *Batson* claim. The OCCA relied on an unreasonable factual determination when it reviewed and approved of the prosecutor’s race-neutral reasons for the challenged peremptory strikes of racial minorities when in fact, the prosecutor offered only one such reason and the trial court offered the others. It further unreasonably applied *Batson* by substituting the trial court’s speculation for the prosecutor’s race-neutral reasons. Reviewing Johnson’s *Batson* claim de novo, we conclude that Johnson established a *prima facie* case of discrimination at *Batson* step one. But the trial court erred at *Batson* step two by failing to request the prosecutor’s race neutral reasons and substituting its own speculation for those reasons. We therefore reverse the district court’s order denying relief on that claim and remand as previously instructed for the district court to either

conduct a *Batson* reconstruction hearing or to determine that such a hearing would be impossible or unsatisfactory.

APPENDIX “E”

Order Denying Rehearing (10th Cir.)

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 13, 2021

Christopher M. Wolpert
Clerk of Court

ALONZO CORTEZ JOHNSON,

Petitioner - Appellant,

v.

JIMMY MARTIN, Warden,

Respondent - Appellee.

No. 19-5091
(D.C. No. 4:16-CV-00433-JED-FHM)
(N.D. Okla.)

ORDER

Before **MORITZ**, **SEYMOUR**, and **BRISCOE**, Circuit Judges.

Appellant and Appellee's petitions for rehearing are denied.

The petitions for rehearing en banc were 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

APPENDIX “F”

Summary Opinion (Okla. Crim. App.)

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2013-173

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 17 2014

SUMMARY OPINION

LUMPKIN, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant, Alonzo Cortez Johnson, was tried by jury trial and convicted of Conspiracy to Commit Murder (Count IV) (21 O.S.2001, § 421), After Former Conviction of Two or More Felonies, and First Degree Murder (Count IX) (21 O.S.Supp.2006, § 701.7(A)) in the District Court of Tulsa County, Case Number CF-2009-2738. The jury recommend as punishment imprisonment for life in Count IV and imprisonment for life and a \$10,000.00 fine in Count IX.¹ The trial court sentenced accordingly and ran the sentences consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

- I. The prosecutor's use of peremptory challenges violated the equal protection and due process rights of Appellant.
- II. The dual commission of the District Attorney prohibited prosecution of this case.
- III. The trial judge erred by admitting statements by alleged co-defendants that occurred after the conspiracy had ended.

¹ Appellant will be required to serve 85% of his sentence in Count IX pursuant to 21 O.S.Supp.2002, § 13.1.

- IV. The trial court erred by allowing the recorded statements of Terrico Bethel to be used at trial against Appellant.
- V. The trial judge erred by permitting information about "code" language to be presented.
- VI. Appellant's rights to Due Process of Law under the Fourteenth Amendment and his confrontation rights under the Sixth Amendment were violated when the trial court allowed the State to use the hearsay testimony of Allen Shields.
- VII. The introduction of gruesome testimony and exhibits deprived Appellant of a fair trial.
- VIII. The evidence was insufficient for a conviction on either count.
- IX. Evidence of other crimes denied Appellant a fair trial.
- X. Testimony regarding the white van that was found should not have been admitted due to spoliation of the evidence.
- XI. Prosecutorial misconduct denied Appellant a fair trial.
- XII. The trial judge erred by failing to hold a hearing on the Motion for New Trial filed by defense counsel.
- XIII. Jury misconduct deprived Appellant of a fair trial.
- XIV. Appellant was deprived of his right to present a defense.
- XV. The trial court erred by excluding evidence.
- XVI. Evidentiary harpoons deprived Appellant of a fair trial.
- XVII. The sentence for conspiracy to commit murder was excessive, as well as the fact that the trial judge refused to run the sentences concurrently.
- XVIII. Cumulative error deprived Appellant of a fair hearing.

After thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the

parties, we have determined that neither reversal nor modification of sentence is warranted under the law and the evidence.

