FILED
United States Court of Appeals
Tenth Circuit

August 14, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARRELL WAYNE FREDERICK,

Petitioner - Appellant,

v.

CHRISTE QUICK, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.[1]

No. 20-6131

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:19-CV-00037-SLP)

Emma V. Rolls (Meghan LeFrancois with her on the briefs) Assistant Federal Public Defenders, Oklahoma City, Oklahoma, for Petitioner – Appellant.

Joshua L. Lockett, Assistant Attorney General (John M. O'Connor, Attorney General of Oklahoma; Julie Pittman and Sheri M. Johnson, Assistant Attorneys General on the brief) Oklahoma City, Oklahoma, for Respondent – Appellee.

Before **MATHESON**, **CARSON**, and **ROSSMAN**, Circuit Judges.

MATHESON, Circuit Judge.

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[1] Christe Quick became warden of the Oklahoma State Penitentiary on July 3, 2023. We substitute her for her predecessor, Jim Farris, as Respondent under Fed. R. App. P. 43(c)(2).

An Oklahoma state court jury convicted Darrell Wayne Frederick of first-degree murder, attempted assault with a dangerous weapon, and domestic abuse. Based on the jury's recommendation, the court sentenced Mr. Frederick to death for the murder. After his direct appeal and state post-conviction proceedings were unsuccessful, Mr. Frederick filed a habeas corpus application in federal court under 28 U.S.C. § 2254. The district court denied relief. We granted a certificate of appealability ("COA") on his claims that appellate counsel provided ineffective assistance and that there was cumulative error.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(c)(1)(A), we affirm the denial of habeas relief.

I. BACKGROUND

A. *Factual History*

In reviewing a § 2254 application, "we presume that the factual findings of the state court are correct unless the petitioner presents clear and convincing evidence to the contrary." *Frost v. Pryor*, 749 F.3d 1212, 1215 (10th Cir. 2014) (quotations omitted); *see also* 28 U.S.C. § 2254(e)(1). Mr. Frederick does not challenge the state court's determination of the facts. The Oklahoma Court of Criminal Appeals ("OCCA") described the facts as follows:

> On March 26, 2011, between 5:30 and 6:30 p.m., Da'Jon Diggs arrived at the home of her grandmother, Connie Frederick (hereinafter referred to as the deceased). The deceased was 85 years old and had been deaf and mute her entire life. She lived in the same house in northeast Oklahoma City in which she had raised six children. Ms. Diggs attended college in another city but frequently

stopped by to check on the deceased. Ms. Diggs, like much of her family, communicated with the deceased through sign language. Also living at the deceased's home at the time was Appellant [Mr. Frederick], her fifty-five (55) year old son. He had been living with the deceased since his release from prison in 2009.

Ms. Diggs entered the home to find Appellant and the deceased "fussing" in the kitchen. Ms. Diggs later explained that despite being mute for speech purposes, the deceased could still make some sounds and was "yelling" at Appellant through guttural noises and sign language involving exaggerated movements with her hands. Ms. Diggs saw Appellant aggressively grab food out of the deceased's hands. Appellant called the deceased a "bitch" and told her to get out of the kitchen. He then shoved her against the kitchen counter. Ms. Diggs intervened and took the deceased to her bedroom, where she was able to calm her.

Meanwhile, Appellant had retreated to his own bedroom. When Ms. Diggs returned to the kitchen to get the deceased a drink of water, Appellant appeared and told her not to take anything to the deceased. Ms. Diggs ignored this warning and took something to eat and drink to the deceased. The deceased wanted juice instead of water and tried to go to the kitchen. However, Appellant prevented her from entering the kitchen. Ms. Diggs then volunteered to go to the store for some juice.

While out of the house, Ms. Diggs phoned both her mother, who lived out of state, and her uncle, Tobias Frederick, to discuss her frustrations with Appellant. Both were the deceased's children and Tobias Frederick was an Oklahoma City Police Officer. Ms. Diggs told both her mother and her uncle that she was afraid Appellant would seriously hurt her or the deceased. When Ms. Diggs returned to the house, she heard Appellant answer the phone. Ms. Diggs was able to determine that it was her uncle Tobias that had called. He told Appellant that he had to leave the deceased's home and find another place to live. Appellant replied angrily, "man, I ain't got time for this" and hung up the phone. Ms. Diggs could hear Appellant yelling into the phone. Ms. Diggs

headed for the deceased's bedroom and told her to stay in the bedroom no matter what happened. Ms. Diggs then shut the bedroom door.

Ms. Diggs headed into another room to retrieve her phone and call police when Appellant charged at her yelling, "oh, you have a problem with me too? I'll take you bitch." Appellant attacked Ms. Diggs, shoving her against the wall. The struggle moved from room to room with Diggs attempting to defend herself. Eventually, she was able to push Appellant off of her, causing him to stumble and she ran out of the house. Appellant chased after her.

Outside, neighborhood kids were playing. Seeing Appellant chase after Ms. Diggs, they shouted at her that Appellant had a brick or rock in his hand. Appellant chased Ms. Diggs around the yard, waving the brick or rock at her. Ms. Diggs ran to the neighbor's home and borrowed a phone to call the police. Appellant, who was dressed only in pajama pants, shouted at the neighborhood children and ran inside the house. He returned a few minutes later, fully dressed. By the time police arrived, Appellant had run around the back of the house. Bystanders heard the rattle of a chain link fence and Appellant was not seen or heard from the rest of the day.

Ms. Diggs followed police into the deceased's home. They found the deceased lying face down on the floor in her bedroom. The deceased had severe bruising and swelling on both sides of her head to the extent that one eye was nearly swollen shut. When asked who injured her, the deceased signed the letter "D" which she used to identify Appellant. The deceased was taken to the hospital. Once there, she was immediately operated on to reduce the pressure in her brain. She had developed a significant subdural hematoma on the left side of her skull. The deceased survived the surgery but never regained consciousness. She passed away two to three weeks later. The cause of death was listed as blunt force trauma to the head.

Appellant was located a day after the deceased's beating. He was found walking along the street approximately three blocks from the deceased's home. When approached by

> police, he initially gave a false name but soon admitted his identity. His right hand was significantly swollen and his right finger was cut and bleeding. There was blood on his clothes. Bloodstains were also found in his bedroom at the decedent's home.

Frederick v. State, 400 P.3d 786, 798-99, *as amended* (June 23, 2017), *overruled on other grounds by Williamson v. State*, 422 P.3d 752 (2018).

B. ***Procedural History***

1. **State Proceedings**

Three attorneys represented Mr. Frederick at trial and on appeal:

1) Catherine Hammarsten represented Mr. Frederick until 11 months before trial;

2) James Rowan replaced Ms. Hammarsten and represented Mr. Frederick at trial; and

3) Gina Walker represented Mr. Frederick in his direct appeal to the OCCA.

a. *Trial*

On May 2, 2011, Mr. Frederick was charged in Oklahoma County District Court with (1) first degree malice murder (Count I), (2) attempted assault and battery with a dangerous weapon after former convictions of two or more felonies (Count II), and (3) domestic abuse assault and battery (Count III).

Because the State sought the death penalty, Mr. Frederick's trial had guilt and penalty phases. At the guilt phase, the jury convicted Mr. Frederick on all three counts. *See Frederick*, 400 P.3d at 798.

During the penalty phase, the State introduced substantial testimony in support of the three aggravators the jury relied on to support its death penalty recommendation:

1) Mr. Frederick "was previously convicted of a felony involving the use of threat of violence to the person;"

2) "the murder was especially heinous, atrocious and cruel;" and

3) "there exists a probability that the defendant will commit or continue to commit acts of violence and constitute a continuing threat to society."

Trial Tr., Vol. VII at 1290:21-1291:12.

In his opening statement during the penalty phase, defense counsel said the jury would hear from Dr. Art Williams, a sociologist, but he did not call Dr. Williams to testify. *Id.* at 1292:8-10. The only evidence defense counsel presented was reading into the record testimony from Nathan Frederick, Mr. Frederick's father, from a 1982 case. Trial Tr., Vol. VIII at 1495:24-1496:4. In that testimony, Nathan, who died in 2007, said that Mr. Frederick was "slow" and "just [didn't] get it together." *Id*. at 1498:10-15. He said Mr. Frederick had a car accident where he "ran into a post and hit his head on the windshield, busted the windshield out of the truck and . . . changed from that very moment." *Id.* at 1498:15-24. Nathan also said that growing up, Mr. Frederick was "quiet" and "easygoing" but that changed after the accident. *Id.* at 1499:5-17. He further testified that Mr. Frederick had lived a sheltered life and left home when he was 14. *Id.* at 1501:18-22, 1506:7-8, 1507:8-12.

Defense counsel presented five mitigating circumstances:

1) "[Mr.] Frederick had an accident in [a] truck, ran into a post and hit his head on the windshield, busted the windshield out of the truck and changed from that very moment;"

2) "[Mr.] Frederick's break with his father which led to him leaving home at the age of fourteen had a negative impact on his development;"

3) "[Mr.] Frederick has become institutionalized which has caused him to become suspicious of other people and overly aggressive;"

4) "[Mr.] Frederick has never learned to live as a free man and is unable to cope with the stress and strain of society;" and

5) "[Mr.] Frederick's father never took an interest in [him] after [he] left home at the age of fourteen."

State Ct. R., Vol. V at 927.

The trial court sentenced Mr. Frederick to death on the murder charge, 25 years in prison on the assault and battery charge, and one year on the domestic abuse charge, to run consecutively. *See id.* at 936-38; 948-50.

b. *Direct appeal*

Mr. Frederick appealed to the OCCA, raising 22 grounds for reversal. *See Frederick,* 400 P.3d at 833. He challenged the jury selection and the jury instructions, the admission of the decedent's statement identifying him as her attacker, and the sufficiency of the evidence. *See id.* at 799-814. He also raised nine grounds alleging that he received ineffective assistance of counsel ("IAC") at trial.[2]

[2] The IAC claims alleged trial counsel failed to (1) file a motion in limine to exclude the decedent's alleged hearsay statements; (2) "investigate or present evidence on potential causes for" injuries to Mr. Frederick's hand; (3) thoroughly cross-examine Ms. Diggs and Tobias Frederick with available impeachment evidence; (4) impeach Ms. Diggs and Tobias Frederick with information that the decedent had a history of falling, that decedent had hit one of Ms. Diggs's aunts in

Id. at 822-32. The OCCA rejected those challenges and affirmed the judgments and sentences. *Id.* at 834.

c. *Post-conviction IAC claims*

Mr. Frederick then filed an application for post-conviction relief in the OCCA and requested an evidentiary hearing. *See* Okla. Stat. tit. 22, § 1089; Aplt. Br. Attachment B at 2. His application sought relief based on ineffective assistance of his appellate counsel and cumulative error. Application for Post-Conviction Relief ("APCR") at v-vii. The OCCA concluded that Mr. Frederick was entitled to an evidentiary hearing and remanded to the trial court. Aplt. Br. Attachment B at 3-4. The trial court held a four-day evidentiary hearing. *Id.* at 4. The court concluded that appellate counsel was not ineffective for failing to raise the issues identified in Mr. Frederick's application. *Id.* Mr. Frederick appealed to the OCCA, which affirmed the denial of his application. *Id.* at 45-46. We provide additional detail about the evidentiary hearing and the OCCA's decision when discussing Mr. Frederick's claims on appeal here.

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the head with a brick, and that Ms. Diggs had her cell phone that day; (5) adequately challenge the State's evidence of prior acquitted conduct; (6) call Dr. Art Williams to testify; (7) request additional peremptory challenges during voir dire and identify unqualified jurors; and (8) object to errors at trial and request admonishments. *See Frederick*, 400 P.3d at 825-32. Mr. Frederick also alleged that trial counsel was ineffective for (9) informing the jury that he was a multiple convicted felon who had been institutionalized, was hard to get along with, and refused to cooperate with testing. *Id.* at 828.

2. **Federal Court Proceedings**

On December 16, 2019, Mr. Frederick filed a § 2254 habeas application, advancing four claims: (1) appellate counsel was ineffective for failing to raise certain IAC claims about trial counsel on direct appeal, (2) the decedent's statements were improperly admitted in violation of the Sixth Amendment Confrontation Clause, (3) the prosecutor's statements during closing arguments deprived him of a fair trial and sentencing, and (4) the accumulation of errors violated his constitutional rights. Dist. Ct. Doc. 20; Aplt. Br. Attachment C at 7, 49, 54, 60. The district court denied relief and denied a COA. Aplt. Br. Attachment C at 2, 63; Dist. Ct. Doc. 35. On February 4, 2021, we granted a COA on Mr. Frederick's ineffective assistance of counsel and cumulative error claims. Doc. 10805518 at 1.

C. ***Legal Background***

1. **Standard of Review and AEDPA**

"On appeal from an order denying a writ of habeas corpus, we review the district court's legal analysis of the state court decision de novo and its factual findings, if any, for clear error." *Smith v. Sharp*, 935 F.3d 1064, 1071 (10th Cir. 2019) (quotations omitted). In addition, "the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') circumscribes our review of federal habeas claims that were adjudicated on the merits in state-court proceedings." *Id.* (quotations and alterations omitted). AEDPA "erects a formidable barrier to federal habeas relief," *Burt v. Titlow*, 571 U.S. 12, 19 (2013), and "requires federal courts to give significant

deference to state court decisions," *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013).

Under AEDPA, when a state court has adjudicated the merits of a claim, a federal court cannot grant habeas relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2); *see also Harrington v. Richter*, 562 U.S. 86, 97-98 (2011).

"The [habeas] petitioner carries the burden of proof" in satisfying AEDPA's demanding standards, *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), and "must . . . show[] there was *no* reasonable basis for the state court to deny relief," *Richter*, 562 U.S. at 98 (emphasis added).

a. *Section 2254(d)(1) - Contrary to or unreasonable application of clearly established Supreme Court law*

In reviewing under § 2254(d)(1), we must first "determine the relevant clearly established law." *Budder v. Addison*, 851 F.3d 1047, 1051 (10th Cir. 2017) (quotations omitted). "As used in the context of AEDPA, clearly established Federal law means only Supreme Court holdings, not the Court's dicta." *Id.* (quotations and alterations omitted).

A decision is "contrary to" the Supreme Court's clearly established precedent "if the state court applies a rule different from the governing law set forth in [the

Supreme Court's] cases, or if it decides a case differently than [the Court] ha[s] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

A state court decision is an "unreasonable application" of Supreme Court precedent "if the state court correctly identifies the governing legal principle from [the Court's] decisions but unreasonably applies it to the facts of the particular case." *Id.* "Evaluating whether a rule application was unreasonable requires considering the rule's specificity." *Richter*, 562 U.S. at 101 (quotations and brackets omitted). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* (quotations omitted).

"In order for a state court's decision to be an unreasonable application of [Supreme Court] law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (quotations omitted); *see Shinn v. Kayer*, --- U.S. ----, 141 S. Ct. 517, 523 (2020) (per curiam). "For purposes of § 2254(d)(1), 'an unreasonable application of federal law is different from an incorrect application of federal law.'" *Richter*, 562 U.S. at 101 (emphases omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). The petitioner must show that a state court's decision is "so obviously wrong" that no reasonable judge could arrive at the same conclusion given the facts of the prisoner's case. *Shinn*, 141 S. Ct. at 523.

Thus, AEDPA "requires a state prisoner to show that the state court's ruling . . . was so lacking in justification that there was an error beyond any possibility for

fairminded disagreement." *Burt*, 571 U.S. at 19-20 (quotations and alterations omitted); *see also Richter*, 562 U.S. at 102 ("[AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents."). "[E]ven a strong case for relief does not mean that the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102. Although AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," *id*., "[w]e will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy," *Burt*, 571 U.S. at 20 (quotations and alterations omitted).

Under § 2254(d)(1), our review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011).

b. *Section 2254(d)(2) - Unreasonable determination of facts*

"[A]ny state-court findings of fact that bear upon [a petitioner's] claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence." *Simpson v. Carpenter*, 912 F.3d 542, 563 (10th Cir. 2018) (quotations omitted). "The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." *Sumpter v. Kansas*, 61 F.4th 729, 734 (10th Cir. 2023) (quoting *Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015)). "The burden of showing that the state court's factual findings are objectively unreasonable falls squarely on the petitioner's shoulders." *Meek v. Martin*, --- F.4th ---, 2023 WL 4714719, at *20 (10th Cir. July 25, 2023).

The standard for determining whether the state court's decision was based on an unreasonable determination of the facts "is a restrictive one." *Grant v. Trammell*, 727 F.3d 1006, 1024 (10th Cir. 2013) (quotations omitted). "We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015) (quotations and alterations omitted). "[A]n imperfect or even an incorrect determination of the facts isn't enough for purposes of § 2254(d)(2)." *Grant*, 727 F.3d at 1024 (citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). And "it is not enough to show that reasonable minds reviewing the record might disagree about the finding in question." *Brown v. Davenport*, --- U.S. ---, 142 S. Ct. 1510, 1525 (2022) (quotations omitted). "Instead, § 2254(d)(2) requires that we accord the state . . . court substantial deference." *Brumfield*, 576 U.S. at 314. We thus "defer to the state court's factual determinations so long as reasonable minds reviewing the record might disagree about the finding in question." *Johnson v. Martin*, 3 F.4th 1210, 1218-19 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1189 & 142 S. Ct. 1350 (2022) (quotations omitted).

A petitioner must also show "that the [state court] based its decision on the factual error." *Harris v. Sharp*, 941 F.3d 962, 1003 (10th Cir. 2019). The state court's decision is not "based on" a finding if (1) it made the finding in addressing "only subsidiary issues," *Grant*, 727 F.3d at 1024, or (2) other reasons supported the court's decision, *Harris*, 941 F.3d at 1003.

In sum, a factual finding may be unreasonable under § 2254(d)(2) only if the state court "plainly misapprehended or misstated the record" and the "misapprehension goes to a material factual issue that is central to the petitioner's claim." *Menzies v. Powell*, 52 F.4th 1178, 1195 (10th Cir. 2022) (quotations and alterations omitted).

2. **Ineffective Assistance of Counsel**

We look to *Strickland v. Washington*, 466 U.S. 668 (1984), to review ineffective assistance of counsel claims. Under *Strickland*, a defendant must establish that (1) counsel's performance "fell below an objective standard of reasonableness," *id.* at 688; and (2) "the deficient performance prejudiced the defense," *id.* at 687.

a. *Deficient performance*

Strickland's first prong—deficient performance—requires a defendant to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. Mr. Frederick asserts that his appellate counsel was ineffective for failing to raise certain issues on direct appeal. To succeed on prong one, Mr. Frederick must show "appellate counsel performed deficiently in failing to raise the particular issue on appeal." *Davis v. Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019).

"[T]he Sixth Amendment does not require [appellate counsel] to raise every nonfrivolous issue," and "appellate attorneys frequently winnow out weaker claims in order to focus effectively on those more likely to prevail." *Id.* (quotations omitted).

Thus, in evaluating whether appellate counsel performed deficiently, we "typically examine[] the merits of the omitted issue." *Id.* (quotations omitted). "If the omitted issue is meritless, its omission will not constitute deficient performance." *Id.* (quotations omitted).

Courts review ineffective assistance claims with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotations omitted). "There are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*

b. *Prejudice*

Under *Strickland*'s second prong—prejudice—a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "In the context of an ineffective assistance of appellate counsel claim, this means the defendant 'must show a reasonable probability that, but for his counsel's unreasonable failure to' raise a particular nonfrivolous issue, 'he would have prevailed on his appeal.'" *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014) (quoting *Smith v. Robbins*, 528 U.S. 259, 285 (2000)).

The court may address the two *Strickland* prongs in either order and need not address both if the defendant has failed to satisfy one. *See Strickland*, 466 U.S. at 697.

3. ***Strickland* Review Under AEDPA**

As discussed, because the OCCA rejected Mr. Frederick's IAC claims on the merits, we evaluate them through AEDPA's deferential lens. "There is no dispute that the clearly established federal law here is *Strickland v. Washington*." *Cullen*, 563 U.S. at 189. Thus, we may grant relief under § 2254(d)(1) only if Mr. Frederick shows the OCCA's decision was "contrary to, or involved an unreasonable application of" *Strickland*. 28 U.S.C. § 2254(d)(1).

"The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (quotations and citations omitted); *Menzies*, 52 F.4th at 1196 ("When a habeas petitioner alleges ineffective assistance of counsel, courts must engage in doubly deferential judicial review."). "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Richter*, 562 U.S. at 105. "Given the two layers of deference," when reviewing under § 2254(d)(1), "a court must consider whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard." *Menzies*, 52 F.4th at 1196 (quotations omitted); *see also Richter*, 562 U.S. at 105 ("[T]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.").

A state court's application of *Strickland* is reasonable at least "so long as 'fairminded jurists could disagree' on the correctness of [its] decision." *Richter*, 562 U.S. at 101 (quotations omitted). Under this test, "if all fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted." *Frost*, 749 F.3d at 1225. "If, however, some fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied." *Id.* Thus, to obtain relief under § 2254(d)(1), Mr. Frederick must demonstrate "there is no possibility fairminded jurists could disagree" that Mr. Frederick's appellate counsel rendered ineffective assistance under *Strickland*. *Richter*, 562 U.S. at 102.

II. **DISCUSSION**

Mr. Frederick argues that appellate counsel was ineffective[3] for failing to raise on direct appeal that trial counsel was ineffective

- <u>at the guilt phase</u>, for failure to

  (1) consult with and present a medical expert;

  (2) adequately cross-examine Medical Examiner Marc Harrison; and

- <u>at the penalty phase</u>, for failure to

  (3) investigate and present testimony from family members; and

[3] Mr. Frederick's application for post-conviction relief raised claims regarding appellate counsel's ineffectiveness. Any independent claim that trial counsel was ineffective is therefore unexhausted. *See* 28 U.S.C. § 2254(b)(1)(A); *Davis*, 943 F.3d at 1296. As we will discuss, trial counsel's ineffectiveness is relevant insofar as it relates to appellate counsel's ineffectiveness for failing to claim on direct appeal that trail counsel was ineffective.

