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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ISAIAH GLENNDELL TRYON,

Petitioner - Appellant,

v.

CHRISTE QUICK, Acting Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 21-6097

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:19-CV-00195-J)

Callie Heller, Assistant Federal Public Defender, Office of the Federal Public Defender (Andrew Stebbins, Research and Writing Specialist, Office of the Federal Public Defender, with her on the briefs), Oklahoma City, Oklahoma, for Petitioner – Appellant.

Jennifer L. Crabb, Assistant Attorney General (John M. O'Connor, Attorney General of Oklahoma, with her on the brief), Oklahoma City, Oklahoma, for Respondent – Appellee.

Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

Isaiah Glenndell Tryon accosted Tia Bloomer, his estranged girlfriend and the mother of his son, in a bus station and stabbed her seven times, resulting in her death. A jury convicted Mr. Tryon of first-degree murder. During a sentencing trial, the

State of Oklahoma ("State") presented evidence of Mr. Tryon's lengthy criminal history and impulsively violent behavior, including testimony about him physically abusing Ms. Bloomer on other occasions, discharging a firearm at a crowd of fleeing people, and fighting while in custody in 2009 and 2013. In a mitigation effort, Mr. Tryon highlighted his difficult upbringing, his parents' substance abuse, his history of depression, several head injuries, and his low Intelligence Quotient ("IQ"). Mr. Tryon also presented expert testimony from John Fabian, a neuropsychologist, and David Musick, a sociology professor. Important to this matter, Mr. Fabian testified that Mr. Tryon was not intellectually disabled. Furthermore, although Mr. Tryon scored a 68—a score below the intellectual disability threshold of 75—on an IQ test administered by Mr. Fabian, Mr. Tryon had scored an 81 on an IQ test administered when he was fourteen. And Mr. Fabian conceded that the score of 68 was low and did not reflect Mr. Tryon's full intellectual capacity.

A jury selected a sentence of death. On direct appeal, appellate counsel raised twenty claims of error, none of which involved ineffective assistance of trial counsel. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Mr. Tryon's conviction and sentence. In an original application for state post-conviction relief, Mr. Tryon argued appellate counsel was ineffective for not arguing that trial counsel was ineffective for (1) not presenting an intellectual disability defense; (2) not obtaining neuroimaging of Mr. Tryon's brain; and (3) not countering the 2009 jail fight evidence. The OCCA rejected these claims on the respective grounds that (1) Mr. Tryon's IQ score of 81, even when accounting for the standard margin of

measurement error, excluded him from an intellectual disability defense under Oklahoma law; (2) Mr. Tryon could not establish ineffective assistance where he did not support his claim with any neuroimages; and (3) additional evidence on the 2009 jail fight was not admissible and, in any event, Mr. Tryon did not suffer prejudice from trial counsel's failure to introduce it.

Mr. Tryon next sought federal habeas relief, while also filing a successive application for post-conviction relief with the OCCA. As to the successive application for post-conviction relief, the OCCA concluded all of Mr. Tryon's claims of ineffective assistance of appellate counsel were procedurally barred because he could have raised them in his original application for post-conviction relief. Thereafter, the district court also denied relief on Mr. Tryon's federal habeas petition. Presently before us are four issues (1) whether to expand the certificate of appealability ("COA") to consider a claim that appellate counsel was ineffective for not arguing that trial counsel was ineffective for not challenging the constitutionality of Oklahoma's statute governing intellectual disability defenses and for not presenting an intellectual disability defense; (2) whether appellate counsel was ineffective for not arguing trial counsel was ineffective for not obtaining and presenting neuroimages; (3) whether appellate counsel was ineffective for not arguing trial counsel was ineffective for not countering the 2009 jail fight evidence; and (4) cumulative error based on ineffective assistance of appellate counsel.

Having considered each of these issues, we deny Mr. Tryon's motion to expand the COA and affirm the district court's denial of relief. First, we deny the

motion to expand the COA because trial counsel did challenge the constitutionality of the Oklahoma statute, Mr. Tryon's own expert testified that Mr. Tryon was not intellectually disabled, and any constitutional challenge appellate counsel could have advanced had no chance of success. Second, on the neuroimages claim, we conclude Mr. Tryon's argument premised on evidence of Fetal Alcohol Spectrum Disorder ("FASD") is unquestionably procedurally barred and outside the scope of the COA. We also conclude the OCCA did not unreasonably apply federal law when holding Mr. Tryon could not demonstrate ineffective assistance of counsel without presenting imaging and accompanying expert reports in his original application for post-conviction relief. Third, we conclude Mr. Tryon did not establish the admissibility of the 2009 jail fight evidence he faults trial counsel for not presenting and that the OCCA did not unreasonably apply federal law by concluding additional mitigation efforts would not have changed the result of the sentencing proceeding. Fourth, having identified no instances of deficient performance, Mr. Tryon's cumulative error claim necessarily fails.

I. BACKGROUND

A. Offense Conduct

In pursuing § 2254 relief, Mr. Tryon confines his challenges to his sentence, without advancing any attacks against his conviction or the OCCA's statement of the facts of his offense conduct. Therefore, and in accord with 28 U.S.C. § 2254(e)(1), we rely upon the OCCA's summary of the facts surrounding the murder:

On March 16, 2012, around 10:30 a.m., [Mr. Tryon] fatally stabbed Tia Bloomer inside the Metro Transit bus station in downtown Oklahoma City. Tia recently broke off her relationship with [Mr. Tryon] due in part to his inability to support their infant child. . . . The couple too had a stormy relationship. The day before her death . . . Tia called Detective Jeffrey Padgett of the Oklahoma City Police Department (OCPD) Domestic Violence Unit to schedule a follow-up interview for an assault case in which she was the named victim. Tia previously denied to authorities that [Mr. Tryon] had assaulted her. Instead, she claimed another man had assaulted her.