In Proposition One, Appellant contends that the State systemically removed minorities from the jury contrary to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We find that the trial court did not abuse its discretion when it found that the State did not engage in systemic or specific discrimination. *Mitchell v. State*, 2011 OK CR 26, ¶ 41, 270 P.3d 160, 173. Although the trial court erred to the detriment of the State when it refused to permit the prosecutor to excuse an African-American juror because it would have left the jury without any African-Americans, we find that the trial court's determination that the State's explanations for excusing each of the minority jurors were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented. *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 1208, 170 L.E.d.2d 175 (2008); *Powers v. Ohio*, 499 U.S. 400, 404, 111 S.Ct. 1364, 1367, 113 L.Ed.2d 411 (1991) ("Although a defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.") (quotation and citation omitted); *Day v. State*, 2013 OK CR 8, ¶ 15, 303 P.3d 291, 299. As Appellant ultimately failed to establish purposeful discrimination on the part of the State no relief is required. *Batson*, 476 U.S. at 90, 95, 106 S.Ct. at 1719, 1722. Proposition One is denied.

In Proposition Two, Appellant contends that the Information filed against him should be set aside because Tulsa County District Attorney, Tim Harris, *ipso facto* vacated his office when he became a Special Assistant United States Attorney. Article II, § 12 of the Oklahoma Constitution prohibits any member of Congress from this State, or person holding any office of trust or profit under the laws of any other State, or of the United States, from holding any office of trust or profit under the laws of this State. *Battiest v. State*, 1988 OK CR 95, ¶ 3, 755 P.2d 688, 689; *Nesbitt v. Apple*, 1995 OK 20, ¶ 23, 891 P.2d 1235, 1243. The record reflects that Harris' position as Special Assistant United States Attorney was unpaid, had minimal duties, and was limited to the investigation of one single case. As such, we find that his position as Special Assistant United States Attorney was not a public office but instead was an employee of an official holding public office. *Id.* Article II, § 12 of the Oklahoma Constitution is inapplicable to this case. *Id.* Proposition Two is denied.

In Proposition Three, Appellant contends that the trial court committed error when it admitted several exhibits at trial that contained the recorded statements of his co-conspirators.² He argues that the co-conspirator's statements failed to meet the requisite threshold of being made during the course and in furtherance of the conspiracy. *Powell v. State*, 2000 OK CR 5, § 71, 995 P.2d 510, 527 ("A statement which is offered against a party and made by his co-conspirator during the course and in furtherance of their conspiracy is

² The record reflects that the State withdrew State's Exhibit No. 108 and substituted State's Exhibit No. 113 in its place. (Tr. 999-1000, 1119-20). Therefore, Appellant's challenge to State's Exhibit No. 108 is moot.

admissible and is not hearsay.”). The record reveals that the trial court did not admit any of the challenged exhibits under the co-conspirator non-hearsay provision in 12 O.S.2011, § 2801(B)(2)(e). As the exhibits were otherwise admissible and their probative value was not substantially outweighed by the danger for unfair prejudice, we find that the trial court did not abuse its discretion in the admission of this evidence. *Goode v. State*, 2010 OK CR 10, ¶ 31, 236 P.3d 671, 678; *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310.

Appellant further challenges Mohammed Aziz’s testimony at trial as failing to meet the requisite threshold of the co-conspirator non-hearsay provision. Aziz testified that, on the day of the murder, Appellant came to his convenience store, knocked on the bulletproof glass and told him to “watch the news.” Appellant did not raise a challenge to Aziz’s testimony at trial. Therefore, we find that he has waived appellate review of his claim for all but plain error. *Mitchell v. State*, 2011 OK CR 26, ¶ 72, 270 P.3d 160, 179. We review Appellant’s claim pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

To be entitled to relief under the plain error doctrine, [an appellant] must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. See *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings” or otherwise represents a “miscarriage of justice.” *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d

at 701 (citing *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993)); 20 O.S.2001, § 3001.1.

Id., 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that Appellant has not shown the existence of an actual error. The challenged statement was not the out-of-court statement of a co-conspirator but was instead Appellant's own statement offered against him. 12 O.S.2011, § 2801(B)(2)(a). As the statement tended to establish that Appellant was a participant in the conspiracy, the statement's probative value was not substantially outweighed by its danger for unfair prejudice. *Goode*, 2010 OK CR 10, ¶ 31, 236 P.3d at 678. Plain error did not occur. Proposition Three is denied.