(4) investigate and present evidence of brain damage to Mr. Frederick.[4]

Mr. Frederick also contends that

(5) appellate counsel Walker was ineffective for failing to provide sociologist Dr. Williams's report to the OCCA in support of the direct appeal claim that trial counsel was ineffective for failure to call Dr. Williams at trial.

Finally, he seeks habeas relief for

(6) cumulative error.

Mr. Frederick has not shown that he is entitled to relief on any of these six issues, so we affirm.

ISSUE ONE (Guilt Phase):
Failure to Consult with and Present a Medical Expert on Cause of Injuries

Mr. Frederick asserts that appellate counsel Walker was ineffective for failing to timely raise an IAC claim based on trial counsel's failure to consult with and present a medical expert on the cause of the decedent's injuries. We affirm denial of relief because the OCCA reasonably concluded that Mr. Frederick was not prejudiced by appellate counsel.

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[4] Courts use two approaches to assess a claim that appellate counsel provided ineffective assistance for failure to raise on direct appeal that trial counsel provided ineffective assistance. First, a court may analyze whether appellate counsel's performance on direct appeal was deficient, and if so, whether that deficiency caused prejudice on direct appeal. *See Davis*, 943 F.3d at 1299. Second, a court may analyze whether trial counsel's performance was deficient and if so, whether that deficiency caused prejudice at trial; and if trial counsel's performance was not deficient, or if any deficiency did not cause prejudice, then appellate counsel could not have been ineffective. *See id.*

On post-conviction review, the OCCA used the first approach to address issues one and two, and the second approach—focusing on the merits of the IAC claim against trial counsel—to address issues three and four. On AEDPA review, we evaluate whether the OCCA's determinations were reasonable.

A. *Additional Background*

1. **Trial**

The State called 15 witnesses during the guilt phase. Trial Tr., Vol. IV at dcclxx; Trial Tr., Vol. V at cmlxxxiv. Defense counsel did not call any witnesses. Trial Tr., Vol. V at cmlxxxiv.

Several State witnesses testified that Mr. Frederick caused the decedent's injuries and that those injuries were not consistent with a fall. For example, a responding officer testified that the decedent had two separate injuries he "would not associate with a fall to the ground." Trial Tr., Vol. IV at 956:18-957:9. A responding paramedic said he did not believe the decedent's injuries were consistent with a fall. Trial Tr., Vol. V at 987:18-23, 995:17-21. He testified that the decedent said in sign language—translated through Ms. Diggs—that "her son did it" and "that he had an object in his hand." *Id*. at 991:20-992:6.

Dr. Michael Hahn, the neurosurgeon who performed surgery on the decedent following the incident, was asked whether the decedent's injuries were consistent with someone falling. He replied the injuries were "a little bit more than what I would expect. . . . That would take a heck of a fall," like if someone fell off of a 4-to-5-foot ledge. *Id.* at 1012:24-1013:9; *see also id.* at 1015:11-16, 1024:23-1025:2. Based on the appearance of the left side of the decedent's face, Dr. Hahn said the injuries were more extensive than he would expect from a woman of her height and stature falling over. *Id.* at 1015:3-10. When asked whether the lacerations on her face were "consistent with falling [or] being hit by something," he replied, "[y]eah

. . . it looks like it had been something that would've been rough." *Id.* at 1019:12-20. He also testified that he could not open the decedent's left eye due to a "large area" of bruising. *Id.* at 1005:4-18.

2. **Direct Appeal**

In preparing the direct appeal, Ms. Walker contacted Dr. Robert Bux, a forensic pathologist, about the cause of the decedent's injuries. The OCCA extended the briefing deadline for Dr. Bux to review materials. Despite the extension, Dr. Bux never contacted appellate counsel about his opinion. Ms. Walker filed a brief without raising an IAC claim about trial counsel's failure to consult with a medical expert.

Dr. Bux contacted Ms. Walker the next month and opined there was no scientific way to establish whether the decedent was assaulted or fell. Evidentiary Hr'g, Vol. II at 396:10-17; Mot. Stay Proceedings, May 20, 2016, at 1. Appellate counsel sought to raise another IAC claim against trial counsel based on a letter from Dr. Bux expressing this opinion. Evidentiary Hr'g, Vol. II at 397:1-12; Mot. Stay Proceedings at 2-3. The OCCA denied that request as untimely because its rules did not allow an additional claim after a party filed a brief-in-chief. Order Den. Mot. Supplement R., June 3, 2016.

3. **Post-Conviction Evidentiary Hearing**

Dr. Bux testified at the post-conviction evidentiary hearing. Evidentiary Hr'g, Vol. II at 309:22-24. He agreed with Dr. Harrison's assessment that the decedent's cause of death was blunt force trauma to the head. *Id.* at 317:15-20. But he opined

the decedent's injuries were consistent with an accidental fall or a fall resulting from a medical event, such as a stroke. *Id.* at 340:10-16; *see also id.* at 323:15-324:7. When asked whether—aside from one picture of the decedent at the scene—he had any "medical evidence that [the decedent] suffered a stroke or a [mini stroke] prior to her fall," he replied, "[n]o way to know." Evidentiary Hr'g, Vol. II at 362:8-12; *see also id.* at 281:18-282:2. Dr. Bux said that even if there were witnesses to the assault, he "would be questioning" their account, "particularly if they said it was a brick" that caused the injury. *Id.* at 341:20-24.

Dr. Bux also testified that:

- Based on Dr. Harrison's written findings, he questioned whether the decedent's death had been caused by being hit by a brick because "bricks typically leave a patterned injury" and he would "expect there to be abrasion and bleeding from being hit multiple times," *id.* at 323:15-24;
- A photograph of the decedent at the scene showed "drawing on the left side of the mouth" that he did not think was "due to swelling of that left cheek area," and Transient Ischemic Attack ("TIA") or stroke were "possibilities" of what caused that, *id.* at 334:16-335:1;[5]
- Someone like the decedent whose brain was shrinking due to age was more at risk for suffering a subdural hematoma, *id.* at 338:12-24; and
- If this had been his case, he would have listed the manner of death as "undetermined" because there were no defensive injuries, no evidence of Mr. Frederick's DNA on the examined bricks, and no evidence of a struggle, *id.* at 341:5-19.

[5] A TIA is a "mini-stroke" that "doesn't present as severe as . . . [a] full-blown stroke." Evidentiary Hr'g, Vol. II at 281:18-282:2.

4. **OCCA Post-Conviction Opinion**

The OCCA rejected Mr. Frederick's claim that appellate counsel was ineffective for failing to timely assert trial counsel's ineffectiveness for not consulting a medical expert. Aplt. Br. Attachment B at 11. It determined that Mr. Frederick had not shown he was prejudiced by appellate counsel. *Id.*

B. ***Analysis***

The OCCA reasonably concluded that Mr. Frederick was not prejudiced by appellate counsel's failure to assert trial counsel's ineffectiveness for not consulting a medical expert.[6] Given the overwhelming evidence of Mr. Frederick's guilt and trial counsel's cross-examination of the State's medical experts, the OCCA reasonably concluded that Mr. Frederick failed to show a reasonable probability of a different result on appeal had appellate counsel argued that trial counsel was ineffective for failing to consult with an expert like Dr. Bux. We affirm the denial of relief on this ground.

First, the evidence overwhelmingly pointed to Mr. Frederick's guilt. *See Richter*, 562 U.S. at 113. Most telling, the decedent communicated that Mr. Frederick attacked her. *Frederick*, 400 P.3d at 799. The evidence from the State's witnesses also showed that Mr. Frederick shoved the decedent against the kitchen counter, yelled at her, chased Ms. Diggs with a brick outside, and returned

[6] Even though the OCCA's decision was "unaccompanied by an explanation," Mr. Frederick still has the burden to "show[] there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

inside for a few minutes before leaving the house. *Id.* at 798-99. The responding officers testified that the decedent's injuries were not consistent with a fall. Trial Tr., Vol. IV at 956:18-957:9; Trial Tr., Vol. V at 995:17-21. And when officers located Mr. Frederick, he refused to confirm his identity, his hand was swollen, there was blood on his clothes, and his finger was bleeding. *Frederick*, 400 P.3d at 799. This evidence pointed to Mr. Frederick's guilt irrespective of medical testimony about the nature of the decedent's injuries.

Second, Dr. Bux's opinions would have added little to what defense counsel Rowan already elicited during cross-examination of the State's medical witnesses. When cross-examining Dr. Hahn at trial, Mr. Rowan elicited testimony that (1) a person with a heart condition could be more susceptible to falling, Trial Tr., Vol. V at 1020:9-19; (2) a person could generate a lot of force by falling into a hard object, *id.* at 1020:24-1021:4; and (3) the decedent was taking aspirin, *id.* at 1022:22-1023:1, which Dr. Harrison confirmed could make her more susceptible to bleeding, *id.* at 1140:21-25. Mr. Rowan also asked whether lacerations on the decedent's head could be consistent with falling and whether she would have been more susceptible to falling if she had previously wilted[7] due to chest pains. *Id.* at 1019:12-20, 1027:18-1028:1.

[7] Dr. Hahn defined "wilting" as when someone "fall[s] to their knees and then . . . to their side." Trial Tr., Vol. V at 1025:22-1026:1.

While cross-examining Dr. Harrison at trial, Mr. Rowan elicited testimony that (1) it was possible someone with a heart condition could take a "wilting fall," which the decedent had previously done, Trial Tr., Vol. V at 1139:15-20; (2) some people are more susceptible to bleeding, *id.* at 1140:6-11; (3) Dr. Harrison never screened the decedent for medications even though certain medications promote brain bleeding, *id.* at 1140:12-25; and (4) there was no remarkable bruising on the left side of the decedent's face, *id.* at 1141:13-19. Mr. Rowan also asked Dr. Harrison to confirm he did not have a brick during the autopsy and that the bruising around the decedent's eyes could have resulted from her treatment at the hospital. *Id.* at 1141:10-1142:3. Finally, Dr. Harrison acknowledged that the decedent had a heart condition and brain atrophy. *Id.* at 1138:8-11, 1139:1-5.

Although Dr. Bux's testimony may have cast doubt on the State's theory of how the decedent was injured, his opinions would have been largely duplicative of points Mr. Rowan elicited during his cross-examination of the State's witnesses. Mr. Frederick thus has not shown that all fairminded jurists would disagree with the OCCA's determination that there was no reasonable probability of a different result.[8]

[8] Mr. Frederick's challenges to the OCCA's factual findings also fail. He disputes the OCCA's finding on direct appeal that the decedent's "head injuries were so severe that her skull was actually crushed in several places." Aplt. Br. at 16 n.11. But the OCCA did not mention this fact in its post-conviction opinion, and Mr. Frederick has not "show[n] that the OCCA based its [post-conviction] decision on the factual error." *Harris*, 941 F.3d at 1003; *see* 28 U.S.C. § 2254(d)(2). He also argues that the OCCA engaged in unreasonable fact finding by "ignor[ing] . . . frailties in the State's case." Aplt. Br. at 16. But that does not amount to an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

Based on the strong evidence of guilt and the cross-examination of the State's medical witnesses, the OCCA reasonably concluded it was unlikely that the result on appeal would have differed if appellate counsel had timely raised a claim of ineffective assistance of trial counsel.

ISSUE TWO (Guilt Phase):
Failure to Adequately Cross-Examine the State's Medical Examiner

Mr. Frederick also argues that appellate counsel was ineffective for not asserting on direct appeal trial counsel's ineffectiveness in cross-examining the State's medical examiner, Dr. Harrison. The OCCA reasonably concluded that Mr. Frederick was not prejudiced by appellate counsel, and its conclusion was not based on an unreasonable determination of the facts. We thus affirm the denial of relief.

A. ***Additional Background***

1. **Trial**

At the trial, Dr. Harrison, the medical examiner who performed the autopsy, opined that the decedent's "cause of death was traumatic head injury, blunt force," *id.* at 1134:13-21, and her "manner of death was homicide," *id.* at 1135:12-14; *see also id.* at 1120:21-23, 1123:6-10. He noted apparent bruising around the decedent's eyes, *id.* at 1125:10-14, and found internal bleeding and areas of softening when he dissected her brain, *id.* at 1133:18-1134:12. Dr. Harrison said that before performing an autopsy, he typically reviews the investigator's narrative, police reports, and hospital records. *Id.* at 1124:5-12.

Trial counsel Rowan cross-examined Dr. Harrison and asked whether it was possible that the decedent's medical conditions caused her to fall, and whether aspirin (which the decedent had taken) would make someone more susceptible to dizziness. *Id.* at 1138:8-1139:20, 1140:21-25. Mr. Rowan also asked Dr. Harrison about the steps he failed to take during the autopsy, including screening for medications and examining a brick while evaluating the decedent's injuries. *Id.* at 1139-41. Mr. Rowan did not ask Dr. Harrison about his opinion on the cause and manner of the decedent's death or the statement in his autopsy report that Ms. Diggs witnessed the assault. Aplt. Br. at 23-24.

In closing argument, the prosecutor said Dr. Hahn and Dr. Harrison "[b]oth indicated . . . based upon their training and experience and their observations" that "this was not consistent with a fall." Trial Tr., Vol. VI at 1228:12-19. Although Dr. Harrison never testified about whether the decedent's injuries were consistent with a fall, defense counsel did not object to the prosecutor's misstatement.

2. **Post-Conviction Evidentiary Hearing**

At the evidentiary hearing, post-conviction counsel asked Dr. Harrison about his autopsy report. The report said: "This 85 year old [B]lack female was reported to have been assaulted with an apparent brick by her son (as witnessed by the decedent's granddaughter)." Evidentiary Hr'g State Ex. 4 at 3. That statement was based on the Investigator's Narrative, which said: "Witness stated that the decedent's son had hit the decedent in the head with a brick. . . . Granddaughter

witnessed assault." Evidentiary Hr'g Def. Ex. 3 at 1.[9] A supplemental investigator's report clarified that no one witnessed the assault. Evidentiary Hr'g State Ex. 5.

Post-conviction counsel questioned Dr. Harrison about whether he relied on the Investigator's Narrative's statement that the decedent's granddaughter witnessed the assault. Dr. Harrison testified as follows:

The Narrative's statement factored into his conclusion that the death was a homicide, but if he had not seen "th[e] words granddaughter witnessed the assault" while performing the autopsy, his opinion about the cause and manner of death would have remained the same based on the other evidence. Evidentiary Hr'g, Vol. II at 278:11-25, 301:14-302:2. "[B]ased on all of the evidence . . . [he] still [stood] by [his] original findings." *Id.* at 301:22-302:2.

His opinions about cause and manner of death were based on a physical examination of a body and review of police and investigators' reports. It would have been difficult to determine the manner of death in this case "without further information from law enforcement investigation [and] hospital records," *id.* at 273:14-25, though he "could probably determine the cause of death," *id.* at 298:11-16.

Based solely on examining the decedent, Dr. Harrison could not rule out a fall as causing the decedent's closed-head injury. *Id.* at 281:10-13, 282:5-8. And it was

[9] An investigator in the Medical Examiner's Office prepared the Investigator's Narrative. Aplt. Br. Attachment B at 13.

possible that a fall causing the decedent to hit her head would be consistent with his autopsy findings. *Id.* at 281:14-17. He would probably expect some external bleeding if the decedent was repeatedly hit in the head with a brick. *Id.* at 284:25-285:12.

A supplemental report issued the day after Dr. Harrison performed the autopsy clarified that Ms. Diggs did not witness Mr. Frederick hit the decedent with a brick. *Id.* at 279:13-280:24, 292:2-23. Dr. Harrison probably read that supplemental report before writing his autopsy report. *Id*.

3. **OCCA Post-Conviction Opinion**

The OCCA concluded that Mr. Frederick was not prejudiced by appellate counsel's failure to raise an IAC claim about trial counsel's cross-examination of Dr. Harrison. Aplt. Br. Attachment B at 15-16. It explained that "Dr. Harrison testified at the Evidentiary Hearing that his opinion on the manner of death was not dependent on the information in the Investigator's Narrative, and that his testimony at trial on the issue would not have changed based upon the information in the Investigator's Narrative." *Id*. at 15. The OCCA noted that Dr. Harrison testified at the evidentiary hearing that his homicide determination "was based upon several factors, including his examination of the body during the autopsy, police reports, Investigator's Narrative and any supplemental reports." *Id.* at 14.

B. ***Analysis***

Mr. Frederick argues that appellate counsel provided ineffective assistance by failing to assert trial counsel's ineffectiveness in cross-examining Dr. Harrison.

According to Mr. Frederick, trial counsel Rowan should have (1) asked Dr. Harrison about his opinion on the cause and manner of the decedent's death, (2) emphasized Dr. Harrison's reliance on mistaken information, and (3) objected to the State's mischaracterization of Dr. Harrison's testimony during closing argument. Aplt. Br. at 22-24.[10] The OCCA reasonably concluded that Mr. Frederick was not prejudiced by appellate counsel, and its conclusion was not based on an unreasonable determination of the facts. We thus affirm the denial of relief.

1. **Reasonable Application of *Strickland* – § 2254(d)(1)**

Mr. Frederick has not shown all fairminded jurists could disagree with the OCCA's conclusion that he would not have prevailed on appeal if counsel had raised trial counsel's ineffectiveness in cross-examining Dr. Harrison.

As to trial counsel's failure to cross-examine Dr. Harrison about the manner and cause of death, the OCCA's no-prejudice determination was reasonable. At the evidentiary hearing, Dr. Harrison testified that "based on all of the evidence . . . [he] still [stood] by [his] original findings." Evidentiary Hr'g, Vol. II at 301:22-302:2. Contrary to Mr. Frederick's suggestion, Dr. Harrison's post-conviction testimony does not undermine his conclusions expressed at trial. He acknowledged that "based on [his] examination of [the decedent]'s body," he could not rule out a fall as the cause of her head injury. *Id.* at 281:10-17; *see also id.* at 282:5-8. But that testimony

[10] Mr. Frederick also asserts that trial counsel was ineffective for failing to obtain the Investigator's Narrative, but he does not develop any argument about why this prejudiced him, so we do not consider it. Aplt. Br. at 25.

was based on his physical examination of the decedent, and Dr. Harrison said police reports and investigators' reports provided additional support for his opinion. *See id.* at 297:20-298:24, 299:20-300:12, 307:12-17.

Moreover, at trial, Mr. Rowan challenged Dr. Harrison's opinion about the manner and cause of death during cross-examination. He asked about the decedent's medical conditions and the possibility they caused her to fall, Trial Tr., Vol. V at 1138:8-1139:20, and whether aspirin (which the decedent had taken) would make someone more susceptible to dizziness, *id.* at 1140:21-25. Mr. Rowan also asked Dr. Harrison to confirm he did not have a brick during the autopsy, *id.* at 1141:1-12, and that there was no remarkable bruising on the left side of the decedent's face, where she was purportedly hit, *id.* at 1141:13-19. Mr. Frederick presents nothing to suggest that additional questioning would have changed the outcome.

Mr. Frederick argues that the OCCA unreasonably concluded he was not prejudiced by trial counsel's failure to exploit Dr. Harrison's reliance on inaccurate information in the Investigator's Narrative about Ms. Diggs having witnessed the assault. Aplt. Br. at 26.[11] But Dr. Harrison said his opinion would be the same regardless of that inaccurate information. Evidentiary Hr'g, Vol. II at 301:14-21.

[11] Mr. Frederick relies on Dr. Harrison's testimony that the Investigator's Narrative "weigh[ed] very heavily along with other information" in determining that the manner of death was homicide. Evidentiary Hr'g, Vol. II at 303; *see also* Aplt. Br. at 26, 28-29. This testimony does not show the OCCA's no-prejudice conclusion was unreasonable, particularly given its determination that Mr. Frederick could not show prejudice because Dr. Harrison testified that his opinion "would not

The OCCA also reasonably concluded that Mr. Frederick was not prejudiced by Mr. Rowan's failure to object to the State's mischaracterization of Dr. Harrison's testimony during closing argument.[12] The prosecutor said Dr. Hahn and Dr. Harrison "[b]oth indicated . . . based upon their training and experience and their observations" that "this was not consistent with a fall." Trial Tr., Vol. VI at 1228:12-19. Dr. Hahn repeatedly testified that the decedent's injuries were not consistent with a fall. *See* Trial Tr., Vol. V at 998:8-10, 1015:3-16, 1024:23-1025:19, 1023:20-23, 1027:18-1028:1. The OCCA thus reasonably concluded that Mr. Frederick would not have prevailed on appeal based on trial counsel's failure to correct the misstatement.

2. **Reasonable Determination of the Facts – § 2254(d)(2)**

Mr. Frederick also argues that the OCCA unreasonably found that "[Dr. Harrison's] opinion on the manner of death was not dependent on the information in the Investigator's Narrative" under 28 U.S.C. § 2254(d)(2). Aplt. Br. Attachment B at 15; *see* Aplt. Br. at 25-26. We disagree.

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have changed based on the information in the Investigator's Narrative." Aplt. Br. Attachment B at 15.

[12] The State asserts that this claim is unexhausted because Mr. Frederick only argued to the OCCA that trial counsel failed to "correct"—rather than "object to"—the prosecutor's misstatement. *See* Aplee. Br. at 25-26. This construes Mr. Frederick's claim too narrowly. Before the OCCA, Mr. Frederick argued that "[t]rial counsel's failure to correct this obvious misstatement of the evidence left the jury to believe that the State's statement was true." APCR, Arguments and Authorities at 30.