During her phone conversation with Detective Padgett, Tia repeated this claim but agreed nonetheless to meet the next day. Later that night, Tia sent [Mr. Tryon] a text message stating the following:

> It's okay bc im [sic] going to tell the truth tomorrow. I'm tired of holding lies for yhu [sic]. Isaiah Tryon is the guy who choked nd [sic] nearly killed me Saturday.

The next day, [Mr. Tryon] accosted Tia inside the downtown bus station while she was talking on her cell phone. Surveillance video from inside the terminal showed [Mr. Tryon] speaking to Tia before stabbing her repeatedly with a knife. Immediately before this brutal attack, an eyewitness heard Tia yell for [Mr. Tryon] to leave her alone. [Mr. Tryon] then stabbed Tia in the neck with the knife, causing blood to gush out from her neck. The surveillance video shows [Mr. Tryon] grabbing the victim then stabbing her when she tried to leave the terminal building. [Mr. Tryon] stabbed the victim repeatedly after she fell to the floor. The victim said "help" as [Mr. Tryon] continued stabbing her repeatedly and blood gushed out of her wounds. During the attack, several bystanders unsuccessfully attempted to pull [Mr. Tryon] off the victim. At one point, a bystander can be seen on the surveillance video dragging [Mr. Tryon] across the floor while [Mr. Tryon] held on to Tia and continued stabbing her.

[Mr. Tryon] released his grip on the victim only after Kenneth Burke, a security guard, sprayed him in the face with pepper spray. The security guard then forced [Mr. Tryon] to the ground, handcuffed him and ordered the frantic crowd to move away both from [Mr. Tryon] and the bloody scene surrounding the victim's body. A bloody serrated knife with a bent blade was found resting a short distance away on the floor.

While waiting for police to arrive, Burke checked on the victim but found no signs of life. Paramedics soon arrived and decided to transport the victim to the hospital because they detected a faint pulse. Despite the efforts of emergency responders, Tia died from her injuries. The medical examiner autopsied the victim and found seven (7) stab wounds to her head, neck, back, torso and right hand. Several superficial cuts were also observed on the victim's face and the back of her neck. The medical examiner testified these cuts were consistent with having been made by a serrated blade. The cause of death was multiple stab wounds. In addition to these injuries, the medical examiner observed redness and heavy congestion in the victim's eyes. The medical examiner did not associate this congestion with the victim's stab wounds but testified it is sometimes found in cases of strangulation.

* * *

After being released from the hospital, [Mr. Tryon] was transported to police headquarters. There, he was read the Miranda warning by OCPD Detective Robert Benavides and agreed to talk. During his interview, [Mr. Tryon] admitted stabbing Tia repeatedly while inside the bus terminal. [Mr. Tryon] said he stabbed the victim six times with a kitchen knife he brought from home. [Mr. Tryon] explained that he and Tia recently broke up and that they had been fighting over his support of their infant son. When [Mr. Tryon] saw Tia at the bus station, he walked up and tried to talk with her about their problems. Tia refused and told [Mr. Tryon] to get away from her. That is when [Mr. Tryon] said he pulled out his knife and began stabbing her.

[Mr. Tryon] claimed he did not know Tia would be at the bus station that morning or that he would even see her that day. [Mr. Tryon] did know, however, that Tia had some business to take care of that day. [Mr. Tryon] admitted bringing the knife with him because if he saw Tia, he planned to stab her. [Mr. Tryon] said Tia was facing him when he grabbed her and started stabbing her in the neck. [Mr. Tryon] described how he continued stabbing Tia after she fell to the ground and how he kept hold of her arm. [Mr. Tryon] said he was sad and depressed when he stabbed Tia because he didn't want to be without her. Nor did he want anyone else to be with her. [Mr. Tryon] did not believe he could find someone else to be with. [Mr. Tryon] admitted that what he did to Tia "wasn't right." At one point during the interview, [Mr. Tryon] demanded protective custody because "people ain't gonna like that type of shit" and would try to kill him in the county jail.

> During the interview, [Mr. Tryon] asked whether Tia was okay. Detective Benavides promised to let him know about Tia's condition as soon as he found out. When informed by Detective Benavides at the end of the interview that Tia did not survive her injuries and was dead, [Mr. Tryon] showed no emotion to this news.

Tryon v. State, 423 P.3d 617, 625–26 (Okla. Crim. App. 2018) (*Tryon I*) (citation and footnote omitted). A jury convicted Mr. Tryon of one count of murder in the first degree. *Id.* at 625.

B. Sentencing Stage Trial

1. Pre-Trial Proceedings

The State filed a Bill of Particulars in re Punishment that alleged four "aggravating circumstances" in support of the death penalty, including: (1) "[t]he murder was especially heinous, atrocious, or cruel," (2) "[t]he defendant was previously convicted of a felony involving the use or threat of violence to the person," and (3) "[a]t the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society."[1] State Criminal Appeal Original Record at 34. In support of the murder being "especially heinous, atrocious, or cruel," the State advanced three allegations. First, the State pointed to the seven stab wounds, describing each:

- Right side of Ms. Bloomer's head;

[1] The Bill of Particulars in re Punishment also alleged, as an aggravating circumstance, that "[t]he murder was committed by a person while serving a sentence of imprisonment on conviction of a felony." State Criminal Appeal Original Record at 34. Although the jury found the State proved this aggravating circumstance, the OCCA invalidated this finding on the ground that Mr. Tryon was serving a probated sentence on which he had never been incarcerated. *Tryon v. State*, 423 P.3d 617, 648–50 (Okla. Crim. App. 2018) (*Tryon I*).