In Proposition Four, Appellant contends that the trial court committed error when it admitted an audio recording containing co-conspirator, Terrico Bethel's, statements to fellow jail inmate, Dolan Prejean. He argues that Bethel's statements constituted hearsay and the admission of this evidence violated his right to confrontation. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). We find that the trial court did not abuse its discretion in the admission of this exhibit. *Goode*, 2010 OK CR 10, ¶ 44, 236 P.3d at 680. Bethel confessed the conspiracy and murder to Prejean in detail on the recording. As the State redacted all of Bethel's statements that expressly referenced Appellant, Bethel's statements on the recording met the hearsay exception found within 12 O.S.2011, § 2804(B)(3) and did not violate Appellant's right to confrontation. *Davis v. Washington*, 547 U.S. 813, 825, 126

S.Ct. 2266, 2275, 165 L.Ed.2d 224 (2006) (recognizing statements which are made from one prisoner to another or made unwittingly to government informant are nontestimonial); *Richardson v. Marsh*, 481 U.S. 200, 208-09, 107 S.Ct. 1702, 1707-08, 95 L.Ed.2d 176 (1987) (finding State may comply with the rule announced in *Bruton*, through redaction of any facially incriminating statements within codefendant's confession); *Miller v. State*, 2004 OK CR 29, ¶ 34, 98 P.3d 738, 745.

Appellant further argues that he was prejudiced because the jurors received a copy of the transcript of the audio recording that had the redacted portions in large, blacked-out blocks. Appellant did not challenge the jury's receipt of this aid at trial. Therefore, we find that he has waived appellate review of this issue for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d 690, 694-95, 698-99. Reviewing Appellant's claim for plain error under the test set forth in *Hogan* we find that Appellant has not shown the existence of an actual error (i.e., deviation from a legal rule). *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. The trial court properly instructed the jurors concerning their consideration of the evidence in the case and the court's rulings upon the admissibility of evidence and we presume that the jury followed those instructions. *Mitchell*, 2011 OK CR 26, ¶ 124, 270 P.3d at 187; Inst. Nos. 9-1, 10-1, 10-9, OUJI-CR(2d)(Supp.2012). Plain error did not occur. Proposition Four is denied.

In Proposition Five, we find that the trial court did not abuse its discretion by allowing Detective Regalado to testify about the meanings of

certain words and phrases Appellant and his associates used in the audio recorded telephone calls. As Regalado's interpretations were rationally based upon his personal observations and experience as a police officer, were helpful to the jury, did not improperly tell the jury who or what to believe, and were subjected to cross-examination, we find that the trial court properly allowed Regalado's testimony on the subject. *Carter v. State*, 2008 OK CR 2, ¶ 11, 177 P.3d 572, 575; *Andrew v. State*, 2007 OK CR 23, ¶ 73, 164 P.3d 176, 195; *Evans v. State*, 2007 OK CR 13, ¶ 5, 157 P.3d 139, 142.

In a single sentence within this proposition, Appellant asserts that the prosecutor had no expertise to support his own speculative interpretation of the language. As Appellant failed to set this claim out as separate proposition of error as required by Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), we find that Appellant has waived review of the issue. *Murphy v. State*, 2012 OK CR 8, ¶ 23, 281 P.3d 1283, 1291. Proposition Five is denied.