At the evidentiary hearing, Dr. Harrison said that, setting aside the inaccurate statement in the Investigator's Narrative, his opinion on the cause and manner of death would not change. Evidentiary Hr'g, Vol. II at 301:14-21. Based on all of the evidence—including police reports, investigative reports, and physical examination of the body—Dr. Harrison said he stood by his original findings. *Id.* at 297:16-298:7, 301:22-302:2. Because Dr. Harrison testified that his opinion would have been the same regardless of the Investigator's Narrative, the OCCA reasonably concluded that Dr. Harrison's opinion was not dependent on the Investigator's Narrative.

The OCCA thus reasonably concluded there was no reasonable probability that the result on appeal would have differed if appellate counsel had raised trial counsel's ineffectiveness in cross-examining Dr. Harrison, and its decision was based on a reasonable determination of the facts.

ISSUE THREE (Penalty Phase):
Failure to Investigate and Present Evidence from Family Members

Mr. Frederick asserts that appellate counsel was ineffective for not raising an IAC claim based on trial counsel's failure to investigate and present testimony from his family. The OCCA reasonably concluded that appellate counsel was not ineffective because trial counsel was not ineffective. We affirm the denial of relief.

A. ***Additional Background***

1. **Family Witnesses**

The family members we discuss in this section are:

1) Karen Frederick, younger sister;

2) Tobias Frederick, younger brother;

3) Jerome Frederick, younger brother;

4) Judith Frederick-Jones, younger sister;

5) Da'Jon Diggs, niece;

6) Johnita Cole, aunt;

7) Latisha Miller, second cousin;[13]

8) LaTrena Sloan, second cousin; and

9) Renita Long, second cousin.

2. **Pretrial and Trial**

Ms. Hammarsten, Mr. Frederick's original trial counsel, testified that during her pretrial preparation, she was "interviewing any family [she] could find." Evidentiary Hr'g, Vol. III at 571:17-20. She said that she and an investigator "looked for every family member we could," particularly those who were sympathetic to Mr. Frederick, and "interviewed them." *Id.* at 590:25-591:6. Based on those conversations, Ms. Hammarsten "got the impression that there was a lot of family that was not interested in [Mr. Frederick]," but a "handful" cared about him. *Id.* at 591:7-12. She also tried to locate two of Mr. Frederick's brothers but failed because they were transient. *Id.* at 595:24-596:9.

About a year before trial, Ms. Hammarsten filed a notice of witnesses that included Ms. Miller and Ms. Cole. The notice said that Ms. Miller would testify that

[13] Ms. Miller was previously known as Ms. Long, which is how her name appeared on the notice of trial witnesses.

Mr. Frederick loved his family and that she had driven Mr. Frederick to the grocery store to buy groceries for the decedent. State Ct. R., Vol. IV at 604. It also said that Ms. Cole would testify that Mr. Frederick took care of the decedent and would not have harmed her without "snapping." State Ct. R., Vol. IV at 605. Mr. Rowan, replacement trial counsel, did not call either family member to testify.

During the penalty phase, the State called Karen Frederick. She described an incident in February 2006 when she tried to open the door at their parents' house and Mr. Frederick "attacked [her]" by hitting her jaw, knocking her over, and beating her with a crutch. Trial Tr., Vol. VII at 1393:17-1397:1. She also reported another time when Mr. Frederick "charg[ed] at [her] with a knife;" struck her, causing her to fall; and "kick[ed] at her." Trial Tr., Vol. VIII at 1433:13-1434:3. Finally, she described when she confronted Mr. Frederick after he hit her grandson on the head. In response, Mr. Frederick "just turned on [her]," threw her on a bed, and choked her. *Id.* at 1434:21-1435:3.

The State also called Ms. Diggs, who testified about observing when Mr. Frederick suddenly "jump[ed]" on her young cousin, "started choking her," and then held a "knife to her throat." *Id.* at 1436:11-1438:20. Karen, Tobias, Ms. Diggs, and Judith Frederick-Jones read victim statements to the jury that blamed Mr. Frederick for the decedent's death. *Id.* at 1481:11-1493:17.

3. **Post-Conviction Evidentiary Hearing**

Post-conviction counsel presented evidence from the following six family members: Jerome, Tobias, Ms. Miller, Ms. Cole, Ms. Sloan, and Ms. Long.

a. *Jerome Frederick*

Jerome Frederick, Mr. Frederick's younger brother, Evidentiary Hr'g, Vol. I at 116:14-118:20, 141:13-16, testified as follows about their upbringing:

Their father was a pastor and owned a gas station. *Id.* at 117:7-15. He spanked them with rubber hoses and extension cords as punishment for doing anything against what he viewed as the church's rules, including playing with friends. *Id.* at 124:9-125:12.[14] Their mother also hit them with extension cords for disobeying her or lying. *Id.* at 126:7-20.[15]

Mr. Frederick's car accident left him unconscious, and he was "different" after the accident—he stayed "[a] little bit more to himself" and disagreed more with their father. *Id*. at 120:13-24; *see also id.* at 149:1-12.

Mr. Frederick left home when he was 14 or 15 after their father beat him. *Id.* at 143:23-144:9, 128:3-129:15. Mr. Frederick had missed church, and their father accused him of having liquor on his breath and said that he would "whoop him." *Id.* at 128:1-12. Mr. Frederick "told [their father] he wasn't gonna take no more

[14] Jerome also testified that their father had children with other women while married, had been accused of having intimate relationships with women in his congregation, and had engaged in sexual behavior with his niece. Evidentiary Hr'g, Vol. I at 117:7-15, 121:7-15, 123:14-19.

[15] In support of his application for post-conviction relief, Mr. Frederick also provided an affidavit from an investigator about her conversation with Arthur "Jimmy" Ross, Mr. Frederick's oldest brother. APCR, Attachment 33. According to Ms. Giblin, Mr. Ross said their father disciplined them by beating them with a hose. *Id.* at 2. But Mr. Ross refused to sign an affidavit to that effect. *Id.* at 3.

whoopins." *Id*. at 128:12-13. Their father then hit Mr. Frederick with his fist, knocking him out. *Id.* at 128:12-25. Jerome did not see Mr. Frederick for about 30 years after that. *Id.* at 139:6-15. And after their father died and Jerome left the house, Mr. Frederick was their mother's primary caretaker. *Id.* at 133:18-22.

On cross-examination, Jerome was asked about other accusations against Mr. Frederick, including allegations that he had raped two family members. Jerome said that Mr. Frederick is "not the type of person that would start trouble" but anyone "backed in [a] corner . . . ha[s] a right to defend themself." *Id.* at 157:4-11. Jerome confirmed that he would have been willing to testify at Mr. Frederick's trial about the information discussed during the evidentiary hearing. *Id.* at 135:23-136:10.

b. *Other family witnesses*

Ms. Miller testified that she had been willing to testify on Mr. Frederick's behalf, but trial counsel never told her the trial date. *Id.* at 68:3-15. She explained she did not attend the trial because she could not miss work. *Id.* at 73:19-22, 77:7-9. Ms. Miller said Mr. Frederick cooked and cleaned for the decedent and bathed her. *Id.* at 65:10-23. She said she would have testified that Mr. Frederick is "a loving person" and would have asked the jury to spare his life. *Id.* at 68:16-25, 78:1-3.

Ms. Cole testified that Mr. Frederick was the decedent's primary caretaker—he cooked for and bathed her. *Id.* at 94:15-25. She said she told trial counsel that she would be willing to testify, but no one contacted her. *Id.* at 97:19-98:25. After she learned the trial had started, Ms. Cole attended every day. *Id.* at 99:3-5. Ms. Cole said she felt "[b]ad" that no one testified for Mr. Frederick because "he's a

loving person," and she would have asked the jury to spare his life. *Id.* at 100:3-101:4.

LaTrena Sloan, Mr. Frederick's second cousin, testified that Mr. Frederick cared for the decedent and they were loving towards each other. *Id.* at 79:14-17, 80:11-15. She said his trial counsel never contacted her, but she would have been willing to speak with counsel. *Id.* at 81:15-20. She attended Mr. Frederick's sentencing and said she would have asked the jury to spare his life. *Id.* at 81:21-82:14.

Renita Long, also a second cousin, did not testify at the evidentiary hearing but submitted an affidavit in support of his application for post-conviction relief. She said Mr. Frederick "took very good care" of the decedent and she "never saw them argue." APCR Attachment 30 at 1. According to Ms. Long, "there were many family members at the trial who supported [Mr. Frederick]." *Id*. She believed the family members who testified for the State "should know that [he] would never do anything to hurt his mother." *Id.* at 2. She attended trial whenever her work schedule allowed and would have testified in support of Mr. Frederick. *Id.* at 1-2.

Tobias Frederick, who testified at trial, also testified at the evidentiary hearing. Evidentiary Hr'g, Vol. III at 510:11-16, 519:22-23. He disputed some of the family members' testimony, saying that the decedent often cooked for herself and that Mr. Frederick was not the primary caretaker. *Id.* at 528:12-13, 534:3-8.

c. *Attorney witnesses*

Finally, Ms. Hammarsten and Mr. Rowan testified. Ms. Hammarsten said she had "express[ed] frustration" to Mr. Rowan when he did not call Ms. Miller or Ms. Cole, but she thought he "had a reason" for not calling them. Evidentiary Hr'g, Vol. III at 608:14-22.

Mr. Rowan acknowledged he did not have a strategic reason for failing to interview Mr. Frederick's family members. Evidentiary Hr'g, Vol. I at 206:4-15. When asked why he did not call Ms. Miller or Ms. Cole, Mr. Rowan said he "just blew it." *Id*. at 234:17-235:8; *see id.* at 238:21-239:2. Ms. Walker, appellate counsel, testified that if she had known that Mr. Frederick's brothers had been willing to testify about the childhood abuse, she would have raised trial counsel's failure to call family members as an IAC claim. Evidentiary Hr'g, Vol. II at 422:6-423:4.

4. **OCCA Post-Conviction Opinion**

The OCCA's analysis centered on trial counsel. It determined that trial counsel Rowan was not ineffective for failing to adequately investigate, develop, and present evidence from Mr. Frederick's family members. Aplt. Br. Attachment B at 22, 33. The OCCA thus concluded that appellate counsel was not ineffective.

As to performance, the OCCA concluded that trial counsel made "reasonable, strategic decisions not to present" Mr. Frederick's family members. *Id*. at 32. It said there were "[s]erious questions . . . [about] the availability and credibility of family members," and counsel was not ineffective for failing to call family members who

could not be located despite due diligence. *Id.* at 30-31. The OCCA noted that even if Ms. Cole, Ms. Sloan, and Ms. Miller could have been located, much of their testimony was based on hearsay. *Id.* at 31. The OCCA concluded it was "unquestionably sound trial strategy" not to call Jerome Frederick because he would have provided "evidence of [Mr. Frederick's] violent, criminal past." *Id.* at 31.

The OCCA next concluded Mr. Frederick was not prejudiced by the omission of testimony from his family members. *Id.* at 32. It explained that even if additional evidence of Mr. Frederick's troubled childhood had been introduced during the penalty phase of the trial, it was "not clear it would have been sufficient to mitigate [his] adult criminal conduct." *Id.* at 33. The OCCA noted that the evidence at trial already showed that Mr. Frederick "did not have a good relationship with his father, left home at an early age[,] and entered the criminal justice system as a juvenile." *Id.* at 32. It also indicated that "[m]any of the incidents of physical abuse and discord in the household and misdeeds of [Mr. Frederick's] father occurred after [Mr. Frederick] left home." *Id.* at 33.

B. ***Analysis***

Assuming without deciding that trial counsel's failure to call family members during the penalty phase of the trial was deficient performance, we nonetheless conclude that the OCCA reasonably determined that trial counsel's failure to do so did not prejudice Mr. Frederick. And its no-prejudice conclusion was not based on an unreasonable determination of the facts. We thus affirm the denial of relief.

1. **Reasonable Application of *Strickland* – § 2254(d)(1)**

The OCCA reasonably concluded that appellate counsel did not perform deficiently.[16] A fairminded jurist could agree with the OCCA that Mr. Frederick was not prejudiced at trial by the omission of evidence from family members.

Like the OCCA, we evaluate whether trial counsel was ineffective to determine whether appellate counsel performed deficiently by failing to raise this trial counsel IAC claim. *See Davis*, 943 F.3d at 1299. We limit our analysis to the prejudice prong and conclude that fairminded jurists could disagree about whether Mr. Frederick was prejudiced at trial from lack of family testimony. *See Strickland*, 466 U.S. at 697.

There were several weaknesses in the evidentiary hearing testimony from family members that (a) Mr. Frederick cared for the decedent and (b) he was abused as a child.

a. *Care for the decedent*

Regarding Mr. Frederick's relationship with his mother, only distant relatives said he cared for the decedent. Their testimony mainly consisted of hearsay based on incomplete information,[17] and Tobias disputed their accounts. The OCCA could thus

[16] The OCCA did not specify a *Strickland* prong in concluding that appellate counsel was not ineffective, so AEDPA deference applies to our review of both prongs. *See Harris*, 941 F.3d at 995 (citing *Premo v. Moore*, 562 U.S. 115, 123 (2011)).

[17] Only Ms. Miller observed Mr. Frederick cook and grocery shop for the decedent. Evidentiary Hr'g, Vol. I at 74:16-19; *see id.* at 87, 94, 101, 105.

have reasonably determined that Mr. Frederick was not prejudiced by the omission of this testimony. *See Young v. Sirmons*, 551 F.3d 942, 961-63, 969 (10th Cir. 2008) (concluding de novo that petitioner was not prejudiced by the omission of mitigating evidence, including testimony from five immediate family members that he cared for his family).[18]

b. *Troubled childhood*

Only Jerome Frederick could provide detailed testimony about Mr. Frederick's troubled upbringing. But calling Jerome as a witness would have revealed additional harmful information about Mr. Frederick's behavior, and the prosecution easily could have undermined Jerome's credibility. Even looking beyond the likely damaging effect of calling Jerome, his testimony about Mr. Frederick's upbringing had little

[18] Mr. Frederick asserts that the OCCA did not consider the evidence of his caring for the decedent in its prejudice analysis and that we should therefore review the merits of his claim de novo. *See* Aplt. Br. at 57. We disagree. The OCCA considered this evidence. Aplt. Br. Attachment B at 25-27, 31. It said that "the majority of [the family members'] testimony" that Mr. Frederick cared for the decedent "was based on hearsay." *Id*. at 31. After discussing the testimony that Mr. Frederick cared for the decedent and Jerome's testimony, the OCCA said: "The record before us supports the finding that [trial counsel] made reasonable, strategic decisions not to present [Mr. Frederick's] family members as witnesses . . . . Further, we find [he] was not prejudiced by [trial counsel]'s omission of this evidence." *Id.* at 32.

The OCCA's omission of the particulars of this evidence in its prejudice analysis does not require de novo review, as Mr. Frederick suggests. AEDPA "demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002), and we must "determine what arguments or theories . . . could have supported[] the state court's decision," *Richter*, 562 U.S. at 102. And even under de novo review, there is no reasonable probability that his sentence would have differed if this evidence had been presented. *See Young*, 551 F.3d at 961-63, 969.

mitigating value because Mr. Frederick left home over 40 years before the murder and lived a violent life throughout his adulthood. Calling Jerome as a witness thus would have damaged the defense in several ways. We expand on these points below.

First, introduction of Jerome Frederick's testimony at trial would have "open[ed] the door to damaging evidence about [Mr. Frederick's] past criminal wrongdoing." *Grant*, 727 F.3d at 1022 (quotations omitted). At the evidentiary hearing, the State cross-examined Jerome about Mr. Frederick's criminal history and two family members' accusations that Mr. Frederick had raped them. Evidentiary Hr'g, Vol. I at 151:19-154:22, 155:1-4. He replied that anyone "backed in the corner," as he suggested Mr. Frederick had been, "ha[s] a right to defend [himself]," but then acknowledged that "[r]aping somebody is not defending yourself." *Id*. at 156:25-157:13.

Second, at the evidentiary hearing, the State showed it could undermine Jerome Frederick's credibility by asking him about an incident when Jerome grabbed Ms. Diggs by the throat and hit the decedent. *Id.* at 158:6-22. Jerome pled guilty to resulting criminal charges, but testified at the evidentiary hearing that he had not pled guilty to hitting the decedent. *See id.* at 159:7-10. The State then impeached him with his plea agreement, undermining any persuasive value of his testimony. *Id.* at 161:4-163:1; *see also* Evidentiary Hr'g, State's Exs. 1, 2. As the district court noted, "[T]he trial judge who presided at the evidentiary hearing found Jerome Frederick's proposed testimony so fraught with risk that . . . presenting him as a mitigation

witness could have given rise to an ineffective assistance of counsel claim." Aplt. Br. Attachment C at 30.

Third, evidence about a troubled childhood "is generally less persuasive when a defendant commits the capital offense later in life." *Grant*, 727 F.3d at 1021. Mr. Frederick left home when he was 14. He committed the murder when he was 55.

Fourth, evidence of Mr. Frederick's violent behavior would have undercut the troubled childhood evidence. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003) ("record of violent conduct" could offset powerful mitigating evidence of childhood abuse). The State presented evidence that Mr. Frederick had (1) robbed a gas station at gunpoint; (2) committed first degree burglary by breaking into a residence in the middle of the night while residents were asleep; (3) brandished a firearm in a hair salon, attempted to shoot two women there, and hit them with his gun; (4) attacked his sister on three occasions; (5) choked and held a knife to the throat of a family member who was approximately 10 years old; (6) attacked a neighbor by beating her face with his fist; and (7) bit a police officer's hand when he tried to collect DNA, which left bruising and a mark. *See* Trial Tr., Vol. VII at 1307:3-6, 1322:1-16, 1346:21-1347:25, 1351:24-1352:10, 1353:1-15, 1379:9-1380:6, 1395:3-4; Trial Tr., Vol. VIII at 1431:9-15, 1433:15-17, 1436:25-1437:1, 1438:11-16, 1444:1-13, 1454:9-1455:17; Court's Exs. 8, 9. The jury thus heard substantial evidence of Mr.

Frederick's continued violent behavior over the course of 40 years, weighing against the potential mitigating effect of evidence of childhood abuse.[19]

Finally, in a comparable case we determined that the OCCA reasonably concluded that the petitioner was not prejudiced by the omission of childhood evidence. *See Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013). There, the petitioner argued that trial counsel was ineffective for failing to investigate and present evidence that his father was "a strict disciplinarian who regularly whipped his children" and that the petitioner was kicked out of the house and placed in a group home. *Id.* at 1208 (internal quotation marks omitted). The OCCA determined that this evidence would have opened the door to negative information about the petitioner, including his history of aggression. *Id.* at 1209. We noted that the OCCA determined that evidence "might even have been counterproductive" because the jury would have learned about damaging information. *Id.* at 1214 (quotations omitted). We said the OCCA reasonably concluded that the aggravating evidence at trial weakened the potential mitigating effect of this evidence. *Id.* Similarly here, the OCCA reasonably concluded that evidence of Mr. Frederick's childhood would have

[19] Mr. Frederick argues that the OCCA's prejudice analysis (1) unreasonably applied *Strickland* in discussing the strength of the State's aggravation case because it "fail[ed] to recognize th[at] mitigation [evidence] need not outweigh the aggravation to find prejudice," Aplt. Br. at 56 (citing *Williams*, 529 U.S. at 398), and (2) was contrary to *Williams*. But under *Williams*, the OCCA weighed "the evidence in aggravation" against "the totality of the available mitigation evidence." *Williams*, 529 U.S. at 397. The OCCA here reasonably applied *Strickland* and its analysis was not contrary to *Williams*.

Attachment A

opened the door to damaging evidence and that the aggravating evidence at trial undermined any potential mitigating effect.[20]

In sum, we cannot conclude that all fairminded jurists would disagree with the OCCA's determination that Mr. Frederick was not prejudiced by trial counsel's failure to call certain family members at the penalty phase of trial. The OCCA thus reasonably determined that appellate counsel was not ineffective for failing to raise that claim.

2. **Reasonable Determination of the Facts – § 2254(d)(2)**

Mr. Frederick also challenges one factual finding underlying the OCCA's no-prejudice determination. He asserts that the OCCA unreasonably found that "[m]any of the incidents of physical abuse and discord in the household and misdeeds of [Mr. Frederick's] father occurred after [Mr. Frederick] left home." Aplt. Br. Attachment B at 33; *see also* Aplt. Br. at 56. According to Mr. Frederick, "[t]he vast majority of incidents about which Jerome testified occurred throughout Frederick's

[20] Nor does Mr. Frederick's troubled childhood evidence amount to the type of childhood evidence that the Supreme Court has described as "powerful." *Wiggins*, 539 U.S. at 534. In *Wiggins*, under de novo review, the Court concluded there was a reasonable probability that the petitioner was prejudiced by the failure to introduce evidence of "severe privation and abuse in the first six years of his life" in the custody of his mother and "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." *Id.* at 535. The Court has also found prejudice from omission of evidence showing the petitioner had been "severely and repeatedly beaten by his father," his parents had been imprisoned for criminal neglect of him and his siblings, and was returned to his parents' custody after their release from prison. *Williams*, 529 U.S. at 395-98. The evidence from Mr. Frederick's family members pales in comparison.

childhood," and those that occurred after Mr. Frederick left home further support Jerome's testimony about Mr. Frederick's childhood. Aplt. Br. at 56.