- Right side of Ms. Bloomer's neck, perforating her larynx;
- Right breast, with depth down to Ms. Bloomer's lung;
- Right side of Ms. Bloomer's torso, with a depth of 4.5 cm, reaching into her lung and a lobe of her liver;
- Right hand, with full penetration, through and through;
- Upper back of Ms. Bloomer's neck, with 4 cm depth cutting into her C1 vertebrae bone;
- Left side of Ms. Bloomer's upper back, with 5 cm depth.

Second, the State noted Mr. Tryon committed the murder in a public place such that Ms. Bloomer's suffering was exposed to public view. Third, the State asserted Ms. Bloomer's death was not instantaneous, causing her to experience suffering, as evidenced by the blood found in her airway.

In support of Mr. Tryon having sustained a previous conviction for a felony involving the use or threat of violence to a person, the State relied upon a 2009 incident resulting in Mr. Tryon pleading guilty to four counts of assault with a dangerous weapon. These convictions derived from Mr. Tryon chasing a group of five individuals out of a hotel and shooting at them as they fled across a parking lot.

Finally, the State offered a long list of accusations to support the final aggravating circumstance, that Mr. Tryon was a continuing threat to society. First, the State identified the callous nature of the offense, which supports the aggravating circumstance under Oklahoma law. Second, the State contended Mr. Tryon was a known member of the "Outlaw 30's Blood" gang and had been a gang member since 2004. *Id.* at 1105. Third, the State pointed to the fact that Mr. Tryon had been involved in three physical altercations while in custody, including one in November 2009 and one in August 2013, while in pre-trial detention for the murder charge.

Fourth, the State identified ten criminal incidents in which Mr. Tryon was the perpetrator: (1) a 2001 Assault and Battery incident where Mr. Tryon punched a female student, chipping four of her teeth, because she "snitched too much," *id.* at 1106; (2) a 2004 Concealed Weapon incident where a police officer stopped Mr. Tryon on a bike and Mr. Tryon fled while attempting to draw a 9-millimeter handgun on the officer; (3) a 2005 Domestic Assault and Battery incident where Mr. Tryon kicked, choked, and punched his younger brother; (4) a 2007 Disorderly Conduct incident where Mr. Tryon threatened a principal at school; (5) the 2009 Assault with a Dangerous Weapon incident involving the shooting outside of the hotel, as already described in support of the prior aggravating circumstance; (6) a 2010 Domestic Assault and Battery incident in which Mr. Tryon repeatedly punched Ms. Bloomer, resulting in her needing medical care; (7) a 2010 Assault and Battery with a Dangerous Weapon incident where Mr. Tryon brandished a revolver at several people in a house and then fired a round in the direction of Ms. Bloomer while she held their two-month-old son; (8) a 2011 Assault and Battery with a Dangerous Weapon incident where Mr. Tryon slashed Ms. Bloomer's nephew with a knife above his eye; (9) a 2011 Domestic Assault and Battery incident where Mr. Tryon choked and headbutted Ms. Bloomer while she held their son; and (10) a 2012 Obstructing Officer incident where Mr. Tryon refused to obey officer commands to leave a third party's residence and then attacked the officers by hitting and kicking them. Fifth, the State pointed to Mr. Tryon's behavior in juvenile facilities, including that he threw a chair at a girl, punched another girl, had violent outbursts toward staff, ran away

from a group home, and possessed a knife while absent without leave from the group home. Sixth, the State relied upon a psychiatric evaluation that concluded Mr. Tryon was "not capable of forming a close emotional bond with anyone and would not be able to experience appropriate guilt or remorse for what he does." *Id.* at 1114. Seventh, and finally, the State alleged Mr. Tryon was "physically abusive towards [Ms.] Bloomer in the days prior to her death," including that, three days prior to the murder, he choked her until she passed out. *Id.* at 1114.

Mr. Tryon filed a Notice of Intent to Raise Intellectual Disability/Mental Retardation as a Defense to the Death Penalty and Motion to Quash Bill of Particulars.[2] In the motion, Mr. Tryon cited *Atkins v. Virginia*, 536 U.S. 304 (2002), for the proposition that "the Eighth Amendment prohibits inflicting the death penalty on mentally retarded defendants." *Id.* at 917. Mr. Tryon further argued he satisfied Oklahoma's definition of intellectually disabled because he scored a 68 on a recent IQ test. Mr. Tryon additionally asserted he suffered from "deficits in adaptive functioning throughout childhood, learning disabilities, and difficulties with the social requirements of school." *Id.* at 918. And, in support of his motion, Mr. Tryon requested a hearing on the issue of intellectual disability. Further, in a footnote,

[2] At the time of Mr. Tryon's case, the controlling Oklahoma statute used the phrase "mentally retarded." Okla. Stat. tit. 21, § 701.10b(A–C) (2006). In 2019, the Oklahoma Legislature amended the statute, replacing "mentally retarded" with "intellectually disabled." *See* Okla. Stat. tit. 21, § 701.10b(A–C) (2019). We use the phrase "intellectually disabled" in this opinion, except when quoting case law or documents that use "mentally retarded."

Mr. Tryon indicated an intent to challenge the constitutionality of Section 701.10b of Title 21 of the Oklahoma Statutes, which governs the criteria for intellectual disability for purposes of exclusion from the death penalty. Finally, before the presentation of evidence at the sentencing stage of the trial, Mr. Tryon argued:

> going forward without having had an *Atkins* hearing or the ability to put forward such evidence, that subjecting Mr. Tryon to potential death penalty in this case is improper and a violation of *Hall v. Florida*[3] and everything prior to that. And also that the statute for which the State was relying upon, the language of the statute, is unconstitutional as it stands given the ruling in the *Hall v. Florida*.