In Proposition Six, Appellant challenges the trial court's admission of the late Allen Shields' preliminary hearing testimony at trial. Appellant concedes that Shields was unavailable but argues that he did not have an adequate opportunity to cross-examine him at preliminary hearing. Reviewing the record, we find that the defense had an adequate opportunity to cross-examine Allen Shields at preliminary hearing consistent with the requirements of the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004); *Delaware v. Fensterer*, 474 U.S. 15, 20,

106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985); *Mancusi v. Stubbs*, 408 U.S. 204, 216, 92 S.Ct. 2308, 2315, 33 L.Ed.2d 293 (1972); *California v. Green*, 399 U.S. 149, 165, 90 S.Ct. 1930, 1938-39, 26 L.Ed.2d 489 (1970). The discovery of potentially new grounds for impeachment of Allen Shields following preliminary hearing did not render the defense's prior opportunity to cross-examine Shields constitutionally inadequate. *Hanson v. State*, 2009 OK CR 13, ¶¶ 9-10, 206 P.3d 1020, 1026; *Howell v. State*, 1994 OK CR 62, ¶¶ 18-19, 882 P.2d 1086, 1091. Accordingly, we find that the trial court did not abuse its discretion when it determined that the transcript of Shields' preliminary hearing testimony was admissible at trial. *Thompson v. State*, 2007 OK CR 38, ¶ 26, 169 P.3d 1198, 1207. Proposition Six is denied.

As to Proposition Seven, we find that the trial court did not abuse its discretion when it admitted the testimony and photographs depicting the crime scene and the nature, extent and location of the victim's injury. *Davis v. State*, 2011 OK CR 29, ¶ 89, 268 P.3d 86, 113 (holding Appellant's failure to contest that victim died due to shot he fired did not cause crime scene photographs to be unduly prejudicial); *Warner v. State*, 2006 OK CR 40, ¶ 167, 144 P.3d 838, 887 ("Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect."); *Smallwood v. State*, 1995 OK CR 60, ¶ 33, 907 P.2d 217, 228 ("Appellant's willingness to concede that there is no dispute over the identity of the victim or the injuries sustained is not determinative of the photographs' admissibility."). Proposition Seven is denied.

In Proposition Eight, Appellant challenges the sufficiency of the evidence supporting his convictions. Reviewing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt." *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; Inst. Nos. 2-17, 4-61, OUJI-CR(2d)(Supp.2012). The jury could have rationally concluded that Appellant became a party to the conspiracy to murder the victim, committed an overt act in furtherance of that agreement and was criminally responsible for the victim's unlawful death. *Littlejohn v. State*, 2008 OK CR 12, ¶¶ 13-14, 181 P.3d 736, 741; *Hancock v. State*, 2007 OK CR 9, ¶ 67, 155 P.3d 796, 812; *Conover v. State*, 1997 OK CR 6, ¶ 18, 933 P.2d 904, 9104-11; *Hackney v. State*, 1994 OK CR 29, ¶¶ 6, 8, 874 P.2d 810, 813-14. Proposition Eight is denied.

As to Proposition Nine, we find that the trial court did not abuse its discretion in admitting other crimes evidence. *Glossip v. State*, 2007 OK CR 12, ¶ 80, 157 P.3d 143, 157. Agent Petrie did not make a specific reference to Appellant's involvement in another offense, therefore, we find that it did not constitute prohibited other crimes evidence. *Nuckols v. State*, 1984 OK CR 92, ¶ 39, 690 P.2d 463, 470-71. Detective Regalado's testimony revealed Appellant's consciousness of guilt through his post-offense conduct and did not constitute prohibited other crimes evidence. *Andrew*, 2007 OK CR 23, ¶ 58, 164 P.3d at 193; *Dodd v. State*, 2004 OK CR 31, ¶¶ 33-34, 100 P.3d 1017, 1031. Proposition Nine is denied.

As to Proposition Ten, Appellant challenges the testimony concerning the white van that the Tulsa Police Department lost. Although Appellant filed a pretrial motion seeking to exclude any evidence concerning the van due to spoliation, he failed to renew this specific challenge at trial and thus waived appellate review of this issue for all but plain error. *Conover*, 1997 OK CR 6, ¶ 24, 933 P.2d at, 911; *Short v. State*, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094. We review Appellant's claim for plain error pursuant to the test set forth in *Hogan* and first determine whether Appellant has shown the existence of an actual error (i.e., deviation from a legal rule). *Hogan*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d at 923. The record reveals that the police inadvertently sold the van at public auction and was sued for the loss by the owner. As Appellant has not shown that the police acted in bad faith, the loss of the evidence did not constitute a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed2d 281 (1988); *Hogan v. State*, 1994 OK CR 41, ¶ 18, 877 P.2d 1157, 1161. Accordingly, we find that Appellant has not shown the existence of an actual error. Plain error did not occur. Proposition Ten is denied.