The OCCA's finding was reasonable under § 2254(d)(2). The record shows that Nathan Frederick's misdeeds with members of his congregation and his niece and the resulting family discord occurred after Mr. Frederick left home. Jerome Frederick testified that Mr. Frederick left in the early 1970s. Evidentiary Hr'g, Vol. I at 137:19-23. Mr. Frederick points to events that occurred nearly 30 years after he left: the decedent's 1996 petition for a protective order against Nathan Frederick and a minor victim's 1997 report that Nathan Frederick had molested her. *See* Aplt. Br. at 34-35, 35 n.19. The OCCA's finding that many incidents of physical abuse, discord, and misdeeds occurred after Mr. Frederick left was not unreasonable.

* * * *

The OCCA reasonably concluded that appellate counsel was not ineffective for failing to assert an IAC claim based on trial counsel's failure to investigate and present testimony from Mr. Frederick's family. Also, its adjudication of that claim was not based on an unreasonable determination of the facts. We thus affirm the denial of habeas relief on this ground.

ISSUE FOUR (Penalty Phase):
Failure to Investigate and Present Brain Damage Evidence

Mr. Frederick asserts that appellate counsel was ineffective for not raising an IAC claim on direct appeal based on trial counsel's failure to investigate and present evidence of brain damage. On post-conviction review, the OCCA reasonably

concluded that appellate counsel was not ineffective because Mr. Frederick was not prejudiced by counsel's omission of this evidence at the penalty phase. We thus affirm the denial of relief on this ground.

A. *Additional Legal Background*

1. Nature of the Impairment

"[E]vidence of mental impairments is exactly the sort of evidence that garners the most sympathy from jurors, and . . . this is especially true of evidence of organic brain damage." *United States v. Barrett*, 985 F.3d 1203, 1222 (10th Cir. 2021) (quotations omitted); *see also Littlejohn v. Trammell*, 704 F.3d 817, 864 (10th Cir. 2013) ("Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available."). "[D]iagnoses of specific mental illnesses" are particularly mitigating because "the involuntary physical alteration of brain structures . . . tends to diminish moral culpability, altering the causal relationship between impulse and action." *Barrett*, 985 F.3d at 1222 (quotations and alterations omitted).

Although "[e]vidence of organic mental deficits ranks among the most powerful types of mitigation evidence available," we have qualified the potential value of this evidence in two important respects. *Id.* (quotations omitted). First, "not all evidence of brain damage has the same potency in the *Strickland* prejudice analysis, and we must examine the *precise nature* of the alleged organic brain damage." *Id.* (quotations omitted). Second, "in some instances, brain damage evidence may be just as likely—if not more likely—to have an aggravating effect rather than a mitigating effect on a sentencing jury." *Id.* (quotations and alterations

omitted). Specifically, "evidence about mental health problems . . . often possesses a double-edged nature, as jurors may conclude that the defendant is simply beyond rehabilitation." *Id.* (quotations omitted); *see Gilson v. Sirmons*, 520 F.3d 1196, 1249-50 (10th Cir. 2008) (brain damage evidence would not have resulted in different outcome partially because it would have confirmed that petitioner "represented a continuing threat").

2. **Connection to the Offense**

"[E]vidence of mental impairments has substantially more mitigating value when it helps explain the defendant's criminal behavior." *Barrett*, 985 F.3d at 1222-23. For example, in *Wilson v. Trammell*, 706 F.3d 1286 (10th Cir. 2013), we concluded the petitioner was not prejudiced by the omission of mental health evidence at trial in part because his "behavior during the crime" was not "tied to" any disorder. *Id.* at 1310. We explained that although an expert testified that the petitioner's diagnoses "might help a jury understand [his] motivation for committing the crime, there was no credible evidence that [he] acted as a result" of any diagnosis. *Id.* at 1309-10 (citations omitted). We reached a similar conclusion in *Littlejohn v. Royal*, 875 F.3d 548 (10th Cir. 2017), where we explained the petitioner failed to show prejudice because there was no evidence that "brain damage played a substantial role in engendering his life of criminal deviance." *Id.* at 563-64. Similarly, in *Grant v. Royal*, 886 F.3d 874 (10th Cir. 2018), in affirming the denial of relief under AEDPA, we said that the psychologist's testimony "never indicated that [the petitioner's] brain defects caused his behavior . . . in a way that would

meaningfully explain his involvement" in the underlying crime. *Id.* at 922 (quotations omitted).

3. **Additional Factual and Procedural History**

a. *Pre-trial*

Ms. Hammarsten testified that in preparing for trial, Mr. Frederick "was adamant he would not take tests" and "[w]ouldn't meet with psychologists." Evidentiary Hr'g, Vol. III at 610:17-23. She "thought [Mr. Frederick] was difficult because there was something going on, but because he was adamant he would not take tests [she] could only speculate." *Id.* at 615:16-20. Ms. Hammarsten stopped representing Mr. Frederick because he thought she was sharing information with the State, *id.* at 574:6-11, and thus did not want to work with her, *id.* at 571:9-16, 573:14-575:11, 605:16-23. Other lawyers in Ms. Hammarsten's office also had difficulties working with Mr. Frederick. *Id.* at 569:4-23. Ms. Hammarsten considered seeking a competency evaluation of Mr. Frederick, but before she could do so, Mr. Rowan replaced her. *Id*. at 614:23-615:2. Mr. Frederick said he would cooperate with Mr. Rowan. *Id.* at 619:7-621:10. Mr. Rowan also had difficulties communicating with Mr. Frederick. Evidentiary Hr'g, Vol. I at 210:18-211:21.

b. *Trial*

In his opening statement at the penalty phase, trial counsel Rowan stated that Mr. Frederick had been in a car accident when he was 13 or 14 that left him unconscious for four days. Trial Tr., Vol. VII at 1296:3-14. Mr. Rowan said Mr. Frederick never went to the hospital even though concussions "are dangerous" and

"cause problems." *Id*. at 1298:25-1299:10. He later presented Nathan Frederick's testimony from 1982 that Mr. Frederick was in a car accident when he was young and "changed from that very moment." Trial Tr., Vol. VIII at 1498:15-24. Trial counsel had listed as two mitigating factors that (1) Mr. Frederick had suffered a severe concussion in his early teens that resulted in brain damage and (2) because of the concussion, he lost the ability to control his impulses. *Id.* at 1524:24-1526:2. The State sought modification of those factors at the close of evidence because Mr. Rowan had not presented any evidence of brain damage. *Id.* The court instructed Mr. Rowan to modify the first mitigator to reflect that Mr. Frederick had been in a car accident and "changed from th[at] moment." *Id.* at 1527:9-12; *see also* State Ct. R., Vol. V at 927.

The State called Karen Frederick as a rebuttal witness to Nathan Frederick's testimony that Mr. Frederick had changed after the accident. Karen said she had been "close to [Mr. Frederick]" and there "was no change in him." Trial Tr., Vol. VIII at 1545:4-9. When asked whether she "notice[d] any huge change in Darrell Frederick's actions before versus after" the car accident, she replied, "No." *Id*. at 1544:2-6.

In closing, Mr. Rowan said:

> Now we've not presented you a neuroscientist. We've not presented you a psychiatrist or a clinical psychologist to explain that we have examined Darrell now and he now has that brain damage. He simply wouldn't let us, resisted that kind of intrusion. So all we have is, you know, anecdotal evidence. You know that a crash that knocks your teeth out, that knocks the windshield out, takes -- the father takes you

> to get an X-ray. An X-ray can't show anything about the brain. It can show fractures perhaps, but not damage to the brain. And I can't prove to you beyond a reasonable doubt that that was the etiology or the beginning of this bad behavior. I can't prove that. But it's logical.
>
> . . .
>
> I can't prove to you that insults to the brain cause impulsivity. But I think we all have our common sense. We all have our experiences in life to know intuitively that's true . . . . But every one of the incidents . . . they all go from a dead stop to very violent in an instant with no explanation. I think there is an explanation but we're not scientists enough to know precisely what the explanation is.

Id. at 1585:13-25, 1587:13-23.

c. *Post-conviction proceedings*

Mr. Frederick's post-conviction counsel retained Dr. Curtis Grundy, an expert in clinical and forensic psychology. Dr. Grundy evaluated Mr. Frederick and determined that "[c]riteria for the diagnoses of Paranoid Personality Disorder and Antisocial Personality Disorder [were] established." APCR, Attachment 39 at 22-23. He also said "there [were] clinical indicators of possible traumatic brain injury" based on Mr. Frederick's car accident and his history of boxing while incarcerated. *Id.* at 23-25. He recommended referral of Mr. Frederick to a neuropsychologist or neurologist for a comprehensive assessment. *Id.* at 25.

Post-conviction counsel then retained Dr. Antoinette McGarrahan to perform neuropsychological testing. Based on that testing, Dr. McGarrahan concluded that Mr. Frederick had "significant indicators of brain damage . . . meaning an overall reduction in his intellect." Evidentiary Hr'g, Vol. IV at 763:2-12. She reported

"primary impairment of [Mr. Frederick's] frontal lobes or executive functioning," *id.* at 763:12-16, probably resulting from the car accident and/or boxing, *id.* at 781:5-10. Dr. McGarrahan agreed that Mr. Frederick had antisocial personality disorder and paranoid personality disorder, but she thought his brain damage guided the behaviors leading to those diagnoses. *Id.* at 765:24-767:10, 780:10-781:4, 796:9-18, 798:10-16.

Dr. McGarrahan explained that the frontal lobe has a "cognitive component" related to "planning, problem-solving, abstract reasoning, [and] one's ability to think globally, to organize and to take in information and be able to process it in a timely manner." *Id.* at 763:12-16; *see also id.* at 764:24-765:3. She further noted that the frontal lobe "controls certain aspects of behavior," including "aggression, violence, acting out, impulsivity," and the ability to "hit[] the brakes on things when we want to do something but we know we shouldn't do it." *Id.* at 764:13-23. She said that the frontal lobe "helps regulate our emotions so that we're not constantly fluctuating up and down." *Id.* at 765:4-7.

Dr. McGarrahan explained that frontal lobe damage could cause difficulties in making complex decisions, interacting with other people, being able to see the "gray area" of situations, and abstract reasoning. *Id.* at 782:22-783:6. But she confirmed that antisocial personality disorder could also cause those difficulties. *Id.* at 783:7-10.

When asked by the State to confirm that she could not "draw any connection between whatever brain damage [Mr. Frederick] may have and any crimes he's ever

committed," Dr. McGarrahan replied, "Right. I can't make this direct link. That's correct." *Id.* at 785:18-22; *see also id.* at 786:1-4 ("I cannot make that direct link.").

Dr. McGarrahan testified that although Mr. Frederick's "aggression and unprovoked and minimally provoked violence" was something "typically see[n] . . . in traumatic brain injury affecting the frontal lobes," *id.* at 789:8-17, "at this point [Mr. Frederick] can exercise" the ability to inhibit aggressive responses, *id.* at 789:18-790:9.

She explained that "aggression [is] at its worst in individuals . . . when they're younger" but that was not "currently the case with [Mr. Frederick's] brain damage." *Id.* at 790:9-14. Dr. McGarrahan then asserted: "You typically don't see unprovoked aggression *even with frontal lobe damage* in individuals who are in their fifth and sixth decade of life." *Id.* at 791:5-8 (emphasis added). Following "decades of being in prison we tend to see the aggression go down over time, typically in about the fourth decade of life." *See id.* at 775:6-10.

When the State asked whether it was her testimony that "many of [Mr. Frederick's] behaviors" were "majoritively [sic] attributable to frontal-lobe damage," Dr. McGarrahan replied:

> I don't know that we can say majority or less of a majority. I think it's certainly a contributing factor. I can't parcel it out because if these things occurred and then it occurred from the brain injury when he was 14, that's hard to parcel out from everything else that has befallen. So I can see how the descriptions of him do fit him; institutionalization, anti-social personality disorder, all of these things fit. But I do think when you look at the test data that we have that it is at least partially explainable by damage to the brain.

Id. at 795:4-19.

d. *OCCA post-conviction opinion*

The OCCA concluded that appellate counsel was not ineffective for failing to assert an IAC claim based on trial counsel's failure to investigate and present brain damage evidence. Aplt. Br. Attachment B at 41-44. It began by evaluating the IAC claim against trial counsel and concluded that trial counsel did not provide ineffective assistance. *Id.* at 38.

First, the OCCA determined trial counsel did not perform deficiently because he made "a strategic choice . . . after reasonable investigation and within the exercise of reasonable professional judgment." Aplt. Br. Attachment B at 39-40. It noted that Mr. Frederick did not cooperate with trial counsel's efforts to have him evaluated and only cooperated after he was sentenced to death. *Id.* at 38-39. The OCCA explained "[i]t would be questionable" to introduce brain damage evidence when Mr. Frederick "had not been personally interviewed and evaluated." *Id.* at 38-39.

Second, the OCCA concluded that Mr. Frederick was not prejudiced by trial counsel's failure to present brain damage evidence. *Id.* at 40. It explained that the introduction of brain damage evidence would have "given the State ample ground to underscore and highlight" Mr. Frederick's antisocial personality disorder diagnosis, which "tends to present an aggravating . . . circumstance in the sentencing context." *Id.* at 40 (quoting *Littlejohn*, 875 F.3d at 564). The OCCA said the brain damage evidence could be viewed as mitigating to one person but aggravating to another. *Id.* at 41. It noted that Dr. McGarrahan said Mr. Frederick's brain damage "would

not impair his day-to-day activities" and "that she could not draw any connection between any brain damage and his criminal conduct." *Id.* at 40. The OCCA also observed that neither Dr. McGarrahan nor Dr. Grundy evaluated Mr. Frederick near the time of trial. *Id.* at 41.

Drawing on its conclusion that trial counsel was not ineffective, the OCCA determined appellate counsel was not ineffective for failing to raise this issue. *Id.* at 43. It concluded that appellate counsel did not perform deficiently because "[a]ppellate counsel need not raise every non-frivolous issue," and appellate counsel could have decided she could not establish trial counsel's ineffectiveness on this ground. *Id.* at 43. The OCCA also determined Mr. Frederick was not prejudiced by appellate counsel because there was no reasonable probability that the result on direct appeal would have differed. *Id.* at 43-44.

B. ***Analysis***

Mr. Frederick argues the OCCA's conclusion that appellate counsel was not ineffective was based on an unreasonable application of *Strickland* and on an unreasonable determination of the facts. We disagree.[21]

[21] Whether it was unreasonable for the OCCA to decide that trial counsel's failure to present expert testimony on brain damage did not prejudice Mr. Frederick turns on whether all fairminded jurists would disagree with the OCCA's assessment of evidence elicited from Dr. McGarrahan at the state post-conviction evidentiary hearing. *Frost*, 749 F.3d at 1225. As the following discussion shows, the OCCA's understanding of her testimony may not have been the only or even the best interpretation, and it may not even have been correct, but it was not unreasonable. *See Grant*, 727 F.3d at 1024 ("[A]n imperfect or even an incorrect determination of

1. **Reasonable Application of *Strickland* – § 2254(d)(1)**

Under AEDPA review, Mr. Frederick has not shown that all fairminded jurists could disagree with the OCCA's conclusion that he was not prejudiced at the penalty phase by trial counsel's failure to present brain damage evidence. The OCCA thus reasonably concluded that appellate counsel was not deficient for failing to assert an IAC claim on this ground.

Although organic brain damage evidence provides a "well-recognized ground[] for mitigation," *Wilson*, 706 F.3d at 1310, the OCCA's no-prejudice determination was not unreasonable because the proffered evidence (a) failed to adequately link brain damage to the murder and (b) would have opened the door to evidence harmful to the defense. Also, (c) Mr. Frederick's reliance on certain cases is misplaced.

a. *Lack of connection*

The brain damage evidence had limited mitigating value because it could not "*meaningfully explain*" why Mr. Frederick murdered the decedent. *Grant*, 886 F.3d at 922. Although Dr. McGarrahan explained that aggression and minimally provoked violence is often seen in individuals with frontal lobe damage, she testified that "[was] not currently the case with [Mr. Frederick's] brain damage" and that he could inhibit his aggression. Evidentiary Hr'g, Vol. IV at 790:9-14. Dr. McGarrahan then said: "You typically don't see unprovoked aggression even with frontal lobe damage

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the facts isn't enough for purposes of § 2254(d)(2)."). As such, under AEDPA, this court cannot grant habeas relief.

in individuals who are in their fifth and sixth decade of life. At this point [Mr. Frederick]'s becoming more docile and having more difficulties in his thinking than he is in his behavior." *Id.* at 790:15-791:10. Because Mr. Frederick was 55 when he murdered the decedent, under Dr. McGarrahan's explanation of frontal lobe damage and age, brain damage does not provide an explanation the murder.

Dr. McGarrahan also said she could not make a "direct link" between Mr. Frederick's brain damage and the crimes he had committed. *Id.* at 785:18-786:4. At most, without specific reference to any crime, she thought Mr. Frederick's frontal lobe damage was "a contributing factor" to his behavior and that his behavior was "partially explainable" by brain damage. *Id.* at 795:4-19.[22]

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[22] The dissent suggests the majority opinion creates a rule that brain damage evidence must have a "direct causal link" to the crime for its omission to be prejudicial. Dissent at 27. It does not. Nor did the OCCA decision. Instead, we follow our precedent explaining that brain damage evidence is more mitigating the stronger its causal connection to the crime. *Grant*, 886 F.3d at 922 (affirming OCCA's no-prejudice determination where brain damage evidence did not "*meaningfully explain*" the defendant's crimes); *Littlejohn*, 875 F.3d at 564 (affirming OCCA's no-prejudice determination where "the evidence . . . did not reveal that [the defendant's] alleged organic brain damage played a substantial role in engendering his life of criminal deviance").

The dissent cites no authority holding otherwise. It relies on *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam). Neither is apposite here. Both concerned Texas jury instructions that limited the jury's consideration of mitigation evidence in capital cases. *Tennard*, 542 U.S. at 277; *Smith*, 543 U.S. at 38. Both held that a capital defendant has a constitutional right for the jury to weigh mitigation evidence as long as "th[e] low threshold for relevance is met," even if there is no "nexus" between the evidence and the crime. *Tennard*, 542 U.S. at 284-85; *see Smith*, 543 U.S. at 38.

We agree that mitigation evidence need not be directly related to the crime to be admissible, and we do not suggest that Dr. McGarrahan's testimony would have been inadmissible at Mr. Frederick's trial. *See* Dissent at 27-28 n.13. But that is a separate question from whether a defense counsel's failure to present mitigation

Dr. McGarrahan's testimony did not explain how Mr. Frederick's brain damage "played a substantial role" in causing him to commit murder. *Littlejohn*, 875 F.3d at 564. A fairminded jurist could conclude that the omission of the brain damage evidence did not prejudice Mr. Frederick. *See Wilson*, 706 F.3d at 1309-10 (no prejudice because petitioner "failed to establish any connection between [the expert's] diagnosis of Defendant and his commission of the murder" and "Defendant's behavior during the crime [was not] tied to that disorder"); *Hooks v. Workman*, 689 F.3d 1148, 1204 (10th Cir. 2012) (potential mitigating impact of mental health problems diminished because diagnosis not connected to crime).[23]

b. *Aggravating evidence*

Brain damage evidence would have opened the door to introduction of Mr. Frederick's antisocial personality diagnosis, which "tends to present an *aggravating*"

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evidence is prejudicial. Neither *Tennard* nor *Smith* addressed that question—in fact, the word "prejudice" does not appear in either opinion.

In short, contrary to the dissent, the OCCA did not impose a "direct link requirement," we do not "endorse" any such requirement, *see* Dissent at 27-28 n.13, and *Tennard* and *Smith* are not contrary to our position.

[23] Further, Mr. Frederick's failure to show that his brain damage was treatable diminished the potential mitigating effect of that evidence. *See Littlejohn*, 875 F.3d at 565 ("[T]he mitigating effect of . . . brain damage would likely have been diminished by the lack of reliable treatable options"); *Grant*, 886 F.3d at 923, 925 ("[T]he potency of . . . organic-brain-damage evidence would have been significantly weakened" because the expert "never indicated that the negative manifestations of [the petitioner's] organic brain damage . . . were treatable."). Mr. Frederick asserts that "Dr. McGarrahan would have testified that . . . any behavioral manifestations of his brain damage can be addressed with psychotropic medication." Aplt. Reply Br. at 32 (quotations omitted). But Dr. McGarrahan did not testify about treatment at the evidentiary hearing, so evidence about treatment was not before the OCCA.

circumstance during the penalty phase. *Littlejohn*, 875 F.3d at 564; *see Harris*, 941 F.3d at 998 (risk of rebuttal evidence of antisocial personality disorder outweighed potential mitigation value of mental health evidence). "[C]ourts have characterized antisocial personality disorder as the prosecution's strongest possible evidence in rebuttal." *Littlejohn*, 875 F.3d at 564 (quotations omitted). Not only was Mr. Frederick diagnosed with antisocial personality disorder, but Dr. McGarrahan also testified that "many of the behaviors . . . that define[] anti-social personality disorder" are also seen in people with brain damage. Evidentiary Hr'g, Vol. IV at 780:10-18; *see also* 782:22-783:10. Evidence of antisocial personality disorder as a causal explanation of Mr. Frederick's behaviors would undercut the potential mitigating effect of the brain damage diagnosis.[24]

[24] The dissent states that "[t]he risk that any antisocial personality disorder evidence in this case would be received by the jury as more aggravating than mitigating is markedly reduced by Dr. McGarrahan's explanatory testimony about its organic origins." Dissent at 23-24 n.12. But our case law explains that antisocial personality disorder is aggravating evidence because it shows "a petitioner's potential for continued dangerousness, even if incarcerated . . . ." *Littlejohn*, 875 F.3d at 564. And nothing in our case law suggests that this depends on the origin of the disorder. In fact, "the introduction of evidence of organic brain damage" can heighten the aggravating effect of antisocial personality disorder by allowing the State "to frame [the disorder] in terms of [the defendant's] (untreatable) physiological conditions and not just his bad behavior." *Id*. at 565. As we said in *Barrett*, such evidence often has "a double-edged nature, as jurors may conclude that the defendant is simply beyond rehabilitation." 985 F.3d at 1222 (quotations omitted).