Vol. V, Tr. Transcript at 1191.

The district court denied Mr. Tryon's motion and overruled his constitutional challenge to Section 701.10b of Title 21 of the Oklahoma Statutes. *Id.* at 1192. Mr. Tryon's case, therefore, proceeded to the sentencing phase of trial.

2. Expert Reports & Witness Testimony

In this subsection, we review the evidence presented during the sentencing phase of trial. We begin by summarizing the pre-trial expert reports and then describe the testimony offered by the state and Mr. Tryon during the second stage, including sentencing witnesses.

a. Expert witness reports

Three reports helped frame trial counsel's development of a mitigation strategy. We discuss each in turn.

[3] 572 U.S. 701 (2014).

i. Assessment report of Nelda Ferguson, licensed psychologist

Nelda Ferguson was an independent licensed psychologist who evaluated Mr. Tryon when he was fourteen-and-a-half years old, following a transfer from juvenile detention to an inpatient medical center after he allegedly attempted to hang himself.[4] Ms. Ferguson administered a battery of performance tests, yielding the following results. On a Wechsler Intelligence Scale for Children III test, Mr. Tryon scored an 81 for a full-scale IQ, with a Verbal IQ of 87 and a Performance IQ of 78. The test also revealed a (1) verbal comprehension of 88, which equated to the 21st percentile; (2) perceptual organization score of 85, placing Mr. Tryon in the 16th percentile; (3) freedom from distractibility rating of 87, placing Mr. Tryon in the 19th percentile, and (4) processing speed score of 77, equating to the 6th percentile. A Bender Gestalt test suggested Mr. Tryon had "poor impulse control." ROA Vol. 2 at 460. Further, an academic achievement test showed Mr. Tryon, who was then in eighth grade but was old enough to be in ninth grade, had (1) an oral reading percentile of 42, equating to an eighth-grade level; (2) a spelling percentile of 45, equating to a seventh-grade level; and (3) an arithmetic percentile of 12, placing him at the fifth-grade level. Ms. Ferguson summarized these results by stating Mr. Tryon had "good academic skills" but his "achievement in math is somewhat lower than reading and spelling." *Id.* at 461.

[4] Of the experts, Ms. Ferguson was the only one to evaluate Mr. Tryon before he turned eighteen, the time at which an intellectual disability must have manifested for purposes of raising an intellectual disability defense under Oklahoma law, Okla. Stat. tit. 21, § 701.10b(B).

Ms. Ferguson also conducted a personality assessment, including a Rorschach ink blot test, and advanced the following findings:

> [Mr. Tryon] presents as a young man who has been *involved in numerous sociopathic and delinquent behaviors for which he exhibits no guilt or remorse*. He talks about being depressed. ([Mr. Tryon] is depressed because he is locked up, *but there is no evidence of any type of major depression*.)
>
> * * *
>
> [Mr. Tryon] talks about missing his mother, *but his relationship with her is not good. They have a dysfunctional relationship* which both are covering up. This is a young man who can also be expected to have problems in most relationships. He has been suspended from school for fighting. His sister reportedly called and reported that he had hit her, and he was charged with domestic abuse (2 counts) involving a cousin. *The absence of a human response on the Rorschach is an ominous indicator that [Mr. Tryon] is not capable of forming a close emotional bond with anyone and he will not be able to experience appropriate guilt or remorse for what he does.*
>
> [Mr. Tryon] has such a great fear of getting out of the hospital and going back to the same neighborhood that he will likely continue doing things to keep himself in the hospital.

Id. at 461 (emphasis added). Consistent with aspects of this opinion, Mr. Tryon reported to Ms. Ferguson that his suicide attempt was a ploy to get out of the detention facility.

ii. Report of John Fabian, forensic & clinical psychologist

Mr. Fabian, one of two experts retained by Mr. Tryon, began his report by detailing Mr. Tryon's homelife growing up, as told by Mr. Tryon during a pair of interviews conducted by Mr. Fabian, one in 2012 and one in 2014. Mr. Tryon reported that there was "significant domestic violence between his parents," that both

of his parents abused crack cocaine, and that his father had a criminal history and was in and out of prison. Fabian Report (Court Ex. 6) at 2. Mr. Tryon also reported that his "family was very poor," that they had to move frequently because of evictions, and that his family lived with one of his aunts at times, especially when his mother was too high on crack to care for the children. *Id.* at 4. Finally, Mr. Tryon claimed that one of his aunts sexually abused him.

Mr. Tryon also reported several items regarding his own criminality and drug usage. Mr. Tryon admitted joining the Outlaw 30s Blood Gang. Mr. Tryon further admitted to using PCP and alcohol starting at age fifteen and to selling drugs in the neighborhood. Finally, Mr. Tryon described incidents where his mother compelled him to sell her drugs under the threat that she would call the police and return him to juvenile court. This happened at times when Mr. Tryon had run away from a juvenile detention group home.

Mr. Fabian's report next discussed Mr. Tryon's intellectual capacity. Mr. Fabian reviewed school records that showed, in addition to the IQ test administered by Ms. Ferguson, Mr. Tryon scored a 75 on an IQ test administered when he was age ten. Those test records also showed Mr. Tryon had several performance scores equivalent to or above the fifth-grade level, some performance scores in the second- and third-grade level, and many achievement scores in the "average" range. *Id.* at 6. School assessments, however, noted that Mr. Tryon had a high "frustration level" and a "learning disability for language impairment." *Id.* at 7.