In Proposition Eleven, Appellant contends that prosecutorial misconduct deprived him of a fundamentally fair trial. He first argues that the prosecutor misstated facts in opening argument when he stated that the five alleged conspirators had gotten together behind closed doors and secretly planned to kill the victim. Appellant did not timely challenge the prosecutor's comment at trial and thus waived appellate review of this claim for all but plain error.

Malone v. State, 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211-12. We review Appellant's claim for plain error pursuant to the test set forth in *Hogan* and first determine whether Appellant has shown the existence of an actual error (i.e., deviation from a legal rule). *Hogan*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d at 923. We first determine whether Appellant has shown the existence of an actual error. Although the five conspirators never assembled all together at the same time, the evidence revealed that the men met in small groups at different times and planned to kill the victim. As Appellant has not shown a variance between the State's recitation of facts and the actual evidence, we find that Appellant has not shown the existence of an actual error. *Bland*, 2000 OK CR 11, ¶ 101, 4 P.3d at 728. Plain error did not occur.

Second, Appellant argues that the prosecutor misrepresented the evidence to the jury during closing arguments when he held up a piece of paper on which he had written Appellant's purported agreement to join the plan to kill the victim and Appellant's signature. The prosecutor's argument properly highlighted the problems associated with proving a conspiracy, including their secretive nature. *Grissom v. State*, 2011 OK CR 3, ¶ 67, 253 P.3d 969, 992; *Davis v. State*, 1990 OK CR 20, ¶ 8, 792 P.2d 76, 81. As the prosecutor clearly informed the jury that no such document existed but that the document contained the prosecutor's handwriting and he was just using it as an illustration, we find that the prosecutor's argument was not so grossly improper and unwarranted as to affect Appellant's rights. *Ball v. State*, 2007 OK CR 42, ¶ 57, 173 P.3d 81, 95.

Third, Appellant argues that the prosecutor misstated the law concerning co-conspirator liability in closing argument. We find that the prosecutor's comments did not misstate the law or mislead the jury concerning co-conspirator liability. *Florez v. State*, 2010 OK CR 21, ¶ 6, 239 P.3d 156, 158; *Littlejohn*, 2008 OK CR 12, ¶¶ 13-14, 181 P.3d at 741. Reviewing the entire record, we find that the cumulative effect of the prosecutor's comments did not deprive Appellant of a fair trial. *Warner*, 2006 OK CR 40, ¶ 197, 144 P.3d at 891. Proposition Eleven is denied.

In Propositions Twelve and Thirteen, Appellant contends that juror misconduct deprived him of a fair trial and that the trial court erred when it failed to hold a hearing on his Motion for New Trial alleging these circumstances. Rule 2.1(A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), requires the District Court to hold a hearing “[i]f a motion for new trial is filed within ten (10) days from the imposition of Judgment and Sentence in open court . . . within thirty (30) days from the date the motion is filed.” As Appellant failed to file his motion within ten days from the trial court's imposition of his sentences, we find that the trial court did not abuse its discretion when it refused to hold a hearing on the motion. *Woodruff v. State*, 1993 OK CR 7, ¶ 15, 846 P.2d 1124, 1132 (“Whether or not to hold an evidentiary hearing was within the discretion of the trial court.”).

We further find that the trial court did not abuse its discretion in denying Appellant's motion. *Jackson v. State*, 2006 OK CR 45, ¶¶ 11-12, 146 P.3d 1149, 1156; *Matthews v. State*, 2002 OK CR 16, ¶ 3, 45 P.3d 907, 912. The