We conclude that Mr. Frederick has not shown that all fairminded jurists could disagree with the OCCA's conclusion that he was not prejudiced at the penalty phase by trial counsel's failure to present brain damage evidence. *See Richter*, 562 U.S. at 102. Contrary to the dissent's characterization, Dissent at 23-24 n.12, this conclusion does not rest alone on the double-edged nature of the brain-damage evidence.

c. *Mr. Frederick's cases*

Mr. Frederick cites two Supreme Court cases and three Tenth Circuit cases in support of his prejudice argument. *See* Aplt. Br. at 74-76. These cases are distinguishable and do not establish that the OCCA's no-prejudice determination was "so lacking in justification that there was an error beyond any possibility for fairminded disagreement." *Burt*, 571 U.S. at 19-20 (quotations and alterations omitted).

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court, reviewing ineffective assistance of trial counsel de novo, concluded that counsel's omission of brain damage evidence and evidence of severe childhood abuse from the penalty phase of trial prejudiced the petitioner. *Id.* at 390-93. The Court explained that experts determined the petitioner "suffer[ed] from organic brain damage, an extreme mental disturbance severely impairing several of his cognitive functions." *Id.* at 392 (quotations omitted). It noted the brain damage was "likely caused by fetal alcohol syndrome and that [the petitioner]'s capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Id.* (quotations and alterations omitted). Here, by contrast, not only does AEDPA constrain our review, but also Dr. McGarrahan's testimony does not show that Mr. Frederick's brain damage "substantially impaired" his ability to appreciate the criminality of his conduct "at the time of [the murder]" or that his cognitive functions were "severely impair[ed]." *Id.*

Similarly, in *Porter v. McCollum*, 558 U.S. 30 (2009), the Supreme Court held the petitioner was prejudiced by counsel's omission of evidence about "(1) [his] heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Id.* at 41. Reviewing under AEDPA, the Court emphasized the petitioner's "extensive combat experience" that took a "mental and emotional toll," noting that "[o]ur Nation has a long tradition of according leniency to veterans." *Id.* at 43-44. The neuropsychologist testified that "[a]t the time of the crime," the petitioner "was substantially impaired in his ability to conform his conduct to the law." *Id.* at 36. Here, again by contrast, Dr. McGarrahan's testimony did not show that brain damage prevented Mr. Frederick from conforming his conduct to the law, and Mr. Frederick had no other substantial mitigating factors like heroic military combat service.

Mr. Frederick's reliance on three Tenth Circuit cases is also unavailing. In *Barrett*, reviewing de novo, we concluded the petitioner was prejudiced by counsel's omission of evidence that he "suffer[ed] from organic brain damage, bipolar disorder, and PTSD." 985 F.3d at 1233. We explained that (1) the neuropsychologist testified there was a "deterioration in [the petitioner's] mental state in the weeks and perhaps the days" before the crime and that his criminal act "clearly was an example of misperceiving and not being able to weigh and deliberate," and (2) the brain damage evidence would not "have opened the door to antisocial personality disorder"

evidence. *Id.* at 1227, 1232 (quotations and alterations omitted). In addition to the absence of AEDPA review, *Barrett* is distinguishable from this case because the evidence there established a "meaningful" connection between brain damage and the crime at issue, *see Grant*, 886 F.3d at 922, there were other mental health diagnoses in addition to brain damage, and there was no risk of the prosecution introducing antisocial personality disorder evidence, *Barrett*, 985 F.3d at 1232-33.

In *Anderson v. Simmons*, 476 F.3d 1131 (10th Cir. 2007), again reviewing de novo, we found that counsel's omission of brain damage evidence prejudiced the petitioner. *Id.* at 1148. We explained that the petitioner was "borderline mentally defective," "function[ed] below the bottom two percent of the general population," suffered "significant damage" to his frontal lobe, and had a "chronic drug addiction" that "exacerbate[d] [his] mental deficits and impairments." *Id*. at 1147 (quotations omitted). The petitioner also "had no history of criminal violence prior to the murders in question." *Id. Anderson* is distinguishable from this case because AEDPA applies here, Mr. Frederick had an extensive history of criminal violence before the murder, Dr. McGarrahan did not testify that he functioned below the general population, and he had no drug addiction.

Finally, Mr. Frederick cites *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004), where we concluded on de novo review that the petitioner was prejudiced by counsel's omission of evidence that he was cognitively impaired, "completely illiterate," had a level of understanding comparable to a 12-year-old child and had brain damage. *Id.* at 941, 944. In finding prejudice, we explained that without the

foregoing evidence, "the jury wholly lacked . . . an *explanation* of how [the petitioner's] organic brain damage caused . . . this 'kind hearted' person to commit such a shocking crime." *Id*. at 943. *Smith* is distinguishable because AEDPA review did not apply, the petitioner there had numerous significant impairments that affected his behavior, and the brain damage provided a "compelling explanation for his behavior." *Id.* at 944 (emphasis omitted).

In sum, Mr. Frederick's cases are factually distinguishable because they involved (1) stronger brain damage evidence, (2) evidence of a connection between the brain damage and the crime, (3) other mitigating evidence, and/or (4) weaker aggravating evidence. Also, all but one of these cases were decided under de novo review, whereas AEDPA constrains our review. Under AEDPA, "even a strong case for relief" may be insufficient. *Richter*, 562 U.S. at 102. Here, we cannot say "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.*[25]

* * * *

[25] The dissent states that we improperly "discount[] Mr. Frederick's authorities" because the additional mitigating evidence in those cases compared to this case "seems beside the point." Dissent at 33. But courts evaluate the prejudicial effect of failing to present certain mitigating evidence by assessing whether "the available mitigating evidence, taken as a whole, might [] have influenced the jury's appraisal of [the defendant's] moral culpability." *Wiggins*, 539 U.S. at 538 (quotations omitted). The presence of strong mitigating factors other than brain damage in the cases Mr. Frederick cites and the absence of such factors in this case supports our conclusion that the OCCA's no-prejudice determination was not "contrary to" or "an unreasonable application of" Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

When federal habeas courts review a state court's decision, AEDPA often plays a critical role. The question here is not simply whether under *Strickland* it is reasonably probable the brain damage evidence from the post-conviction evidentiary hearing would have produced a different result at trial. Instead, because of AEDPA, we must decide whether Mr. Frederick has shown the OCCA's determination that it is not reasonably probable the brain damage evidence would have made a difference was unreasonable. That is, even if we disagree with the OCCA, we must affirm unless all fairminded jurists would find the OCCA was wrong.

Comparing this case with our recent decision in *United States v. Barrett* illustrates this point. In *Barrett*, we granted habeas relief, holding it was reasonably probable that brain damage evidence from an evidentiary hearing would have led the penalty phase jury to reach a different result. 985 F.3d at 1233. But unlike here, AEDPA did not apply in *Barrett* because it was a federal prosecution and habeas review was de novo under § 2255. *Id.* at 1209-12, 1221. Moreover, again unlike here, there was no evidence of anti-social personality disorder in *Barrett*, and there was evidence linking the brain damage to the murder offense. *See id.* at 1232-33.

Given the strength of the State's aggravation case and the limited mitigating value of the brain damage evidence, the OCCA reasonably concluded that Mr. Frederick was not prejudiced by trial counsel's failure to introduce that evidence during the penalty phase. The OCCA thus reasonably concluded that appellate counsel did not perform deficiently by failing to assert an IAC claim on this ground.

2. **Reasonable Determination of the Facts – § 2254(d)(2)**

Mr. Frederick also argues that the OCCA's no-prejudice determination was based on three unreasonable factual findings. We disagree.

As previously noted, under § 2254(d)(2), we may not conclude the OCCA's factual findings were unreasonable "merely because we would have reached a different conclusion in the first instance." *Brumfield*, 576 U.S. at 313-14 (quotations and alterations omitted). "Instead, § 2254(d)(2) requires that we accord the [OCCA] substantial deference." *Id.* We thus "defer to the state court's factual determinations so long as reasonable minds reviewing the record might disagree about the finding in question." *Johnson*, 3 F.4th at 1218 (quotations omitted). When the state court's factual determination is based on its review of a recorded exchange, the § 2254(d)(2) test requires only that the state court offer a "plausible reading of" the exchange. *Sharp v. Rohling*, 793 F.3d 1216, 1230 (10th Cir. 2015).[26] In addition, because the

[26] We cite *Sharp* to illustrate the high bar petitioners face to show that a state court made an unreasonable determination of facts based on its reading of the record. In *Sharp*, a detective interviewed the petitioner. He said she was not "going to jail" and that "[y]ou are a witness to this thing so long as you do not do something dumb and jam yourself." 793 F.3d at 1230 (quoting the record). The petitioner then made incriminating statements, was arrested, and later convicted. *Id*. at 1221. The state court found the detective "made no promise of leniency." *Id*. at 1230.

We concluded this was an unreasonable determination of fact under § 2254(d)(2) because it was "not a plausible reading of the interview"—the detective expressly "promised [the petitioner] she would not go to jail despite her confession." *Id*. Had the state court's reading of the transcript been plausible, its factual determination would not have been "unreasonable" under § 2254(d)(2). The "plausibility" determination in *Sharp* applied the "reasonableness" standard from § 2254(d)(2) to a state court's reading of a transcript.

This understanding of *Sharp* comports with other cases' application of § 2254(d)(2). *See Harrison v. Parris*, No. 16-6750, 2017 WL 6049366, at *2

state court's determination must be "based on" an unreasonable factual determination, Mr. Frederick must show that the OCCA "plainly misapprehended or misstated the record" and that the "misapprehension goes to a material factual issue that is central to [his] claim." *Johnson*, 4 F.4th at 1219 (quotations and alterations omitted).

First, Mr. Frederick argues that the "OCCA unreasonably found that [Dr.] McGarrahan concluded Frederick's brain damage 'would not impair his day-to-day activities.'" Aplt. Br. at 76. But the OCCA did not misstate the record, and reasonable minds at most could disagree whether this finding was inaccurate. *See Brumfield*, 576 U.S. at 314. Dr. McGarrahan testified that brain damage did not impair day-to-day activities like planning a trip to the grocery store, buying groceries, or holding a job. Evidentiary Hr'g, Vol. IV at 782:3-18. And although she said brain damage could impair some day-to-day activities like making complex decisions and abstract reasoning, she acknowledged that someone with antisocial personality disorder could also have those difficulties. *Id.* at 782:19-783:10. The

(6th Cir. Dec. 4, 2017) ("[W]here there are 'a number of plausible ways to interpret the record,' a federal habeas court's disagreement with the inferences the state court drew from the record is not sufficient to reverse its findings if the state court's interpretation is plausible.") (quoting *Renico v. Lett*, 559 U.S. 766, 778 (2010)); *see also Smith v. Aldridge*, 904 F.3d 874, 884 (10th Cir. 2018) (citing with approval an Eleventh Circuit case denying habeas relief on a claim that a state court had erred in "credit[ing] one set of affidavits over another" because the court "had plausible reasons" to do so).

OCCA's finding was a "plausible reading of" her testimony, *Sharp*, 793 F.3d at 1230, and thus not unreasonable.[27]

Further, Mr. Frederick fails to meet his burden "to establish that the OCCA's analysis was 'based on an unreasonable determination of the facts.'" *Lott*, 705 F.3d at 1177 (quoting 28 U.S.C. § 2254(d)(2)). In concluding that Mr. Frederick was not prejudiced by the omission of brain damage evidence, the OCCA provided multiple reasons for its decision. It explained that the brain damage evidence "could have opened the floodgates to evidence very harmful to [Mr. Frederick]" and that the State could have highlighted evidence of his anti-social personality disorder, which tends to be aggravating at sentencing. Aplt. Br. Attachment B at 40-41 (quotations omitted). In light of the OCCA's analysis, Mr. Frederick could not show the OCCA's no-prejudice determination was based on its description of Dr. McGarrahan's testimony. *See Harris*, 941 F.3d at 1003 ("Even if a state court's

[27] The dissent says "the OCCA's factual finding that Mr. Frederick's brain damage '*would not* impair his day-to-day activities' cannot be reconciled with [Dr. McGarrahan's] actual testimony." Dissent at 37. But Dr. McGarrahan specifically acknowledged the many day-to-day activities that organic brain damage would "[n]ot typically" impair. Evidentiary Hr'g, Vol. IV at 782:12-18. Although Dr. McGarrahan testified that brain damage might impair a person's ability to "mak[e] complex decisions" and interact with others, she said that other factors—such as antisocial personality disorder—can also cause similar impairments. *Id*. at 783:7-10. ("Q: And those four [difficulties] you just listed, they might also be present with anti-social personality disorder and/or other nonmental illness-type disorders; correct? A: That's true."). At most, the OCCA's summary failed to capture the nuance of Dr. McGarrahan's testimony, but this is not enough to show "there is no 'possibility for fairminded disagreement'" on what Dr. McGarrahan said. Dissent at 15 (quoting *Richter*, 562 U.S. at 102-03).

individualized factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2)." (quotations and alterations omitted)); *Smith v. Duckworth*, 824 F.3d 1233, 1251 (10th Cir. 2016) ("[E]ven if the OCCA mischaracterized the specific contours of the evidence," the petitioner "failed to demonstrate that the OCCA's prejudice decision was based on an unreasonable determination of the facts." (quotations and emphasis omitted)).

Second, Mr. Frederick challenges the OCCA's determination that "[Dr.] McGarrahan concluded that she 'could not draw any connection between any brain damage and [Mr. Frederick's] criminal conduct.'" Aplt. Br. at 77 (quoting Aplt. Br. Attachment B at 40). This determination was not unreasonable. When asked to confirm that she could not "even draw *any connection* between whatever brain damage [Mr. Frederick] may have and any crimes he's ever committed," Dr. McGarrahan said, "Right. I can't make this direct link. That's correct." Evidentiary Hr'g, Vol. IV at 785:18-22 (emphasis added). This supports the OCCA's determination. She also explained, "[y]ou typically don't see unprovoked aggression even with frontal lobe damage in individuals who are in their fifth and sixth decade of life." *Id.* at 791:5-8; *see id.* at 775:6-10 (following "decades of being in prison we tend to see the aggression go down over time, typically in about the fourth decade of life"). Finally, she testified that "at this point [Mr. Frederick] can exercise" the ability to inhibit aggressive responses. *Id.* at 789:18-790:9; *see also id.* at 790:9-14 ("aggression [is] at its worst in individuals . . . when they're younger" but that is not

"currently the case with [Mr. Frederick's] brain damage"). The record thus supports that the OCCA's finding was not unreasonable.[28]

Mr. Frederick points to Dr. McGarrahan's testimony about the relationship between his brain damage and his behavior. *See* Aplt. Br. at 77-78. She said Mr. Frederick's brain damage was a "contributing factor" to his "behaviors," and that his behavior was "at least partially explainable" by brain damage. Evidentiary Hr'g, Vol. IV at 795:4-19. But she never said that brain damage was a contributing factor to the crime in this case or even specify that she was referring to criminal behavior.[29]

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[28] The dissent would accept Mr. Frederick's argument that the OCCA made an unreasonable determination of fact when it stated that Dr. McGarrahan failed to "draw *any connection* between any brain damage and [Mr. Frederick's] criminal conduct." Dissent at 38 (quoting Aplt. Br. Attachment B at 40). Yet the dissent concedes that the OCCA drew this language from a statement that Dr. McGarrahan expressly adopted. Evidentiary Hr'g, Vol. IV at 785:18-22 ("Q: And as a matter of fact . . . as a neuropsychologist you really can't even draw any connection between whatever brain damage he may have and any crimes he's ever committed, can you? A: Right. I can't make this direct link. That's correct."). We cannot say that no fairminded jurist would agree with the OCCA's characterization of Dr. McGarrahan's testimony when that characterization quotes directly from the transcript of her testimony. The dissent relies on "a set of debatable inferences" about what Dr. McGarrahan really meant, which cannot be used "to set aside the conclusion reached by the state court." *Rice v. Collins*, 546 U.S. 333, 342 (2006).

[29] The dissent states Dr. McGarrahan testified that Mr. Frederick's "frontal lobe damage was 'certainly a contributing factor' to his criminal behavior." Dissent at 29-30 (quoting Evidentiary Hr'g, Vol. IV at 795); *see also id.* at 38. Dr. McGarrahan said the words "contributing factor" in response to a question about explaining "many of [Mr. Frederick's] behaviors," Evidentiary Hr'g, Vol. IV at 795:4-11, not his "criminal behavior."

And as noted above, Mr. Frederick's age when he committed the murder further undermines any inference that brain damage contributed to the crime. Dr. McGarrahan testified, "You typically don't see unprovoked aggression even with

"[A]ccord[ing] the [OCCA] substantial deference," as we must, even if "reasonable minds reviewing the record might disagree" about whether Dr. McGarrahan could draw a connection between Mr. Frederick's brain damage and the murder, that is insufficient to establish that the factual finding was unreasonable. *See Brumfield*, 576 U.S. at 314 (quotations and alterations omitted). Thus, the OCCA's finding was not unreasonable. Moreover, Mr. Frederick again does not show that the OCCA's decision was based on this finding, and for the reasons previously discussed, the OCCA's prejudice decision was not based on this finding.

Third, Mr. Frederick argues that the OCCA unreasonably determined that (1) "the introduction of . . . brain damage . . . would have given the State ample ground to underscore and highlight th[e] antisocial personality evidence before the jury," Aplt. Br. at 78, and (2) the experts' testimony "could reasonably be viewed as mitigating to one person and aggravating to another," Aplt. Br. at 79. These are legal conclusions, not factual determinations, and are thus not subject to 28 U.S.C. § 2254(d)(2). *See Wood v. Carpenter*, 907 F.3d 1279, 1293 (10th Cir. 2018) (the OCCA's statement was a legal, not factual, determination). Moreover, as discussed, our precedent supports the OCCA's legal determination that brain damage evidence could open the door to introduction of antisocial personality disorder evidence and

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frontal lobe damage in individuals who are in their fifth and sixth decade of life." *Id*. at 790:15-791:10. Mr. Frederick was 55 when he killed his mother.

that brain damage evidence can be double-edged. *See Grant*, 886 F.3d at 921; *Littlejohn*, 875 F.3d at 564-65.

The findings underlying the OCCA's prejudice conclusion were not unreasonable. Mr. Frederick thus has not overcome § 2254(d)(2)'s bar to relief.[30]

* * * *

The OCCA reasonably concluded that appellate counsel was not ineffective for not asserting an IAC claim based on trial counsel's failure to investigate and present brain damage evidence, and its adjudication of that claim was not based on an unreasonable determination of the facts. We thus affirm the denial of habeas relief on this ground.

[30] The dissent bases its contrary conclusion on its interpretation of Dr. McGarrahan's testimony regarding (1) whether Mr. Frederick's alleged brain damage would impair his day-to-day activities and (2) whether she could draw a direct link between the brain damage and the crime. The dissent insists that there is no ambiguity in this testimony and that the OCCA's interpretation was simply wrong. *See* Dissent at 39 n.15. But as shown above, Dr. McGarrahan's testimony was equivocal on these points. Even if the dissent's reading of Dr. McGarrahan's testimony is plausible, this shows only that "reasonable minds reviewing the record might disagree about the finding[s] in question." *Brown*, 142 S. Ct. at 1525 (quotations omitted). That is not enough under AEDPA. *Id.*; *see also* Brian R. Means, *Federal Habeas Manual* § 3:80 (2022) ("That reasonable minds reviewing the record might disagree about the factual finding does not suffice to super[s]ede the [state] court's factual finding."). Instead, Mr. Frederick bore the burden to show that the OCCA's order did not reflect a "plausible reading of" the testimony, *Sharp*, 793 F.3d at 1230, and he has failed to meet that burden.

ISSUE FIVE (Penalty Phase):
Failure to Attach a Report by Dr. Art Williams in Support of IAC Claim

On direct appeal, appellate counsel asserted that trial counsel was ineffective for failing to call Dr. Williams. In his post-conviction petition, Mr. Frederick argued that appellate counsel was ineffective for not providing Dr. Williams's report in support of that claim. The OCCA reasonably concluded that Mr. Frederick was not prejudiced by appellate counsel's failure to submit the report. We thus affirm.

A. ***Additional Background***

1. **Trial and Appeal**

During the penalty phase, trial counsel Rowan said he would call Dr. Williams, a sociologist, who would "show [the jury Mr. Frederick's] life." Trial Tr., Vol. VII at 1292:17-21. Dr. Williams met with Mr. Frederick, but Mr. Frederick did not cooperate and refused to meet again. Evidentiary Hr'g, Vol. III at 588-89. Based on his observations, Dr. Williams wrote a brief report. APCR, Attachment 32.

After Mr. Rowan did not call Dr. Williams, the prosecutor challenged that decision based on her planned cross-examination about Mr. Frederick's prior statements during competency evaluations that he did not have a brain injury. Trial Tr., Vol. VIII at 1514-17, 1523-24. Defense counsel responded that he did not call Dr. Williams because (1) Mr. Frederick refused to do any testing and (2) Dr. Williams would have testified that Mr. Frederick was institutionalized,[31] which was

[31] Dr. Williams explained that institutionalization "renders some people so dependent on external constraints that they gradually lose the capacity to rely on internal organization and self-imposed personal limits to guide their actions and

"obvious." *Id*. at 1515-16. Counsel also noted his concern that Dr. Williams's testimony could open the door to discussion of a different murder charge against Mr. Frederick. *Id.* at 1522:13-1523:3.