Mr. Fabian conducted his own IQ and performance testing on Mr. Tryon, which produced the following results. Mr. Tryon scored a full-scale IQ of 68, placing him in the "2nd percentile and extremely low range and mild mentally retarded range." *Id.* at 13. Mr. Fabian opined this full-scale IQ score was significantly impacted by Mr. Tryon's processing speed score of 62, which placed him for that component in the "1st percentile, extremely low range." *Id.* at 13. Several other aspects of the test, however, placed Mr. Tryon above the intellectually disabled range, including (1) verbal comprehension in the 7th percentile; (2) perceptual reasoning in the 5th percentile; and (3) working memory in the 4th percentile. *Id.* at 13. Further, Mr. Tryon performed better on a neuropsychological and cognitive functioning test, on which he placed in the 21st percentile. Finally, Mr. Fabian placed Mr. Tryon's readings skills between sixth and ninth grade and his arithmetic skills in the third- or fourth-grade range. Based on all the available data regarding Mr. Tryon's intellect, Mr. Fabian opined that "I *cannot* say that Mr. Tryon is mentally retarded by history developmentally, but he is functioning in that range currently." *Id.* at 35 (emphasis added). Mr. Fabian did, however, recommend that "[g]iven Mr. Tryon's low intelligence and current IQ of 68, he should be considered for an *Atkins v. Virginia* mental retardation/intellectual disability evaluation." *Id.* at 38.

Regarding Mr. Tryon's mental health, Mr. Fabian reviewed Mr. Tryon's records and noted that, in 2004, Mr. Tryon was diagnosed with Major Depressive Disorder, Conduct Disorder, Impulse Control Disorder, and Cannabis Abuse.

Furthermore, Mr. Fabian discussed Mr. Tryon having reported three suicide attempts and that for much of his teenage years there was concern that, in the absence of mental health services, he would attempt to inflict serious bodily harm on himself or another person. Additionally, Mr. Fabian noted that Mr. Tryon's reported mental health symptoms were consistent with Major Depressive Disorder. Based on his evaluation, Mr. Fabian diagnosed Mr. Tryon as suffering from (1) Major Depressive Disorder; (2) probable Bipolar Disorder; (3) Attention Deficit/Hyperactivity Disorder ("ADHD"); (4) substance dependence to PCP, alcohol, and cannabis; and (5) Antisocial Personality Disorder. Mr. Fabian also concluded that Mr. Tryon "likely has a longstanding condition of . . . frontal damage and dysfunction in the brain." *Id.* at 35. And Mr. Fabian noted that there was evidence of Post-Traumatic Stress Disorder ("PTSD") but that Mr. Tryon was exaggerating his reports and symptoms.

Specific to the mitigation effort, Mr. Fabian offered nine factors on which the defense could focus:

1) Intellectual deficiency (*IQ's around 80* indicating borderline range of intelligence)
2) Low commitment to school and poor academic success
3) Head injury, neurological injury, and organic brain impairment
4) Neuropsychological and cognitive deficit
5) Psychiatric disorders, primarily schizophrenia and affective disorders
6) History of familial family abuse/neglect
7) Parental substance abuse
8) Family separation
9) History of substance dependence

Id. at 19–20 (emphasis added). But, as emphasized in the first factor, Mr. Fabian concluded Mr. Tryon's real IQ was "around 80" and that he functioned in the "borderline range," rather than the intellectually disabled range. *Id.* at 19.

iii. Report of Robert Musick, sociology professor

Professor Musick reviewed a similar set of records as Mr. Fabian and also interviewed Mr. Tryon, Mr. Tryon's mother, and one of Mr. Tryon's brothers, Rico Wilson. Professor Musick commenced his report by summarizing Mr. Tryon's upbringing and familial situation, making several observations similar to Mr. Fabian's but doing so in greater detail. From interviewing Rico Wilson, Professor Musick learned that Mr. Tryon's father not only beat Mr. Tryon's mother but also beat Mr. Tryon and Mr. Tryon's male siblings. Professor Musick also discussed the impact the death of Mr. Tryon's maternal grandmother had on the family, as she was a "stabilizing force" in Mr. Tryon's life. ROA Vol. 2 at 744. Professor Musick concluded that Mr. Tryon's behavior at school became more disruptive following the death of his grandmother and that Mr. Tryon turned to a gang member as a mentor and role model. Professor Musick also drew a temporal correlation between the passing of Mr. Tryon's grandmother and Mr. Tryon's abuse of marijuana, alcohol, and PCP.

Professor Musick next discussed several head injuries Mr. Tryon reported sustaining: (1) a 2001 or 2002 incident where he was hit by a car while riding a bike; (2) a 2008 incident when he fell over a bike; (3) a 2010 incident where he was a passenger in a vehicular crash; (4) a fight against three individuals as a means of

gaining entrance to the gang; and (5) a history of banging his head against the wall. Professor Musick opined that Mr. Tryon might have suffered one or more traumatic brain injuries ("TBIs"), and that:

> Researchers have found that most TBIs are mild, and if undiagnosed, receive no treatment or inappropriate treatment. TBIs can contribute to increased irritability, depression or anxiety. TBIs can produce behavioral changes like impulsive behavior, reduced frustration tolerance, lack of empathy, emotional instability, apathy or aggression. If undiagnosed and left untreated, or if inappropriately treated, TBIs can lead to alcohol and drug abuse. It is also important to note that repeated "subconcussive collisions," such as those experienced by persons fist fighting, can lead to "progressive brain disease connected to depression and cognitive impairment." Consequently, it is relevant that the defendant experienced blows to the head.

Id. at 748 (footnotes with citations omitted).