trial court properly refused to receive the juror's post-verdict letter and, later, the two jurors' affidavits asserting allegations concerning the motives, methods, and mental processes by which the jury reached its verdicts because jurors are not permitted to impeach their verdicts. *Matthews*, 2002 OK CR 16, ¶ 14, 45 P.3d at 915; *Weatherly v. State*, 1987 OK CR 28, ¶¶ 11-13, 733 P.2d 1331, 1335 12 O.S.2011, § 2606(B). Appellant, otherwise, failed to establish juror misconduct by clear and convincing evidence. *Coddington v. State*, 2006 OK CR 34, ¶ 25, 142 P.3d 437, 446; *Woodruff*, 1993 OK CR 7, ¶¶ 12-14, 846 P.2d at 1132 (holding mere speculation that juror had knowledge of facts and circumstances involving the case insufficient to establish juror misconduct); *Keller v. State*, 1982 OK CR 59, ¶¶ 17-20, 651 P.2d 1339, 1342-43 (denying appellant's claim verdict affected by outside influence on jurors where juror explained she was tired, gave up and voted with rest of jurors even though it was not right); *Randleman v. State*, 1976 OK CR 160, ¶ 21, 552 P.2d 90, 93 (rejecting juror misconduct claim based on single affidavit where there was no evidence trial judge observed any juror sleeping during trial). Propositions Twelve and Thirteen are denied.

In Proposition Fourteen, Appellant contends that he was deprived of his right to present a complete defense in two separate instances. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986). He first challenges the trial court's ruling concerning statements within Bethel's confession to Prejean that he believed were exculpatory but that the State had redacted because they expressly implicated Appellant contrary to

Bruton. Appellant sought to have his name redacted but to leave in Bethel's directions to Appellant's house, which was in-fact Allen Shields' home. The trial court gave Appellant the option of leaving in both his name and Bethel's erroneous conclusion as to Appellant's home or redacting both the name and Bethel's erroneous conclusion. Appellant chose to have both his name and the erroneous conclusion redacted. We find that Appellant's request to redact his name but leave the erroneous conclusion would have been confusing, misleading and not assure the fair and reliable ascertainment of guilt or innocence. *Postelle v. State*, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131; *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275; 12 O.S.2011, § 2403. As the evidence was inadmissible, we find that the trial court did not abuse its discretion in limiting Appellant's introduction of evidence. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 (1998); *Simpson v. State*, 2010 OK CR 6, ¶¶ 9-11, 230 P.3d 888, 895.

Second, Appellant challenges the trial court's refusal to permit him to publish to the jury Detective Regalado's report concerning his interview of co-conspirator, Mohammed Aziz. We find that Appellant's claim is not supported by the record. Appellant never sought to admit the law enforcement report into evidence, therefore, we find that Appellant was not denied his right to present a complete defense. As both Regalado and Aziz admitted the statement which Appellant wanted to show the jury and the report was otherwise inadmissible, we find that the trial court did not abuse its discretion when it limited Appellant's cross-examination of Regalado by refusing him permission to

publish the report to the jury. *Mitchell*, 2011 OK CR 26, ¶¶ 58, 69, 270 P.3d at 177-78; 12 O.S.2011, § 2803(8)(a). Proposition Fourteen is denied.

In Proposition Fifteen, Appellant contends that the trial court committed error when it excluded evidence as to the outcome of Allen Shields' polygraph test despite the fact that the State presented evidence concerning the outcome of Fred Shields' polygraph test. Appellant did not seek to introduce the outcome of Allen Shields' polygraph test based upon this ground at trial. He failed to make any offer of proof concerning the excluded evidence. As such, we find that he waived appellate review of this issue for all but plain error. *Mitchell*, 2011 OK CR 26, ¶ 72, 270 P.3d 179. We review Appellant's claim for plain error pursuant to the test set forth in *Hogan* and first determine whether Appellant has shown the existence of an actual error (i.e., deviation from a legal rule). *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that the trial court properly excluded the outcome of Allen Shields' polygraph examination. This Court has repeatedly held that "the results of polygraph tests are not admissible for any purpose." *Matthews v. State*, 1998 OK CR 3, ¶ 18, 95 P.2d 336, 343; *Paxton v. State*, 1993 OK R 59, ¶ 42, 867 P.2d 1309, 1323; *Birdsong v. State*, 1982 OK CR 120, ¶ 8, 649 P.2d 786, 788; *Fulton v. State*, 1975 OK CR 200, ¶ 3, 541 P.2d 871, 871. The United States Supreme Court has recognized that the *per se* exclusion of polygraph evidence as unreliable does not deny a defendant the ability to present his defense. *Scheffler*, 523 U.S. at 309, 118 S.Ct. at 1265. Appellant did not challenge the State's introduction of the outcome of Fred Shields' polygraph test. The outcome of Allen