On direct appeal, Ms. Walker claimed that trial counsel was ineffective for failure to call Dr. Williams, but she did not provide a copy of Dr. Williams's report to the OCCA.

2. **Post-Conviction Proceedings**

Mr. Frederick attached Dr. Williams's seven-page report to his application for post-conviction relief. In the report, Dr. Williams said that "[g]iven Mr. Frederick's life history of impaired judgment and lack of insight, brain damage . . . [could not] be ruled out," but he could only raise it as a "concern" because Mr. Frederick refused evaluation. APCR, Attachment 32 at 17.[32] The report also said that Mr. Frederick was "institutionalized to such a degree that prison is where he functions best, as it is a controlled, structured environment." *Id.* at 20.

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restrain their conduct. If and when this external structure is taken away, severely institutionalized persons may find that they no longer know how to do things on their own, or how to refrain from doing those things that are ultimately harmful or self-destructive." APCR, Attachment 32 at 17 ¶ 1.

[32] In a footnote, the State suggests that we cannot consider Dr. Williams's report because Mr. Frederick did not present the report during the evidentiary hearing. Aplee. Br. at 55 n.20. But, as the State acknowledges, the report was attached to Mr. Frederick's application for post-conviction relief. APCR Attachment 32. It was therefore in the "record that was before the state court." *Grant*, 727 F.3d at 1019 n.5 (quotations omitted).

At the evidentiary hearing, Mr. Rowan said he did not call Dr. Williams in mitigation because:

- Dr. Williams was a sociologist and thus was not qualified to diagnose brain damage;
- Mr. Frederick did not spend much time talking to Dr. Williams;
- The prosecutor "would've torn him up on the stand;" and
- The jury had not heard anything about Mr. Frederick's prior homicide charge, and if Dr. Williams had testified "he would've had to admit that he knew that [Mr. Frederick] had been charged with a prior murder."

Evidentiary Hr'g, Vol. I at 200:25-201:20, 204:8-16. He emphasized that the last factor was most important. *See id.* at 231:21-232:2.

3. **The OCCA Opinions on Direct Appeal and Post-Conviction Review**

On direct appeal, appellate counsel argued that trial counsel was ineffective for failing to call Dr. Williams. *See Frederick*, 400 P.3d at 831. The OCCA concluded it was reasonable trial strategy not to call Dr. Williams because the record showed that trial counsel's decision was based on Mr. Frederick's failure to cooperate and a concern about information that would be elicited on cross-examination. *Id.* The OCCA also concluded that Mr. Frederick was not prejudiced by that decision. *Id.* It explained that "much of what Dr. Williams would have testified to was already before the jury in the form of testimony from other witnesses," and "[n]ot calling Dr. Williams . . . forced the prosecution in part to alter its course at trial." *Id.*

In his application for post-conviction relief, Mr. Frederick asserted that appellate counsel was ineffective for not providing Dr. Williams's report to the

OCCA to support the claim on direct appeal that trial counsel was ineffective for failing to call Dr. Williams. APCR at 40. The OCCA denied relief, concluding that appellate counsel was not ineffective because she had sufficiently raised an IAC claim on direct appeal based on trial counsel's failure to call Dr. Williams. Aplt. Br., Attachment B at 33.

B. ***Analysis***

Mr. Frederick is not entitled to relief. On direct appeal, the OCCA rejected his claim that trial counsel was ineffective for failing to call Dr. Williams. There was no reasonable probability that Dr. Williams's report would have changed that result. The OCCA thus reasonably determined that Mr. Frederick was not prejudiced on direct appeal.[33]

Because the OCCA determined on direct appeal that trial counsel was not ineffective for failing to call Dr. Williams, we evaluate that opinion to assess whether it was reasonably probable that Dr. Williams's report would have changed the result.

"[A]bsent a showing to the contrary, an attorney's conduct is [presumed] objectively reasonable because it could be considered part of a legitimate trial strategy." *United States v. Babcock*, 40 F.4th 1172, 1177 (10th Cir. 2022) (quotations and alterations omitted). In concluding on direct appeal that trial counsel Rowan's decision not to call Dr. Williams was reasonable trial strategy, the OCCA

[33] Because the OCCA did not specify a *Strickland* prong in rejecting this claim, AEDPA review applies to both prongs. *See Harris*, 941 F.3d at 995.

explained that Dr. Williams would have been under "intense scrutiny" during cross-examination and that the prosecutor planned to call a rebuttal witness. *Frederick*, 400 P.3d at 831. It also noted Mr. Rowan's concern that calling Dr. Williams would open the door to evidence that Mr. Frederick had been acquitted of murder. *Id.* The OCCA thus focused on the damaging information about Mr. Frederick that would have been elicited on cross-examination. Mr. Frederick has not shown a reasonable probability that Dr. Williams's report would have altered the OCCA's conclusion on direct appeal that trial counsel did not perform deficiently.

Nor would Dr. Williams's report have altered the OCCA's conclusion that Mr. Frederick was not prejudiced by trial counsel's failure to call Dr. Williams. The OCCA explained that "[n]ot calling Dr. Williams to testify appears to have forced the prosecution in part to alter its course at trial" and that the decision not to call Dr. Williams "was easily explained in closing argument." *Id.* Inclusion of his report would not have altered this analysis. The OCCA also noted that "much of what Dr. Williams would have testified to was already before the jury." *Id.* Although the report may have provided additional information, it largely mirrors what Mr. Rowan had represented to the jury. Mr. Frederick has not shown a reasonable probability that the report would have altered the result on direct appeal.

Mr. Frederick argues that because appellate counsel did not provide Dr. Williams's report to the OCCA, "she was left to argue vaguely" about what Dr. Williams would have told the jury. Aplt. Br. at 59. But Mr. Frederick does not specify the information in the report that was not already before the jury. At most,

the report indicates that Dr. Williams would have testified to "evidence of Frederick's educational struggles; dysfunctional childhood; or time in the Helena Boys' Home." Aplt. Br. at 62. But the jury had heard testimony that Mr. Frederick left home at 14, stopped attending school around that age, and was charged with robbery shortly after. Trial Tr., Vol. VIII at 1497, 1502, 1509-10. It is thus unlikely that Dr. Williams's report would have altered the OCCA's conclusion.[34]

In sum, the OCCA's denial of post-conviction relief based on appellate counsel's failure to provide Dr. Williams's report was not an unreasonable application of *Strickland*. A fairminded jurist could agree that Mr. Frederick was not prejudiced on direct appeal by omission of Dr. Williams's report. We thus affirm the denial of relief on this ground.

ISSUE SIX: Cumulative Error

Mr. Frederick asserts that the cumulative effect of the errors was prejudicial and demands reversal. We affirm the denial of relief on Mr. Frederick's cumulative error claim.

A. ***Legal Background***

"A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that

[34] Mr. Frederick also challenges the OCCA's factual findings on direct appeal under 28 U.S.C. § 2254(d)(2). But the OCCA's post-conviction adjudication of Mr. Frederick's claim was not "based on" findings on direct appeal. *See* 28 U.S.C. § 2254(d)(2).

collectively they can no longer be determined to be harmless." *Hooks*, 689 F.3d at 1194 (quotations omitted). This analysis applies only when "there are two or more actual errors," *id.* at 1194-95 (quotations omitted), and we only cumulate errors on claims on which we granted a COA, *Johnson*, 3 F.4th at 1235.

Strickland "claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice." *Johnson v. Carpenter*, 918 F.3d 895, 909 (10th Cir. 2019) (quotations omitted). We therefore evaluate whether the OCCA would have reversed on cumulative-error grounds on direct appeal if Mr. Frederick's appellate counsel had raised the IAC claims as discussed here. *Id.*

B. ***Analysis***

After finding no errors, the OCCA denied relief on Mr. Frederick's cumulative error claim without reaching the merits. Aplt. Br. Attachment B at 45. Because the OCCA did not conduct a cumulative error analysis, we review his claim de novo. *See Underwood v. Royal*, 894 F.3d 1154, 1186 (10th Cir. 2018).

Although Mr. Frederick raised ineffective assistance of counsel claims based on appellate counsel's performance, he makes no argument as to the cumulative effect of appellate counsel's errors on direct appeal. Instead, his arguments focus on the cumulative effect of trial counsel's alleged errors.[35] For certain claims, we

[35] Our precedent is not entirely clear on how to apply the cumulative error analysis when a petitioner's claims are based solely on appellate counsel's conduct. Some of our cases suggest that we do not cumulate alleged errors by appellate counsel if those errors relate to conduct that occurred at trial. *See Harmon v. Sharp*,

limited our analysis to whether Mr. Frederick was prejudiced by appellate counsel and did not assess deficient performance. We thus effectively presumed that appellate counsel performed deficiently for (1) not raising claims about trial counsel's failure to consult and present a medical expert, (2) not raising a claim about trial counsel's cross-examination of Dr. Harrison, and (3) not providing Dr. Williams's report in support of an IAC claim. Taken together, those errors did not have a substantial and injurious effect on direct appeal.[36]

We affirm the denial of relief on Mr. Frederick's cumulative error claim.

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936 F.3d 1044, 1083 (10th Cir. 2019) ("On cumulative error review in this case, we do not aggregate any prejudice from Petitioner's ineffective assistance of appellate counsel claims because no *trial* prejudice can stem from ineffective assistance of appellate counsel."); *cf. Tolbert v. Ulibarri*, 325 F. App'x 662, 665 (10th Cir. 2009) ("Because the alleged ineffective assistance of trial and appellate counsel occurred in separate proceedings . . . reasonable jurists would agree that there is nothing to cumulate.") (quotations omitted) (although not precedential, we find the reasoning of this unpublished decision instructive under 10th Cir. R. 32.1 and Fed. R. App. P. 32.1).

But other cases have applied a cumulative error analysis to ineffective assistance claims directed at appellate counsel when there were also separate claims directed at trial counsel—there are no IAC claims against trial counsel here. *See Johnson*, 918 F.3d at 909 ("We . . . look to whether the state court would have reversed on cumulative-error grounds on direct appeal if [the petitioner's] appellate counsel had brought each of the claims we denied for insufficient prejudice.") (quotations omitted); *Bush v. Carpenter*, 926 F.3d 644, 686-87 (10th Cir. 2019) (considering ineffectiveness of appellate counsel for failing to raise IAC claim in cumulative error analysis).

We need not decide which approach is correct because even if we cumulate appellate counsel's alleged errors, Mr. Frederick has not shown he is entitled to relief.

[36] Contrary to Mr. Frederick's suggestion, we do not consider prejudice stemming from the prosecutor's closing argument because we did not grant a COA on that claim. *See Johnson*, 3 F.4th at 1235.

III. **CONCLUSION**

We affirm the denial of relief on Mr. Frederick's ineffective assistance and cumulative error claims. We also deny his request for an evidentiary hearing.

Attachment A

20-6131, *Frederick* v. *Quick*

ROSSMAN, J., dissenting

I cannot affirm Darrell Wayne Frederick's death sentence because the failure to investigate and present evidence of his organic brain damage at the penalty phase constitutes objectively unreasonable assistance of counsel.[1] Counsel's deficient performance prejudiced Mr. Frederick because the jury charged with sentencing him was denied complete information about his circumstances.[2] Mr. Frederick first litigated his brain damage evidence claim in state postconviction proceedings before the OCCA, where he lost on the merits of both *Strickland* prongs. Today, the court declines to disturb the OCCA's determination, insisting the state's case was so strong, the fact that Mr. Frederick suffered from organic brain damage would not have mattered to a single member of his jury. On the record before us, I cannot agree.

The Eighth and Fourteenth Amendments give capital defendants the right to present mitigating evidence regarding "any aspect of a defendant's

[1] The evidence at the heart of Mr. Frederick's fourth IAC claim has been described as mental health evidence, evidence of organic brain damage, brain damage evidence, and the like. I adopt the majority's formulation: "brain damage evidence." Maj. Op. at 46.

[2] The majority opinion asserts Mr. Frederick's ineffectiveness of appellate counsel claim comprises five arguments. I focus—and would reverse—only on the fourth: the failure to investigate and present evidence of brain damage at the penalty phase. Maj. Op. at 17-18.

character . . . and any of the circumstances of the offense," "proffer[ed] as a basis for a sentence less than death." *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)); *see generally* U.S. Const. amends. VIII, XIV. The Sixth Amendment effects that right by guaranteeing legal representation with the "skill and knowledge . . . necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984) (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275-76 (1942)); *see generally* U.S. Const. amend. VI. The right to the effective assistance of counsel is "a bedrock principle in our justice system" and indeed, the very "foundation for our adversary system." *Martinez* v. *Ryan*, 566 U.S. 1, 12 (2012).

A defendant's constitutional rights—and his counsel's constitutional obligations—are especially heightened at the penalty phase of a capital case. "What is essential," at that stage, "is that the jury have before it *all possible relevant information* about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added). Our own court has confirmed "[t]he sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." *Anderson* v. *Sirmons*, 476 F.3d 1131, 1142

(10th Cir. 2007) (quoting *Romano* v. *Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001)).

Mr. Frederick was sentenced to death by jurors who never had the opportunity to see him as a full human being. Defense counsel, Mr. James Rowan, did not call a single live witness to testify on Mr. Frederick's behalf. Nor did counsel present any expert witness testimony, even though the theory of defense at the penalty stage was Mr. Frederick sustained a head injury in a car accident that left him forever changed. Mr. Rowan reasonably suspected his client suffered from organic brain damage. Yet without conducting any investigation into the matter, Mr. Rowan still made it the central theme of the defense. Having developed no proof, Mr. Rowan simply offered the jury this guess: "I think there is an explanation [for Mr. Frederick's behavior] but we're not scientists enough to know precisely what that explanation is." Trial Tr., Vol. VIII at 1587.

In postconviction proceedings, capital habeas defense counsel confirmed what Mr. Rowan assumed: Mr. Frederick had "significant indicators of brain damage," including "an overall reduction in his intellect" and "primary impairment of his frontal lobes." Evidentiary Hr'g, Vol. IV at 763. According to the post-conviction evidence, organic brain damage was "certainly a contributing factor" for Mr. Frederick's criminal behavior. *Id.* at 795-96.

Mr. Frederick's jury knew none of this. Significant mitigating evidence—evidence that might have explained or contextualized the conduct for which Mr. Frederick was convicted—was not presented during the penalty phase. Instead, defense counsel advanced an uninvestigated defense. Under the circumstances, Mr. Rowan's approach to the capital defense function was not merely wrong, it was objectively unreasonable. And because imposition of the death sentence under Oklahoma law requires a unanimous jury, *Malone* v. *State*, 168 P.3d 185, 215 n.138 (Okla. Crim. App. 2007), "the question is whether there is a reasonable probability that, absent the errors, [at least one juror] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The state presented a powerful case, but defense counsel offered the jury effectively nothing against which to weigh it. Had the defense put actual evidence of Mr. Frederick's organic brain damage "on the mitigating side of the scale"—and not just a defense lawyer's unsubstantiated personal conjecture—"there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003).

The district court's denial of habeas relief should be reversed. AEDPA deference does not counsel otherwise. With respect, I dissent.

I

The majority opinion does not dwell on what happened before Mr. Frederick's trial, but the history of his legal representation is critical to understanding and assessing the brain damage evidence claim. I detail that background here, before moving on to analyze the claim.

A

Mr. Frederick was originally represented by Ms. Catherine Hammarsten of the Oklahoma County Public Defender's Office. Evidentiary Hr'g, Vol. III at 566. Their attorney-client relationship proved difficult. At the postconviction evidentiary hearing in 2017, Ms. Hammarsten confirmed feeling "frustrated" because Mr. Frederick did not like her "getting into his personal life." *Id.* at 610. He was "unwilling to share," "unwilling to submit to testing," and "[w]ouldn't meet with psychologists." *Id.*

Mr. Frederick harbored paranoid beliefs about Ms. Hammarsten. He thought she was "sharing information with the prosecutors" and accused her of bringing school children into the jail. *Id.* at 615, 619. In her opinion, Mr. Frederick was exhibiting behaviors beyond simply being "a difficult client." *Id.* at 615.[3] She consulted Dr. Art Williams—an expert "in the areas of social work,

[3] The record shows Ms. Hammarsten was concerned Mr. Frederick might not be competent to stand trial. Ms. Hammarsten never sought a competency evaluation, however, and Mr. Frederick's competency was never evaluated in this case.

psychotherapy, substance abuse, mitigation and criminal justice." APCR Attachment 32, Affidavit at ¶ 1. Before trial in 2014, Dr. Williams met with Mr. Frederick for a single three-hour "interview" and found him "very circumspect and suspicious about providing information and [he] refused to cooperate in testing." *Id.*, Exhibit 2 at 1.[4]

Ms. Hammarsten testified that, after consulting with Dr. Williams about Mr. Frederick, "our speculation was that there was some brain damage." Evidentiary Hr'g, Vol. III at 615. Dr. Williams prepared a report[5] detailing what he knew about Mr. Frederick's upbringing, his institutionalization and its effects,[6] and his behavior. He observed Mr. Frederick had competed on a

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[4] Apparently, Mr. Frederick believed Dr. Williams was hired to convince him to plead guilty in exchange for a life sentence—something Mr. Frederick did not wish to do. According to Dr. McGarrahan's testimony at the postconviction evidentiary hearing, Mr. Frederick "associate[d Dr.] Williams with Ms. Hammarsten's attempt to get him to accept a plea," contributing to his disinterest and lack of cooperation with both of them. Evidentiary Hr'g, Vol. IV at 749-50.

[5] I agree with the majority opinion that, contrary to the state's position, Dr. Williams's report and affidavit are properly before us. Both documents were attached to Mr. Frederick's application for postconviction relief and, therefore, are part of the "record that was before the state court." Maj. Op. at 73 n.32 (quoting *Grant* v. *Trammell*, 727 F.3d 1006, 1019 n.5 (10th Cir. 2013)).

[6] As Dr. Williams explained,

> Mr. Frederick is institutionalized. He has grown up in and adapted himself to a world where it is dangerous to show fear or weakness; where it is safest to be hypervigilant and mistrustful, and where he has become so dependent on the internal constraints of a prison

prison boxing team and "brain damage from chronic insult cannot be ruled out." APCR Attachment 32, Exhibit 2 at 4, 7. Based on "lengthy conversations" with Mr. Frederick's sister and legal team, Dr. Williams concluded Mr. Frederick "likely suffers from long-standing mental illness(es) and/or traumatic brain injury." *Id.*, Affidavit at ¶ 6. Though he was "trained to recognize mental illness and brain injury," Dr. Williams admitted he was "not qualified to actually diagnose these conditions." *Id.* Dr. Williams was prepared to testify at Mr. Frederick's trial only "regarding [his] reservations about [Mr. Frederick's] mental and cognitive health" and thus "recommended that a qualified neuropsychologist and/or psychiatrist examine Mr. Frederick to explore formal diagnoses of mental disease and/or traumatic brain injury." *Id.*

Ms. Hammarsten, however, consulted no expert capable of diagnosing organic brain damage.

B

About a year before trial, Mr. Rowan replaced Ms. Hammarsten as defense counsel. Mr. Rowan was "an experienced capital litigator" and well known to the Oklahoma bench. Aplt. Br. Attachment B at 30. The state court judge who presided over the substitution told Mr. Frederick his new lawyer

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> system that he does not know how to function in a healthy way with those in the outside world.

APCR Attachment 32, Exhibit 2 at 5.

would likely bring experts in to speak with him. Mr. Frederick expressed no concern about this possibility. Evidentiary Hr'g, Vol. III at 621. Mr. Frederick "was so happy to be getting rid of me," Ms. Hammarsten testified, "yes, he would've cooperated with somebody else." *Id.*

But Mr. Rowan did not bring in any experts. Though Mr. Rowan admitted he "routinely in a capital murder case ha[d his] clients screened by a psychologist who does a clinical interview," he did not undertake these efforts in Mr. Frederick's defense. Evidentiary Hr'g, Vol. I at 202. When he took over from Ms. Hammarsten, Mr. Rowan received "several banker's boxes full of material." *Id.* at 189. Mr. Rowan was well aware Ms. Hammarsten believed Mr. Frederick potentially suffered from organic brain damage, but the record established she had conducted no investigation into the matter. Still, Mr. Rowan thought it "looked like a thoroughly investigated case." *Id.*

Based on Ms. Hammarsten's experience, Mr. Rowan did not "think Mr. Frederick was particularly interested in being examined by a neuropsych." *Id.* at 203. According to Mr. Rowan, Ms. Hammarsten told him "she had some difficulty getting experts in. And so that clouded my judgment in trying to talk [Mr. Frederick] into having somebody examine him." *Id.* at 245-46.

No investigation into Mr. Frederick's brain damage occurred until the postconviction phase. At that point, Mr. Rowan admitted he "[a]bsolutely"

would have presented evidence of organic brain damage to the jury if he had it. *Id.* at 204-05.

C

The penalty-stage defense depended on the jury believing that Mr. Frederick suffered from organic brain damage. But the only mitigation evidence presented was decades-old testimony by Mr. Frederick's father, given in a state postconviction proceeding relating to Mr. Frederick's 1972 robbery conviction.[7] Mr. Frederick's father died in 2007. His testimony was read into the record by the parties, with a defense investigator reciting the father's direct testimony and the prosecutor reading the cross-examination questions. In this way, the jury learned of a car accident in which Mr. Frederick "hit his head on the windshield" and "was a changed child from that very moment." Trial Tr., Vol. VIII at 1498.