Finally, Professor Musick provided a summary of the opinion he was prepared to offer at trial:

> [Mr. Tryon] *was tortured as a child*. His mother, Sheryl Wilson, was a crack cocaine addict, who could straighten up enough to manipulate the system. She could be there for a brief school conference, where her signature might be required. She could meet with the occasional probation officer, counselor or juvenile court official. She could apply for and get, food stamps for herself, and Social Security benefits for [Mr. Tryon]. However, the rest of the time, Sheryl Wilson was drugged on crack cocaine. She was incapable of caring for, or protecting, her children, including [Mr. Tryon]. [Mr. Tryon], periodically, watched his father beat his mother, again-and-again. [Mr. Tryon] and his siblings were left with relatives and others, who denied them food, who made them sleep on floors and who said hurtful things about them, in their presence. It is clear that [Mr. Tryon] was exposed to a *grossly pathological style of care by his mother and father*. This treatment by his parents left [Mr. Tryon] with a large body of pain, with an overriding fear of abandonment (then, focused on his mother), and with a recurring desire to commit suicide. As he grew older, [Mr. Tryon] took these qualities into his relationships. Simply put, [Mr. Tryon] hurt so bad that he wanted to die. *When faced with abandonment by the one*

> *to whom he had transferred his love and attachment, [Mr. Tryon] lashed out, and killed*. [Mr. Tryon] was a tortured soul that day. He had been a tortured soul since early childhood. A likely final element of this tragic episode is put into place when we consider head injuries experienced by the defendant during his short life. *Again-and-again, his head has been exposed to physical trauma, the type of trauma that can lead to impulsive behavior, lack of empathy, emotional instability and aggression*. [Mr. Tryon's] head injuries, too, must be taken into consideration as mitigating factors. In sum, [Mr. Tryon] was pushed along a path, largely by family pathology, by gang membership, and possibly by head injuries, that lead to the tragic event making this trial necessary.

Id. at 751–52. Professor Musick's report, however, neither suggested the need for any follow-up evaluations or testing nor concludes Mr. Tryon was intellectually disabled.

b. Trial evidence

i. State's case in support of aggravating circumstances

The State began its second stage case by presenting, through stipulation, Mr. Tryon's judgment of conviction from when he pleaded guilty to four counts of assault with a dangerous weapon and received a ten-year deferred sentence stemming from the incident where he chased after and then shot at a crowd of people outside a hotel. This evidence established the aggravating circumstance that Mr. Tryon "was previously convicted of a felony involving the use or threat of violence to the person." *See* State Criminal Appeal Original Record at 34.

The rest of the State's second stage case, in the form of witness testimony, focused on the continuing threat aggravator and can be broken into two parts—

testimony about Mr. Tryon's violent and criminal behavior in the community and testimony about two altercations Mr. Tryon was involved in while in custody.[5]

As to Mr. Tryon's violent and criminal behavior in the community, the State offered testimony from four police officers about various criminal incidents where Mr. Tryon was the perpetrator. Two of the witnesses provided particularly striking testimony. First, Lieutenant Jermaine Johnson testified that he attempted to stop a juvenile Mr. Tryon for smoking a cigarette but Mr. Tryon fled and tried to draw a 9-millimeter handgun on Lieutenant Johnson. Second, Sergeant Bradley Pittman testified about observing the incident where Mr. Tryon fired a weapon at a crowd of fleeing individuals, as well as the arrest of Mr. Tryon thereafter and the recovery of a Colt Python .357 revolver. In addition to the testimony of police officers, the State elicited testimony from Tamara Pitts, one of Mr. Tryon's cousins, that Mr. Tryon had punched her in the eye, resulting in her signing an assault and battery complaint against Mr. Tryon.

As to Mr. Tryon's conduct and the threat he posed to other inmates while in custody, the State presented three pieces of evidence. First, the State offered testimony from Tye Hart, an employee at the Oklahoma County Jail when Mr. Tryon was in custody in 2009 in relation to a different offense. Mr. Hart testified that, while

[5] The State also incorporated its first-stage evidence pertaining to the murder of Ms. Bloomer, including testimony from the medical examiner, in support of the heinous, atrocious, or cruel aggravator. Because Mr. Tryon, in this appeal, does not advance any challenge to the heinous, atrocious, or cruel aggravator, we do not discuss this testimony.

on duty, he observed a fight in the dayroom between two inmates, one of whom was Mr. Tryon. On cross-examination, though, Mr. Hart conceded that he did not know which inmate started the fight and that Mr. Tryon obeyed orders and stopped fighting upon command. However, counsel for Mr. Tryon did not further probe Mr. Hart regarding Mr. Tryon's involvement in the fight and failed to present a misconduct report concluding the other inmate "jumped" Mr. Tryon. *See* Original Application for Post-Conviction Relief—Death Penalty Case at Attach. 16, *Tryon v. State*, PCD-2015-378 (Okla. Crim. App. Apr. 27, 2017) (*Tryon II*) (misconduct report on jail fight concluding other inmate instigated the fight and Mr. Tryon acted in self-defense).

Second, the State presented testimony from Timothy Mundy, an intake officer at the pre-trial detention facility at which Mr. Tryon was held following his arrest for the murder of Ms. Bloomer. Mr. Mundy testified that Mr. Tryon admitted membership in the Outlaw Bloods gang and that Mr. Mundy observed numerous gang tattoos on Mr. Tryon's body.