Shields' polygraph examination did not rebut the State's evidence concerning the outcome of Fred Shields' polygraph test, thus we find that the State did not open the door to Appellant's admission of this unreliable evidence. *See Hogan*, 2006 OK CR 19, ¶¶ 68-69, 139 P.3d at 931-32; *Davis*, 2011 OK CR 29, ¶ 165, 268 P.3d at 127. Accordingly, we find that Appellant has not shown the existence of an actual error. Plain error did not occur. Proposition Fifteen is denied.

In Proposition Sixteen, Appellant contends that he was deprived of a fair trial by evidentiary harpoons. Neither Regalado nor Petrie willfully jabbed information indicating Appellant's involvement in other crimes, therefore, we find that the officers' testimony did not constitute an evidentiary harpoon. *Anderson v. State*, 1999 OK CR 44, ¶ 36, 992 P.2d 409, 421. As the trial court sustained Appellant's general objection and took curative measures, we find that any error was cured. *Powell*, 2000 OK CR 5, ¶ 103, 995 P.2d at 533; *Rogers v. State*, 1995 OK CR 8, ¶ 22, 890 P.2d 959, 972. Proposition Sixteen is denied.

As to Proposition Seventeen, we find that Appellant's sentence for Conspiracy to Commit Murder is within the applicable statutory range and when considered under all the facts and circumstances of the case, is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291; *Lamb v. State*, 1988 OK CR 106, ¶ 12, 756 P.2d 1236, 1238. The trial court did not abuse its discretion when it ran Appellant's sentences consecutively. *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535; *Kamees*

v. State, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09. Proposition Seventeen is denied.

As to Proposition Eighteen, we find that Appellant was not denied a fair sentencing trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. Proposition Eighteen is denied.

DECISION

The judgment and sentence is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

APPEARANCES AT TRIAL

MARK D. LYONS
ATTORNEY AT LAW
616 SOUTH MAIN, SUITE 201
TULSA, OK 74119
COUNSEL FOR DEFENDANT

TIM HARRIS
DISTRICT ATTORNEY
DOUG DRUMMOND
ASSISTANT DISTRICT ATTORNEY
500 SOUTH DENVER
TULSA, OK 74103
COUNSEL FOR THE STATE

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

APPEARANCES ON APPEAL

LISBETH L. McCARTY
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. WELCH
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

RA

APPENDIX “G”

Order Affirming Denial of Post-Conviction Relief (Okla. Crim. App.)

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR - 7 2016
No. PC-2015-923
MICHAEL S. RICHIE
CLERK

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

On October 21, 2015, Petitioner Johnson, by and through counsel William H. Campbell, appealed to this Court from the denial of his Application for Post-Conviction Relief in Tulsa County Case No. CF-2009-2738.

On December 12, 2012, Johnson, represented by counsel, was convicted after a jury trial of Count 4, Conspiracy to Commit Murder and Count 9, First Degree Murder in Tulsa County Case No. CF-2009-2738. In accordance with the jury's recommendation, Johnson was sentenced to life imprisonment for each offense, the sentences ordered to be served consecutively. Johnson appealed to this Court and his conviction was affirmed in an unpublished opinion issued January 10, 2014. *See, Johnson v. State, F-2013-173 (July 17, 2014) (Not for Publication).* All issues previously ruled upon by this Court are *res judicata*, and all issues not raised in the direct appeal, which could have been raised, are

waived. A review of this Court's docket indicates this is Johnson's first application for post-conviction relief filed with this Court in this matter.¹

In his January 2, 2015 application for post-conviction relief filed with the District Court, Johnson raised 5 propositions of error, all centered around the claim that the errors denied Johnson the right to confrontation, due process and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Johnson admits in his application filed in the District Court that each of these claims of error were raised on direct appeal, but argues that the claims were not properly presented, were not presented in a manner in which they have been presented in his post-conviction application, or were decided erroneously by this Court. As an aside, counsel states that each of these errors constituted ineffective assistance of trial counsel.