Based solely on this evidence, the defense proffered two mitigators on the subject of Mr. Frederick's organic brain damage.[8] The state objected, concerned about the absence of supporting proof:

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[7] The testimony was given in 1982. Trial Tr., Vol. VIII at 1496.

[8] In Oklahoma, as is true in other states, the penalty phase is a separate proceeding where "evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated" by statute. Okla. Stat. Ann. tit. 21, § 701.10(C) (2023).

(*continued*)

Attachment A

> [T]he very first thing that they want to submit to this jury is that Darrell Frederick suffered a severe concussion in his early teen years which resulted in damage to the brain. The second mitigator that they want to submit is the concussion Darrell Frederick suffered in his early teen years caused [him to] lose the ability to control his impulses. So they're—they're putting this issue front and center.

Id. at 1524-25. The problem was, in the state's view, "[t]here's been absolutely no evidence whatsoever that he had a severe concussion that resulted in damage to the brain." *Id.* at 1525. The testimony of Mr. Frederick's father established there was a car accident, the state explained, but there was "certainly no evidence of a severe concussion or brain damage." *Id.* at 1525-26. The trial judge agreed: "There's got to be some evidence put in somewhere as to these mitigating circumstances. You can't just say something with *no evidence at all* . . . ." *Id.* at 1526-27 (emphasis added). The defense then proceeded on a narrower mitigator: "Darrell Frederick had an accident in the truck, ran into a post and hit his head on the windshield, busted the windshield out of the truck and changed from that very moment." O.R., Vol. V at 927.

The two initially proffered brain damage mitigators were, first, that "Darrell Frederick suffered a severe concussion in his early teen years which resulted in damage to the brain," and, second, that "the concussion Darrell Frederick suffered in his early teen years caused Darrell Frederick [to] lose the ability to control his impulses." Trial Tr., Vol. VIII at 1524-25.

Mr. Frederick's defense presented other mitigators which did not rely on the brain damage evidence. *See* Maj. Op. at 6-7.

D

The evidentiary deficiency in Mr. Frederick's mitigation case did not deter defense counsel from putting his uninvestigated defense front and center. Recognizing the lack of evidence, Mr. Rowan confessed what he had not proved and implored the jurors instead to use common sense:

> Now we've not presented you a neuroscientist. We've not presented you a psychiatrist or a clinical psychologist to explain that we have examined Darrell now and he now has that brain damage. He simply wouldn't let us, resisted that kind of intrusion. So all we have is, you know, anecdotal evidence. You know that a crash that knocks your teeth out, that knocks the windshield out, takes—the father takes you to get an X-ray. An X-ray can't show anything about the brain. It can show fractures perhaps, but not damage to the brain.
>
> And I can't prove to you beyond a reasonable doubt that that was the etiology or the beginning of his bad behavior. I can't prove that. But it's logical. We're learning more and more about concussions now. I mean, don't football players go out and spend several weeks in—under observation when they get a concussion? You know, we've learned more about concussions and how dangerous they are and how they can affect the brain. And there's an executive function in the brain that governs impulses. . . .
>
> I can't prove to you that insults to the brain cause impulsivity. But I think we all have our common sense. We all have our experiences in life to know intuitively that's true, that that—you protect the brain. You wear a helmet when you play football. But every one of the incidents—and go through them in your own mind. . . . [T]hey all go from a dead stop to very violent in an instant with no explanation. *I think there is an explanation but we're not scientists enough to know precisely what that explanation is*.

Trial Tr., Vol. VIII at 1585-87 (emphasis added).

The perfunctory nature of Mr. Frederick's "halfhearted mitigation case," *Wiggins*, 539 U.S. at 526, was brought into relief by the state's ample aggravation case: three aggravators supported by over a dozen live witnesses. The third aggravator—whether "at the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society"—was the one, according to the state, the jury "probably heard the most evidence on." Trial Tr., Vol. VIII at 1565. The state's witnesses recounted Mr. Frederick's violent criminal history, describing a 1981 incident where he had "cre[pt] into a house" where a family of four lived, a 2003 assault at a hair salon, and several times when Mr. Frederick lashed out violently and without provocation toward family members or neighbors. *Id.* at 1566-68; *see also* Aplt. Br. Attachment C at 20. "[H]is behavior has demonstrated a threat to society," the state argued, because "[h]e does it over and over and over." Trial Tr., Vol. VIII at 1567. After deliberating for less than three hours, the jury sentenced Mr. Frederick to death. *Id.* at 1597, 1606.

E

At the postconviction evidentiary hearing, Mr. Frederick's lawyer on direct appeal, Gina Walker, testified that after reading the trial transcripts, she became concerned about the disconnect between Mr. Rowan's mitigation theory and the evidence presented to support it. "[A] large part of Mr. Rowan's case," she explained, "was that Darrell had had some sort of brain injury, had

a traumatic brain injury or brain damage which propelled him to not have really good control over his emotions." Evidentiary Hr'g, Vol. II at 424. But in her view, there was "hardly any evidence" presented to the jury on the issue. *Id.* "I'm not a psychologist or a psychiatrist," Ms. Walker added, but "I felt like Darrell Frederick probably had a mental illness." *Id.* She formed this opinion after meeting with her client one time. *Id.* at 425.

Despite these well-founded concerns, Ms. Walker did not raise an IAC claim based on Mr. Rowan's failure to investigate or present any evidence regarding the brain damage theory of the defense.

II

The Sixth Amendment guarantees "the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686 (citation omitted). *Strickland* requires a defendant who claims ineffective assistance to show (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) that any deficiency was "prejudicial to the defense." *Id.* at 688, 692. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The OCCA rejected Mr. Frederick's claim that trial counsel's failure to investigate

and present mitigating evidence of organic brain damage constituted ineffective assistance.[9]

Because the OCCA adjudicated the merits, we must apply AEDPA's limitations on federal habeas relief. *See Harrington* v. *Richter*, 562 U.S. 86, 92 (2011) (explaining "the availability of habeas relief is limited with respect to claims"—like Mr. Frederick's—"'adjudicated on the merits' in state-court proceedings"). Specifically, 28 U.S.C. § 2254(d) governs our resolution of Mr. Frederick's IAC claim based on the brain damage evidence. He can prevail only if he shows the OCCA's resolution of his brain damage evidence claim either, under § 2254(d)(1), "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or under § 2254(d)(2), "resulted in a decision that was based on an unreasonable determination of the facts in light

[9] I analyze Mr. Frederick's appellate IAC claim—as did the OCCA and the district court, and as does the majority opinion—by considering whether trial counsel provided ineffective assistance. When the basis of an ineffective-assistance claim is the failure by appellate counsel to raise an issue on appeal, "we must look to the merits of the omitted issue." *United States* v. *Orange*, 447 F.3d 792, 797 (10th Cir. 2006). "If the omitted issue is without merit, counsel's failure to raise it 'does not constitute constitutionally ineffective assistance of counsel.'" *United States* v. *Cook*, 45 F.3d 388, 393 (10th Cir. 1995) (citation omitted), *abrogated on other grounds by Neill* v. *Gibson*, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001).

of the evidence presented in the State court proceeding."[10] Section 2254(d) imposes a "difficult" burden on a habeas petitioner; relief is available only where there is no "possibility for fairminded disagreement" with the state court's decision. *Richter*, 562 U.S. at 102-03. In my view, Mr. Frederick has cleared this hurdle.

Mr. Rowan reasonably suspected Mr. Frederick had sustained brain damage in a car accident. This was a suspicion shared by Mr. Frederick's first capital defense counsel, Ms. Hammarsten. Neither lawyer, however, performed the investigative work necessary to vet this suspicion. That alone is troubling, but this case illustrates how an otherwise questionable-though-permissible strategic choice becomes constitutionally ineffective assistance under well-established federal law.

Not only did Mr. Rowan believe Mr. Frederick suffered from organic brain damage but *he chose to make Mr. Frederick's brain damage the central theory of the penalty-stage defense without conducting any investigation to establish it*. Under *Strickland*, no attorney who suspected their client sustained brain damage in a car accident and then centered their defense on that fact could reasonably conclude investigating and presenting that

[10] I agree with much of the majority's recitation of the applicable legal principles prescribing our review, so I do not repeat them here. *See* Maj. Op. at 10-14.

mitigation evidence would be a waste. Mr. Rowan's choice left the jury—freighted with the enormous weight of deciding whether to sentence Mr. Frederick to death—alone with their common sense and the state's case in aggravation. Mr. Rowan's performance falls well below any objectively reasonable understanding of the defense function in a capital case. Under the circumstances, the OCCA's deficient-performance ruling is "contrary to" and an "unreasonable application of" *Strickland*'s first prong.

The OCCA's determination that any deficiency was not prejudicial to the defense—the second *Strickland* prong—was likewise premised on an unreasonable application of federal law. As I will explain, the law does not require organic brain damage to have a *direct* link to the criminal conduct before the absence of that mitigation evidence can be deemed prejudicial. That mistaken view of the law informed the OCCA's no-prejudice determination. The record also demonstrates the OCCA misstated the expert testimony presented at the postconviction evidentiary hearing and misunderstood the precise nature of Mr. Frederick's organic brain damage and its impact on his behavior. The OCCA's conclusion that there was no reasonable probability of a non-death verdict, therefore, was based on an incorrect understanding of the totality of the mitigation evidence. In my view, the majority opinion abides, and perpetuates, these errors.

Mindful of the constraints AEDPA deference imposes on our review, I conclude Mr. Frederick has satisfied § 2254(d) as to his brain damage evidence claim and is therefore entitled to habeas relief.

****

The district court all but concluded Mr. Rowan's performance during the penalty phase was constitutionally deficient. And my colleagues today do not contend Mr. Rowan's investigation and presentation of mitigating evidence was constitutionally adequate. (In fact, the majority opinion does not even discuss *Strickland*'s first prong.) Still, I will start with deficiency and then turn to prejudice. *See Harmon* v. *Sharp*, 936 F.3d 1044, 1058 (10th Cir. 2019) (explaining *Strickland* prongs may be addressed in any order).

III

The OCCA determined Mr. Rowan's failure to investigate and present evidence of brain damage to the jury was "a strategic choice made after reasonable investigation and within the exercise of reasonable professional judgment." Aplt. Br. Attachment B at 40. On appeal, Mr. Frederick contends the OCCA's decision was an unreasonable application of *Strickland*. I agree.

To assess deficient performance under *Strickland*, we consider whether counsel's performance "fell below an objective standard of reasonableness" under "prevailing professional norms." 466 U.S. at 688. This inquiry requires us to analyze "the facts of the particular case, viewed as of the time of counsel's

conduct." *Id.* at 690. True, our review of counsel's performance under *Strickland*'s first prong is "highly deferential," *Byrd* v. *Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (quoting *Hooks* v. *Workman*, 606 F.3d 715, 723 (10th Cir. 2010)), but we must be "'particularly vigilant' in ensuring the right to effective assistance of counsel when a defendant is subject to a sentence of death," *Anderson*, 476 F.3d at 1141 (quoting *Smith* v. *Mullin*, 379 F.3d 919, 938 (10th Cir. 2004)).

"An IAC claim premised on a lack of investigation is governed by the same *Strickland* standards as all other IAC claims." *Davis* v. *Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019) (citing *Rompilla* v. *Beard*, 545 U.S. 374, 380-81 (2005)). "Counsel's duty to investigate and present mitigating evidence is now well established." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 cmt. (rev. ed. 2003); *see also id.* (gathering cases).[11] "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

[11] "The Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the American Bar Association (ABA) . . . as "guides to determining what is reasonable"' performance." *Smith*, 379 F.3d at 942 (quoting *Wiggins*, 539 U.S. at 524).

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. To be sure, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 383.

To assess whether defense counsel exercised reasonable professional judgment, we do not ask "whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*." *Wiggins*, 539 U.S. at 523 (citing *Strickland*, 466 U.S. at 691). "To be deficient, the performance must be outside the wide range of professionally competent assistance. In other words, it must have been completely unreasonable, not merely wrong." *Byrd*, 645 F.3d at 1168 (quoting *Hooks*, 606 F.3d at 723). "[E]very effort [must] be made to eliminate the distorting effect of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

As Mr. Frederick persuasively points out, the district court correctly understood "Mr. Rowan was aware that [Mr. Frederick] potentially suffered from brain damage," Aplt. Br. Attachment C at 42, and thus defense counsel's duty to investigate was implicated. Mr. Rowan had reviewed Ms.

Hammarsten's files, including Dr. Williams's pretrial report, which squarely acknowledged the possibility of brain damage. APCR Attachment 32, Exhibit 2 at 4, 7. Mr. Rowan met with Dr. Williams before trial and determined he would not be an appropriate witness, in part because he was not qualified to diagnose organic brain damage. Cognizant of these deficiencies, Mr. Rowan conducted no further investigation *yet still* "embrac[ed] Petitioner's head injury as the reason for his violent actions." Aplt. Br. Attachment C at 42.

This is precisely what *Strickland* forbids. Mr. Rowan reasonably could decline to investigate a theory he chose not to rely upon. What he could not do—but did here—is refuse, without basis, to investigate a theory on which he would then base his life-or-death pitch to Mr. Frederick's jury. At issue here is not just the absence of a constitutionally sufficient investigation—it is the presentation of, and reliance on, an *uninvestigated defense*. Our deference to an attorney's choice must run out in such circumstances.

The OCCA essentially attributed the lack of expert mental health evidence to Mr. Frederick's failure to cooperate. The OCCA reasoned "[i]t would be questionable to put any sort of mental health evidence before the jury where [Mr. Frederick] has not been personally interviewed and evaluated." Aplt. Br. Attachment B at 39. Mr. Frederick may not have cooperated fully with Ms. Hammarsten. But that is why counsel was substituted. Mr. Rowan

"was specifically brought into the case to restore the attorney/client relationship." Aplt. Br. Attachment C at 43.

Nothing in the record suggests Mr. Frederick refused to cooperate with Mr. Rowan. Mr. Rowan—acknowledging his judgment was "clouded" by Ms. Hammarsten's experience—testified Mr. Frederick never said "he would refuse to cooperate with any expert that [Mr. Rowan] put forward," Evidentiary Hr'g, Vol. I at 246, and never actually "refuse[d] to come out to see an examiner," *id.* at 204. The majority opinion—endorsing the OCCA—continues to rely on Ms. Hammarsten's efforts to explain why Mr. Rowan did not need to investigate Mr. Frederick's organic brain damage. But it is Mr. Rowan's performance that is accused of being constitutionally deficient, not Ms. Hammarsten's. As the district court correctly observed, "using [Mr. Frederick's] lack of cooperation with Ms. Hammarsten as justification for Mr. Rowan's failure to consult with a mental health expert is problematic." Aplt. Br. Attachment C at 43.

Even if Mr. Frederick had been uncooperative with Mr. Rowan, that still would not excuse the total failure to investigate a mitigation theory counsel intends to present to the jury. The district court acknowledged as much: "The fact that [Mr. Frederick] may have been uncooperative or obstinate does not relieve counsel of the duty to perform a reasonable mitigation investigation." *Id.* (citing *Porter* v. *McCollum*, 558 U.S. 30, 40 (2009) ("Porter may have been

fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation.")).

In assessing the reasonableness of Mr. Rowan's decision not to investigate, the OCCA should have considered "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. An effective attorney in Mr. Rowan's position would at least "attempt to have his client evaluated by a qualified mental health expert, even if he anticipated that the client may not actively participate in the evaluation," especially "[w]here counsel is aware of possible brain damage and chooses to make it a central theme in his mitigation case." Aplt. Br. Attachment C at 43. But Mr. Rowan failed to investigate the "facts relevant to plausible options" in his mitigation case because he never consulted any mental health expert. *Strickland*, 466 U.S. at 690.

Given the absence of any investigation combined with Mr. Rowan's decision to present a defense that depended on such an investigation, counsel's performance was constitutionally deficient under *Strickland*. For these reasons, I would find the OCCA's deficient-performance determination on Mr. Frederick's brain damage evidence claim was "contrary to" and "involved an unreasonable application of[] clearly established Federal law." § 2254(d)(1).

IV

The majority opinion focuses only on *Strickland*'s prejudice prong, endorsing the OCCA's conclusion that Mr. Frederick was not prejudiced at the penalty phase by trial counsel's failure to investigate and present brain damage evidence. According to the majority, the OCCA's "no-prejudice determination was not unreasonable" for three reasons: "[B]ecause the proffered evidence (a) failed to adequately link brain damage to the murder and (b) would have opened the door to evidence harmful to the defense. Also, (c) Mr. Frederick's reliance on certain cases is misplaced." Maj. Op. at 56.[12]

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[12] I respond at length to reasons (a) and (c) discussed in the majority opinion but not (b), which asserts the brain damage evidence was essentially double-edged, so its omission at the penalty phase was not prejudicial. I recognize we have held antisocial personality disorder "tends to present an aggravating, rather than mitigating, circumstance in the sentencing context." *Littlejohn* v. *Royal*, 875 F.3d 548, 564 (10th Cir. 2017). And, we have held it is possible for brain damage evidence to heighten the aggravating effect of antisocial personality disorder evidence. *See* Maj. Op. at 59 n.24 (citing *Littlejohn*, 875 F.3d at 565).

I am not certain treating the most powerful form of mitigating evidence as essentially aggravating so as to foreclose a showing of prejudice accords with Supreme Court precedent. *See Williams*, 529 U.S. at 397-98; *Wiggins*, 539 U.S. at 534-38; *Rompilla*, 545 U.S. at 390-93; *Sears* v. *Upton*, 561 U.S. 945, 955-56 (2010) (per curiam). Regardless, the general principles relied on in the majority opinion do not counsel in favor of denying habeas relief here. The risk that any antisocial personality disorder evidence in this case would be received by the jury as more aggravating than mitigating is markedly reduced by Dr. McGarrahan's explanatory testimony about its organic origins. *See, e.g.*, Evidentiary Hr'g, Vol. IV at 795-96 (describing how the "etiology of [Mr. Frederick's antisocial personality disorder] behaviors . . . is at least in part due to brain damage"). "[Mr. Frederick's] brain damage," Dr. McGarrahan testified,

Having investigated these reasons, I do not see how affirmance is warranted under § 2254(d)(1) or (2).

A

1

Recall, capital habeas defense counsel first retained Dr. Curtis Grundy, an expert in clinical and forensic psychology. *See* Maj. Op. at 51. He determined Mr. Frederick had "indicators of possible traumatic brain injury" and referred him for neuropsychological testing. APCR Attachment 39, Exhibit 2 at 10, 12; *see also* Evidentiary Hr'g, Vol. IV at 692-93. Dr. Antoinette McGarrahan, a psychologist "specializ[ing] in forensic psychology and neuropsychology," was then retained to administer the testing. Evidentiary Hr'g, Vol. IV at 738, 743-44. After meeting with Mr. Frederick for 8 hours, Dr. McGarrahan concluded he had "significant indicators of brain damage," *id.* at 763, and his brain damage was "certainly a contributing factor" to his criminal behavior, *id.* at 795.

"is guiding those behaviors of anti-social personality disorder." *Id.* at 798. Only by misunderstanding the precise nature of Mr. Frederick's brain damage, as presented at the postconviction evidentiary hearing, would it be reasonable to conclude such mitigating evidence would have opened the door to evidence harmful to the defense. The point I make does not depend on the "origin of the disorder," Maj. Op. at 59 n.24, but on the well-settled understanding that a court assessing prejudice based on the failure to investigate and present mitigating evidence must consider the precise nature of the mitigating evidence and assess its value in the context of the whole record. *See, e.g.*, *Wiggins*, 539 U.S. at 534.

According to the OCCA, "even if trial counsel had the information . . . Dr. McGarrahan testified to at the Evidentiary Hearing, it is not clear that Petitioner was prejudiced by its absence at trial" because she "could not draw any connection between any brain damage and [Mr. Frederick's] criminal conduct." Aplt. Br. Attachment B at 40. The majority opinion affirms this conclusion under § 2254(d)(1), holding the proffered mitigation "failed to adequately link brain damage to the murder." Maj. Op. at 56. I respectfully disagree.

It is worth restating the critical purpose of mitigating evidence in a death penalty case. The breadth of mitigation evidence a defendant may proffer in his defense is well established. In *Lockett* v. *Ohio*, the Supreme Court held the "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, *any aspect* of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis added and alteration omitted). This is because "the imposition of death by public authority is . . . profoundly different from all other penalties," so the sentencer "must be free to give 'independent mitigating weight'" to any reason a defendant gives to spare his life. *Eddings*, 455 U.S. at 110 (quoting *Lockett*, 438 U.S. at 605). Mitigating circumstances are intended to impart "compassion[]" and a "fundamental respect for

humanity" into the sentencing proceedings. *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). Thus, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard* v. *Dretke*, 542 U.S. 274, 285 (2004) (alteration omitted) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 822 (1991)).

"Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available." *Littlejohn* v. *Trammell*, 704 F.3d 817, 864 (10th Cir. 2013). "And for good reason—the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action." *Hooks* v. *Workman* (*Hooks II*), 689 F.3d 1148, 1205 (10th Cir. 2012); *see also Smith*, 379 F.3d at 942 (describing how evidence of this type is "exactly the sort . . . that garners the most sympathy from jurors"). Despite acknowledging this, Maj. Op. at 47, the majority opinion concludes evidence of brain damage is not valuable mitigation unless "link[ed] . . . to the murder," *id.* at 56.

Neither the OCCA nor the majority opinion goes so far as to say Mr. Frederick's organic brain damage had no mitigating value. But the OCCA "discount[ed] entirely the effect [the] testimony might have had on the jury," *Porter*, 558 U.S. at 43, because Dr. McGarrahan did not directly connect—or as the majority opinion says "failed to adequately link"—the brain damage to

the crime. The majority opinion approves of the OCCA's approach, requiring mitigating evidence to "play[] a substantial role" in the murder before its omission can be deemed prejudicial. Maj. Op. at 58 (quoting *Littlejohn*, 875 F.3d at 564).