Third, the State put forth testimony from Corporal Nathan Hanson, a disciplinary grievance coordinator at the detention facility at which Mr. Tryon was held while awaiting trial for the murder of Ms. Bloomer. Corporal Hanson testified that he was tasked with investigating a 2013 fight in which Mr. Tryon was involved. As part of his investigation, Corporal Hanson watched a video of the fight. The video, which was played for the jury, shows Mr. Tryon walking up to another inmate and instantaneously punching the inmate and wrestling the inmate to the ground, all

without any apparent provocation. This concluded the State's evidence in support of the aggravating circumstances.

ii. Mr. Tryon's mitigation effort

Mr. Tryon presented a two-fold mitigation defense, relying on testimony from Mr. Fabian and Professor Musick to discuss his intellectual functioning and mental health history and testimony from family members and Professor Musick to paint a picture of his poor upbringing.

Mr. Fabian testified in a manner generally consistent with his report. Mr. Fabian explained Mr. Tryon suffered from "polytrauma," "significant trauma," and "numerous types of trauma," which placed him at greater risk for committing violent acts, such as the murder of Ms. Bloomer. Vol. VII, Tr. Transcript at 1649–50. In total, Mr. Fabian identified for the jury eight traumas that placed Mr. Tryon in a high-risk category:

- Domestic violence in upbringing and Roy Tryon beating the children and displaying violence
- Parental separation
- Lack of parental attachment from his mother due to her crack cocaine use
- Exposure to violence in the community
- Reported sexual abuse by his aunt
- Criminality in his family, which under a social learning theory, Mr. Tryon tended to mirror
- Family history of mental illness from his father
- Mother's prenatal drug use

Mr. Fabian opined that exposure to these traumas and risk factors early in life impacted Mr. Tryon's brain development, especially his neurocircuitry development

governing problem solving skills, planning, processing, and impulse control. And Mr. Fabian opined that Mr. Tryon had few, if any, protective factors in his life to balance out the numerous risk factors.

Mr. Fabian also provided extensive testimony about Mr. Tryon's intellectual functioning and capabilities. Mr. Fabian informed the jury that he administered an IQ test on which Mr. Tryon scored a 68. However, Mr. Fabian downplayed the results of the IQ test, stating he considered that score "a bit low," and further opined that the scores "weren't really commensurate or real consistent" with other aspects of his neuropsychological assessment. *Id.* at 1669, 1678. Mr. Fabian described Mr. Tryon as "low functioning" but stated that he "d[id]n't believe Mr. Tryon [was] mentally retarded." *Id.* at 1654, 1671; *see also id.* at 1678, 1679, 1684 (three times describing Mr. Tryon as "low functioning"). Mr. Fabian further suggested that the low IQ score of 68 was attributable to Mr. Tryon being "emotionally overwhelmed" from being in detention during the IQ testing and that Mr. Tryon's low processing speed score, which particularly brought down his full-scale IQ score, might be attributable to "potential brain damage." *Id.* at 1672, 1678. Overall, Mr. Fabian concluded Mr. Tryon "functions likely somewhere in the borderline range of intelligence" with an IQ "around an 80." *Id.* at 1683. Mr. Fabian stated that Mr. Tryon is "low functioning and *certainly not mentally retarded . . . not so low as to be considered mentally retarded*." *Id.* at 1684 (emphasis added).

On cross-examination, Mr. Fabian described obstacles he encountered in compiling mitigating evidence as a result of funding limitations to pay for his expert

services and for testing he might otherwise have administered. For instance, Mr. Fabian indicated the approved expert fees did not permit him to conduct in-person interviews of collateral witnesses who could have provided additional perspective on Mr. Tryon's upbringing and corroborated Mr. Tryon's self-reports about his upbringing. More importantly, the prosecutor questioned Mr. Fabian about the lack of imaging verifying issues with Mr. Tryon's brain, specifically the lack of CAT scan or MRI imaging. Mr. Fabian responded that the neuropsychological tests he performed "suggested that there were deficits in executive function, where that would be part of the frontal lobe" and that he "discussed with the lawyers . . . that they should get his brain scan[ned] and there was a funding issue." *Id.* at 1750.

As for Professor Musick, he testified that Mr. Tryon was disaffected and alienated from the few stable people he had in his life because his aunts viewed his mother as a burden and him and his siblings as crack babies. Professor Musick also discussed what he called a 'family genogram' of gang involvement that placed Mr. Tryon on a path of violence. Professor Musick further attempted to tie Mr. Tryon's head injuries to his behavioral issues, lack of impulse control, lack of empathy, and aggression.

Professor Musick offered the following overall opinion about Mr. Tryon's life and trajectory:

> First and foremost, he was exposed to a grossly neglectful pattern of child care by his parents, but also by persons in whose custody he was left. And I believe that's the significant factor here.

> He was taught violence by his biological father. His mother participated in that by being a regular victim available and willing to take this man back in again and again. That the primary thing, in school, he simply couldn't perform as a normal child would and his behaviors were interpreted as his being aggressive and hostile and violent instead of the behaviors of a troubled little boy who needed help.
>
> He failed at school; he found a gang through relatives; joined a gang. From that moment on, his life, of course, was set in many ways. And his accumulating pain manifested by numerous suicide attempts demonstrates the degree to which this man, as a child, needed help.

Vol. VIII, Tr. Transcript at 1850–51. Mr. Tryon sought to support these opinions offered by Professor Musick through testimony from family members.