In a most thorough and complete order, entered September 30, 2015, filed October 6, 2015, the District Court of Tulsa County, the Honorable William D. LaFortune, District Judge, denied Johnson's request for relief. Judge LaFortune noted that Johnson's direct appeal of his conviction was affirmed by this Court, and found that the claims presented in Johnson's application for post-conviction were all presented and rejected on direct appeal. In denying Johnson's request for relief, the District Court cited, with regard to each of Johnson's post-

¹ Johnson raised 18 propositions on direct appeal.

conviction errors, the specific portions of this Court's direct appeal opinion where these exact claims were addressed and rejected. Finding Johnson was not entitled to relief, Judge LaFortune denied his request for the same.

We agree. The Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a Petitioner with a second direct appeal. *Fowler v. State*, 1995 OK CR 29, ¶2, 896 P.2d 566, 569; *Maines v. State*, 1979 OK CR 71, ¶4, 597 P.2d 774. A claim which could have been raised on direct appeal, but was not, is waived. *Fowler*, 1995 OK CR 29 at ¶2, 896 P.2d at 569; *Fox v. State*, 1994 OK CR 52, ¶2, 880 P.2d 383, 384-85; *Johnson v. State*, 1991 OK CR 124, ¶4, 823 P.2d 370, 372. Claims which were raised and addressed in previous appeals are barred as *res judicata*. *Fowler*, 1995 OK CR 29 at ¶2, 896 P.2d at 569; *Walker v. State*, 1992 OK CR 10, ¶6, 826 P.2d 1002, 1004.

Johnson admits that the claims presented in his application for post-conviction relief were raised on direct appeal, but argues that appellate counsel did not fully develop the issues, failed to reference relevant testimony and bring the same to this Court's attention, and with regard to at least one proposition argues that this Court's decision was erroneous claiming this Court did not consider all controlling authority. As indicated above, claims raised and addressed in previous appeals are barred from further consideration. We find nothing in Johnson's alleged claims of error espoused in his application for post-

conviction relief that differs substantively from these same arguments which were presented on direct appeal.

As for Johnson's claims of ineffective assistance of appellate counsel, this claim may be raised for the first time on post-conviction as it is usually a petitioner's first opportunity to allege and argue the issue. As set forth in *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.3d 969, post-conviction claims of ineffective assistance of appellate counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *Smith v. Robbins*, 528 U.S. 259, 289, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) ("[Petitioner] must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel."). Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-66. And we recognize that "[a] court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065).

While citing numerous statutes and criminal cases, Johnson cites no specific factual instances wherein appellate counsel failed to effectively represent his interests. Johnson's supplemental arguments to the issues raised on direct appeal notwithstanding, we find nothing in this record establishing that appellate counsel's performance was deficient or objectively unreasonable. The record does not support the claim that counsel's performance has resulted in prejudice. Johnson must show a reasonable probability that appellate counsel would have prevailed on direct appeal had he argued these propositions of error in the manner that counsel now presents them in this post-conviction appeal. We find no such error in appellate counsel's representation. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

As Petitioner has failed to establish that he is entitled to post-conviction relief, the order of the District Court of Tulsa County in Case No. CF-2009-2738, denying Petitioner's application for post-conviction relief is **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Tulsa County; the District Court of Tulsa County, the Honorable William D. LaFortune, District Judge; Petitioner and counsel of record.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th

day of April, 2016.

Clancy Smith
CLANCY SMITH, Presiding Judge

GARY L. LUMPKIN, Vice Presiding Judge

Arlene Johnson
ARLENE JOHNSON, Judge

David B. Lewis
DAVID B. LEWIS, Judge

Robert L. Hudson
ROBERT L. HUDSON, Judge

ATTEST:

Michael J. Dickey

Clerk

PA/F