I can discern no support in applicable law for the direct causal link the OCCA—and the majority opinion—seem to demand in assessing whether Mr. Rowan's deficient performance can be deemed prejudicial under *Strickland*'s second prong.

In *Tennard* v. *Dretke*, 542 U.S. 274, 289 (2004), the Supreme Court explicitly rejected the Fifth Circuit's requirement that mitigating evidence must have some "nexus" to a capital defendant's crime for the jury's failure to consider that evidence to be deemed prejudicial. The Court reaffirmed *Tennard* in *Smith* v. *Texas*, 543 U.S. 37, 45 (2004), when it characterized the "nexus" requirement as a "test we never countenanced and now have unequivocally rejected."[13]

[13] The majority opinion resists the relevance of *Tennard* and *Smith*, suggesting those cases, unlike the matter before us, simply "concerned Texas jury instructions that limited the jury's consideration of mitigation evidence in capital cases." Maj. Op. at 57 n.22 (citing *Tennard*, 542 U.S. at 277, and *Smith*, 543 U.S. at 38). To be sure, those cases explain a state cannot prevent a sentencer from considering relevant mitigating evidence, *i.e.*, evidence with any tendency to mitigate the defendant's culpability. *See, e.g.*, *Tennard*, 542 U.S. at 286. But in so holding, the Court said "the Fifth Circuit's screening test ha[d] no basis in [the Court's] precedents and, indeed, [wa]s inconsistent with the standard [the Court] ha[s] adopted for relevance in the capital

Citing *Grant*, the majority opinion says the brain damage evidence "had limited mitigating value because it could not '*meaningfully explain*' why Mr. Frederick murdered the decedent." Maj. Op. at 56 (quoting *Grant* v. *Royal*, 886 F.3d 874, 922 (10th Cir. 2018)). But *Grant* is not so definitive. There we held the OCCA reasonably concluded organic brain damage evidence would have minimal mitigating value because an expert's testimony "never indicated that [petitioner's] brain defects *caused* his behavior to be 'impulsive' or 'aggressive' *in a way that would meaningfully explain* his involvement in the" crimes. 886 F.3d at 922 (emphases added). Here, Dr. McGarrahan testified Mr. Frederick's brain damage was "certainly a contributing factor." Evidentiary Hr'g, Vol. IV at 795. That is a meaningful explanation.

The other cases the majority opinion relies on are similarly distinguishable. In *Wilson*, we rejected defendant's IAC claim premised on trial counsel's failure to introduce additional mental health evidence in mitigation. We reasoned defendant "failed to establish *any connection* between [the mental-health evidence] and [defendant's] commission of the murder." *Wilson* v. *Trammell*, 706 F.3d 1286, 1309 (10th Cir. 2013) (emphasis added). While it

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sentencing context." *Id.* at 287. That is, mitigating evidence need not "relate specifically to [a] petitioner's culpability for the crime he committed." *Id.* at 287 (citing *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986)). For this reason, the Court held the "nexus" test underlying the Texas jury instructions was "incorrect." *Id.* at 289. And so too is the direct link requirement imposed by the OCCA and endorsed today by the majority opinion.

was "possible" defendant "could have been delusional at the time of the crime"—a component of the expert's description of defendant's condition—this failed to explain "the planning for the crime." *Id.* at 1310. Similarly, in *Hooks II*, we explained the expert's testimony about defendant's "mental problems . . . was troubling" because it was not "connect[ed] . . . to the circumstances of the crime." 689 F.3d at 1204. The expert "knew almost nothing about [defendant's] case." *Id.* He merely described the defendant's mental-health history and the psychological examinations he had performed, explaining the two were "consistent." *Id.* at 1203. Because this testimony did not "connect the dots between, on the one hand, a defendant's mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question," it left the jury "with almost no explanation of how [defendant's] mental problems played into the murder." *Id.* at 1204.

Contrary to what the majority opinion suggests, mitigating evidence need not draw a straight line directly to the criminal conduct to have real value under applicable law. Indeed, if only evidence with an explanatory nexus was deemed mitigating, it is hard to imagine how the capital sentencing process could give effect to "the fundamental respect for humanity underlying the Eighth Amendment." *Eddings*, 455 U.S. at 112 (citation omitted). Though Dr. McGarrahan testified she "cannot make that direct link," Evidentiary Hr'g, Vol. IV at 786, she explained Mr. Frederick's frontal lobe damage was

"certainly a contributing factor" to his criminal behavior, *id.* at 795. Typically, "the frontal lobes are what hits the brakes on things when we want to do something but we know we shouldn't do it. So being able to inhibit or not engage in those behaviors." *Id.* at 764. The frontal lobe, she explained, involves three "broad areas," one of which "controls certain aspects of behavior," including "aggression, violence, acting out, impulsivity." *Id.* Dr. McGarrahan could not "say with a hundred percent certainty," but she believed "[Mr. Frederick's] aggression and unprovoked and minimally provoked violence, you typically see that in traumatic brain injury affecting the frontal lobe." *Id.* at 789.

For example, "in talking with somebody on a porch about everyday things going on, the weather or what's going on in the neighborhood," if somebody were to "start[] beating somebody, that's unprovoked." *Id.* at 792. "[W]hen you see this minimally provoked [violence] or somebody making a benign comment that results in such severe aggression for no reason"—like the "reports that [Mr. Frederick] beat his sister while she was on crutches"—"then you have to question it." *Id.* Dr. McGarrahan acknowledged Mr. Frederick was becoming more docile with age, but she opined his "out of the blue" violent acts—including attacks on family members—were a "red flag for frontal lobe damage." *Id.* at 791. Bringing everything together, Dr. McGarrahan testified

Mr. Frederick's behavior "is at least partially explainable by damage to the brain." *Id.* at 795.

Under applicable law, Dr. McGarrahan's testimony was valuable mitigating evidence because it gave the jury a reason to spare Mr. Frederick's life. It served an explanatory purpose and had a humanizing function, allowing the jury to understand why Mr. Frederick was paranoid, aggressive, impulsive, short-tempered, and struggled to regulate his emotions in everyday social interactions. *Id.* at 764-65. In the penalty-stage closing argument, Mr. Rowan told the jury:

> [W]e have to acknowledge the incredible pain that Darrell Frederick has visited upon his own family by killing the one person in his life that really loved him. . . . We don't have a justification for that. It's inexcusable. . . . But we tried hard to find an explanation. Something that would explain . . . his violent episodes that you've seen time and time again. From a standstill start to going off . . . with no preparation, no warning, no nothing. That's not normal.

Trial Tr., Vol. VIII at 1582. But an explanation existed, as Dr. McGarrahan confirmed. That Mr. Frederick was a person who suffered from organic brain damage "'might well have influenced the jury's appraisal' of [Mr. Frederick's] moral culpability, *Wiggins*, 539 U.S. at 538, and could have served as "a basis for a sentence less than death," *Lockett*, 438 U.S. at 604. Under *Strickland*, its absence was "prejudicial to the defense." 466 U.S. at 692.

The OCCA's no-prejudice determination discounted the value of the brain damage mitigating evidence to the jury and demanded a causal link the law does not require; it is thus "contrary to" and "involved an unreasonable application of, clearly established Federal law," as determined by the Supreme Court. § 2254(d)(1).

2

The majority opinion also rejects Mr. Frederick's challenge to the OCCA's no-prejudice determination by distinguishing the Tenth Circuit and Supreme Court cases he relies on, including *Rompilla*, *Porter*, *Barrett*, *Anderson*, and *Smith*. I do not find this reasoning to be supportive of affirmance.

It is important to remember Mr. Frederick's appellate IAC claim focuses on whether the OCCA unreasonably applied *Strickland*. That is the key authority at issue. The majority opinion distinguishes Mr. Frederick's cases because those authorities involved de novo review and not, as here, AEDPA deference. This is a fundamental distinction but not a dispositive one.

As the majority opinion correctly explains, AEDPA "erects a formidable barrier to federal habeas relief," and "requires federal courts to give significant deference to state court decisions." Maj. Op. at 9-10 (first quoting *Burt* v. *Titlow*, 571 U.S. 12, 19 (2013); then quoting *Lockett* v. *Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013)). But deference does not tie our hands, as I fear the

majority opinion has concluded. AEDPA's standards are "demanding but not insatiable" and "[d]eference does not by definition preclude relief." *Miller-El* v. *Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003)). We must undertake our review "cognizant that our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Fairchild* v. *Workman*, 579 F.3d 1134, 1140 (10th Cir. 2009) (internal quotation marks and citation omitted). When the question before the court of appeals concerns the ultimate punishment, the principled application of deference must animate our obligations.

Most problematic, however, the majority opinion discounts Mr. Frederick's authorities because those cases involved supposedly more "substantial mitigating factors" than the brain damage evidence kept from Mr. Frederick's jury. Maj. Op. at 61. That Mr. Frederick was not a Korean War veteran, *Porter*, 558 U.S. at 41, or did not suffer from fetal alcohol syndrome, *Rompilla*, 545 U.S. at 392, or bipolar disorder, *United States* v. *Barrett*, 985 F.3d 1203, 1233 (10th Cir. 2021), seems beside the point. There is no absolute hierarchy of mitigation evidence because "[n]o two capital defendants will ever be the same." *Canales* v. *Lumpkin*, 142 S. Ct. 2563, 2569 (2022) (Sotomayor, J., dissenting from the denial of certiorari). Even if the cases Mr. Frederick marshals involved "weaker aggravating evidence" and "stronger brain damage

evidence," Maj. Op. at 63, for Mr. Frederick's jury, there was effectively no mitigating evidence.

It is "possible that [some jurors] could have heard" all the mitigating evidence about [Mr. Frederick's] organic brain damage "and still have decided on the death penalty." *Rompilla*, 545 U.S. at 393. But "that is not the test." *Id.* As Mr. Frederick correctly observes, the mitigating evidence need not outweigh the aggravating evidence to demonstrate prejudice. Aplt. Br. at 56 (citing *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000) ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of [a] penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.")).

For these reasons, I respectfully disagree with the majority and conclude Mr. Frederick has satisfied his burden under § 2254(d)(1).

B

Mr. Frederick also satisfied his burden under § 2254(d)(2). In *Smith* v. *Sharp*, we explained how to conduct § 2254(d)(2)'s factual inquiry:

> "[A] state court's determination of the facts is unreasonable" if "the court plainly and materially misstated the record or the petitioner shows that reasonable minds could not disagree that the finding was in error." . . . And if the petitioner shows "the state courts plainly misapprehend or misstate 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."

935 F.3d 1064, 1072 (10th Cir. 2019) (internal citations omitted). Under § 2254(d)(2), "an unreasonable determination of the facts does not, itself, necessitate relief." *Byrd*, 645 F.3d at 1172 (internal quotation marks omitted). "Rather, a habeas petitioner must demonstrate that the state court's decision is 'based on'—i.e., 'rests upon'—that unreasonable determination of the facts." *Smith* v. *Duckworth*, 824 F.3d 1233, 1251 (10th Cir. 2016).[14]

Again, I begin with the understanding that review under § 2254(d)(2) is deferential. *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). We cannot conclude a state court's factual findings are unreasonable "merely because we would have reached a different conclusion in the first instance." *Brumfield* v. *Cain*, 576 U.S. 305, 313-14 (2015) (alteration omitted) (quoting *Wood* v. *Allen*, 558 U.S. 290, 301 (2010)). Rather, we must

[14] The majority opinion relies on one of our prior cases to explain the deference we must give to a "state court's factual determination [] based on its review of a recorded exchange." Maj. Op. at 65 (citing *Sharp* v. *Rohling*, 793 F.3d 1216, 1230 (10th Cir. 2015)). Because the majority opinion's phrase—"plausible reading"—does not feature in the statute we are applying, it must refer simply to the deference AEDPA requires we give to "[]reasonable determination[s] of the facts." *Sharp*, 793 F.3d at 1229 (citing 28 U.S.C. § 2254(d)(2)). As a statement of AEDPA review's first principle, I agree Mr. Frederick faces a "high bar." Maj. Op. at 65 n.26. But where the OCCA's factual determination misrepresented the record before it, I would find Mr. Frederick clears this hurdle.

defer to the state court's factual determinations if "reasonable minds reviewing the record might disagree about the finding in question." *Duckworth*, 824 F.3d at 1241.

Applying these legal principles, I explain why the OCCA's no-prejudice ruling was based on an unreasonable determination of the facts under § 2254(d)(2).

1

Reasonable minds could not disagree that the OCCA made incorrect factual findings on issues central to Mr. Frederick's penalty-phase mitigation claim. Specifically, the OCCA misstated and misunderstood the nature of the organic brain damage identified by Dr. McGarrahan and her testimony about whether there was any connection between it and Mr. Frederick's criminal behavior.

We must begin by considering the "precise nature" of the organic brain damage evidence. *See Grant*, 886 F.3d at 921. The OCCA found "despite Dr. McGarrahan's testimony that [Mr. Frederick] suffered from brain damage, she also concluded that such would not impair his day-to-day activities, and that she could not draw any connection between any brain damage and his criminal conduct." Aplt. App. Attachment B at 40. The OCCA misstated and misunderstood the record, in at least two critical ways.

First, taking Dr. McGarrahan's testimony as a whole, it was unreasonable for the OCCA to find Mr. Frederick's brain damage "would not impair his day-to-day activities." Dr. McGarrahan was asked if she had seen a diminution in Mr. Frederick's functioning day-to-day due to his frontal lobe damage. She responded, "Within the institutional setting, no." Evidentiary Hr'g, Vol. IV at 781-82. She agreed frontal lobe damage would not typically impair a person going to the grocery store or holding some jobs. But she then explained the precise nature of Mr. Frederick's organic brain damage—frontal lobe damage—*would* impact a person's day-to-day activities in terms of "[d]ifficult[ies] making complex decisions"; "[d]ifficulties interacting with other people"; and "[d]ifficulties being able to see the gray area, the abstract reasoning that many people are able to do in order to engage in relationships." *Id.* at 782-83.

Under these circumstances, the OCCA's factual finding that Mr. Frederick's brain damage "*would not* impair his day-to-day activities" cannot be reconciled with her actual testimony. Aplt. Br. Attachment B at 40 (emphasis added). The majority opinion discerns no error under § 2254(d)(2) because Dr. McGarrahan "acknowledged that someone with antisocial personality disorder could also have those difficulties." Maj. Op. at 66. I struggle to see how this relates to our analysis, especially where Dr. McGarrahan explained that Mr. Frederick manifested symptoms of antisocial

personality disorder *because of* his organic brain damage. *See* Evidentiary Hr'g, Vol. IV at 796 ("I agree that the criteria are met that [Mr. Frederick] is engaged in the behaviors that are required for anti-social personality disorder. I think where we [i.e., Dr. McGarrahan and the state] may not agree is the etiology as to why he's engaging in those behaviors. And I believe it's attributable to his brain damage.").

Second, contrary to the OCCA's finding, Dr. McGarrahan connected Mr. Frederick's brain damage to his criminal behavior. At the hearing, Dr. McGarrahan had the following exchange with the state:

> **Q:** And you're not here to testify for the Judge that this is any sort of excuse for the crime he's been convicted of, are you?
>
> **A:** No, none whatsoever. That's up to the Judge himself to make that determination.
>
> **Q:** And as a matter of fact, . . . as a neuropsychologist you really can't even draw any connection between whatever brain damage he may have and any crimes he's ever committed, can you?
>
> **A:** Right. I can't make this direct link. That's correct. . . . We can talk about the – the history of aggression and the history of violence and the difficulties he's having in his thinking and his emotion and his behavior, but I cannot make that direct link. That is correct.

Evidentiary Hr'g, Vol. IV at 785-86.

The OCCA found Dr. McGarrahan could not "draw *any connection* between any brain damage and [Mr. Frederick's] criminal conduct." Aplt. Br. Attachment B at 40 (emphasis added). Though an accurate quote from the transcript, this is an inaccurate recitation of Dr. McGarrahan's actual

testimony. She confirmed Mr. Frederick's frontal lobe damage was "certainly a contributing factor" to his criminal behavior. Evidentiary Hr'g, Vol. IV at 795. The judge at the evidentiary hearing clarified with Dr. McGarrahan that "[o]n this frontal lobe traumatic brain damage[,] you said one of the indicators of that is aggression. . . . Was it in his case or do you know?" *Id.* at 789. Dr. McGarrahan responded: "You can't say with a hundred percent certainty. When you look at all the factors taken together, yes, I believe his aggression and unprovoked and minimally provoked violence, you typically see that in traumatic brain injury affecting the frontal lobes." *Id.* Under these circumstances, the OCCA's finding that Dr. McGarrahan did not make "any connection" belies her testimony as a whole.[15]

2

Reasonable minds could not disagree the OCCA's decision on prejudice rested upon its unreasonable determination of the facts. § 2254(d)(2).

The OCCA's erroneous factual findings—misapprehending and misstating Dr. McGarrahan's testimony about the precise nature of Mr.

[15] Contrary to the majority opinion's conclusion, the OCCA's finding was not just "[a]n imperfect or even an incorrect determination of the facts," Maj. Op. at 55 n.21 (quoting *Grant*, 727 F.3d at 1024), or a mere "fail[ure] to capture the nuance," *id.* at 67 n.27. The OCCA found Mr. Frederick's brain damage "would not impair his day-to-day activities"—when it would—and that Dr. McGarrahan "could not draw any connection between any brain damage and his criminal conduct"—when she did. Aplt. Br. Attachment B at 40.

Frederick's frontal lobe damage and the connection between his brain damage and criminal behavior—"had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland*, 466 U.S. at 695-96. In evaluating whether prejudice resulted from the omission of mitigation evidence, the OCCA had to consider the "totality of the available mitigation evidence" before it—"both that adduced at trial" and that adduced in the postconviction proceeding—and to reweigh the combined mitigation evidence against the aggravation evidence presented by the state. *Williams*, 529 U.S. at 397-98. The "totality of the available mitigation evidence," therefore, is a key input in the reasonable probability calculus.

The OCCA's factual mistakes affected that court's understanding of what constituted the "totality of the available mitigation evidence" and how it weighed against the aggravating evidence. The input was wrong, so the outcome was distorted. Having misapprehended the evidence, the OCCA concluded: "The introduction of evidence of organic brain damage *of the kind testified to by Dr. McGarrahan* would have given the State ample ground to underscore and highlight this antisocial personality evidence before the jury." Aplt. Br. Attachment B at 40 (emphasis added). Because the OCCA mistakenly believed "the kind" of organic brain damage evidence Mr. Frederick had "would not impair his day-to-day activities" and had no "connection . . . [to] his criminal conduct," *id.*, the prejudice determination necessarily rested on an

incorrect understanding of the totality of the mitigation evidence. Under these circumstances, even viewed through AEDPA's deferential lens, I believe Mr. Frederick has satisfied the requirements of § 2254(d)(2).

V

Mr. Frederick has carried his burden to show the OCCA's ruling on the brain damage evidence claim was "contrary to" and an "unreasonable application of" clearly established Supreme Court authority and was "based on an unreasonable determination of the facts in light of the evidence presented." § 2254(d)(1), (2). The majority opinion reaches the opposite conclusion, and while I respect the decision of the court, I cannot join it.

"As capital punishment has traveled its long and tortuous path, we have kept faith in the outcome of its attending adversarial process of trial by jury." *Canales* v. *Davis*, 966 F.3d 409, 428 (5th Cir. 2020) (Higginbotham, J., dissenting). "Our adversarial system," however, "works only when it is adversarial." *Id.* It "is essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Strickland*, 466 U.S. at 705 (Brennan, J., concurring in part) (quoting *Jurek*, 428 U.S. at 276). "[A]n individualized decision is essential in capital cases." *Lockett*, 438 U.S. at 605.

Every stakeholder in this case has acknowledged the complete absence of mitigating evidence offered to spare Mr. Frederick's life. At trial, Mr. Rowan

admitted to the jury he had no evidence to explain Mr. Frederick's behavior. The state successfully challenged two proffered defense mitigators because they lacked a factual basis, and the trial court acknowledged the jury cannot hear about a mitigating factor wholly unsupported by evidence. The OCCA recognized "Mr. Rowan's presentation of a single second stage witness, presented only through the reading of the transcript from a prior proceeding, and the omission of any mental health experts, seems to be an obvious case for a finding of ineffectiveness." Aplt. Br. Attachment B at 41. And the federal district court could not reconcile defense counsel's utter lack of investigation into Mr. Frederick's brain damage with the decision to make brain damage the center of the penalty-stage defense.

No jury appraised the significant mitigating evidence about Mr. Frederick's brain damage that competent counsel would have discovered. Despite the "enormous stakes confronted in [his] capital case," Mr. Frederick's jury was denied the opportunity to make a principled, individualized sentencing decision because trial counsel did not "equip[them] with the 'fullest information possible concerning [Mr. Frederick's] life and characteristics.'" *Hanson* v. *Sherrod*, 797 F.3d 810, 830 (10th Cir. 2015) (citation omitted). Under these circumstances, I have no faith in the sentencing outcome and cannot affirm the ultimate punishment of death for Mr. Frederick.

I respectfully dissent.

FILED
United States Court of Appeals
Tenth Circuit

August 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARRELL WAYNE FREDERICK,

Petitioner - Appellant,

v.

Christe Quick, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 20-6131
(D.C. No. 5:19-CV-00037-SLP)
(W.D. Okla.)

JUDGMENT

Before **MATHESON**, **CARSON**, and **ROSSMAN**, Circuit Judges.

This case originated in the Western District of Oklahoma and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Attachment A