Mr. Tryon presented testimony from his sister, brother, cousin, and two aunts. Common themes in the testimony from these witnesses were (1) the abusive relationship between Mr. Tryon's parents; (2) Mr. Tryon's parents' addiction to crack cocaine while raising him; (3) Mr. Tryon's mother's absence from the home while on two-to-three-day drug binges; (4) Mr. Tryon's parents' absence from the home due to incarceration; (5) poverty creating insecurity in food and housing; and (6) incidents of Mr. Tryon engaging in self-harm behaviors. Mr. Tryon's brother also described an incident in which Mr. Tryon was stabbed when he was nineteen and how that incident prompted Mr. Tryon to carry a knife. These family witnesses, however, were not entirely beneficial to Mr. Tryon's mitigation effort, with several of them discussing Mr. Tryon's history of physically abusing Ms. Bloomer. Most damaging, Mr. Tryon's cousin testified about the incident where Mr. Tryon discharged a firearm in Ms. Bloomer's direction while she held her and Mr. Tryon's young son. Also underscoring Mr. Tryon's violent temper, Mr. Tryon's brother testified that

Mr. Tryon had choked him and then punched his sister, resulting in Mr. Tryon being charged with assault and battery. Finally, numerous family members discredited Mr. Tryon's allegation that an aunt sexually abused him. This created the impression that Mr. Tryon falsified reports to Mr. Fabian and Professor Musick in an effort to manipulate the expert opinions and the jury.

Also on the familial side, Mr. Tryon presented testimony from his father, Roy Tryon. Roy admitted to using drugs while raising Mr. Tryon and having a violent temper in the home. Roy also testified about his frequent absences from the home, in part due to him being incarcerated in a state penitentiary on four occasions. Finally, and of particular importance to one of the issues Mr. Tryon raises in this appeal, Roy testified about Mr. Tryon's mother's use of PCP and marijuana while pregnant with Mr. Tryon.

Finally on the familial side, Mr. Tryon presented testimony from his mother, Sheryl Wilson. Obtaining Sheryl's testimony proved challenging as she (1) claimed to be suffering from angina and was taken to the hospital on the first day of her scheduled testimony; (2) informed an investigator for the prosecution that she did not want to advocate for sparing Mr. Tryon's life; and (3) absconded from the courthouse during a recess in her testimony, resulting in Mr. Tryon asking the court to issue a warrant for his mother's arrest so that the sheriff could apprehend her and return her to the courthouse.

While on the witness stand, Sheryl confirmed many of the details of Mr. Tryon's upbringing but also downplayed the family's destitution and her failure

to nurture. For instance, she admitted using PCP, crack cocaine, and powder cocaine during her relationship with Roy, but contended her usage when raising Mr. Tryon was only intermittent and that she did not use cocaine around her children or on days when she was working. Sheryl did, however, readily admit that she used crack cocaine "practically every[]day" during the first eight months of her pregnancy with Mr. Tryon. Vol. VII, Tr. Transcript at 1546. And Sheryl admitted that she coerced Mr. Tryon into selling her cocaine at the threat of sending him back to juvenile detention. When it came to her relationship with Roy, Sheryl testified that he was abusive toward her but never toward the children.[6]

[6] This response, coupled with some sustained objections by the prosecutor, prompted an outburst from Mr. Tryon in which he yelled:

> Mama, tell it how it is, man fuck, Blood. * * * It can't be fucking hurt no more than I already in some shit. * * * I'm just saying quit holding things back. You need to tell them how the fuck it is. * * * I'm already facing the DP. Fuck these people, I'm saying. I don't give a fuck. I'm tired of this trial anyway. I need the death penalty. I don't give a fuck about this shit, man. * * * Yeah, just take me back to the jail. I mean, fuck, I don't need to be in here. Give me the DP. That's the fuck I've been asking for since day one. Give me the fucking DP, straight up, man. Quit bringing me the fuck over here, man.

Vol. VII, Tr. Transcript at 1555–56. Sheryl responded by stating, "I'm done too." *Id.* at 1556; *see also Tryon I*, 423 P.3d at 653. In the middle of Mr. Tryon's outburst, the jury was removed from the courtroom and the trial judge later instructed the jury to disregard Mr. Tryon's outburst. However, based on Mr. Tryon's argumentation on direct appeal, it appears "the jury heard [him] scream out . . . that he needed the death penalty." Brief for and on Behalf of Isaiah Glenndell Tryon at 96, *Tryon I* (Okla. Crim. App. May 12, 2016). Finally, although Mr. Tryon pursued an issue on direct appeal regarding the trial court's denial of his motion for a mistrial following his outburst, *Tryon I*, 423 P.3d at 652–53, Mr. Tryon did not pursue a claim for federal habeas relief on this ground.

Sheryl also provided some testimony about Mr. Tryon's troubled youth. While Sheryl denied Mr. Tryon ever made a serious attempt at suicide, she did confirm Mr. Tryon cut his wrists. She also confirmed that Mr. Tryon had significant behavioral issues, resulting in him being transferred to an alternative school in fourth or fifth grade, and her taking him to juvenile affairs when he was around fourteen. Furthermore, around the time of his stay in juvenile detention and a mental health treatment center, Mr. Tryon was prescribed Zoloft and Seroquel for depression. However, after the initial prescription ran out, Sheryl did not attempt to obtain a refill, leaving Mr. Tryon unmedicated. Finally, Sheryl testified she knew Mr. Tryon began using powder cocaine around age seventeen or eighteen and that he also used PCP.

Although her testimony supported or corroborated aspects of Mr. Tryon's mitigation effort, Sheryl, on both direct examination and cross examination, provided several pieces of testimony harmful to Mr. Tryon's mitigation effort. First, Sheryl expressed sympathy for Ms. Bloomer and discussed her own love for Ms. Bloomer. And, in contrast to these emotions, Sheryl described Mr. Tryon's physical attacks against Ms. Bloomer, including observing him "headbutting" and "beating" Ms. Bloomer. Vol. VIII, Tr. Transcript at 2065. Relatedly, Sheryl testified that Mr. Tryon frequently abused alcohol and that he was a violent drunk. Second, Sheryl testified that Mr. Tryon's violent episodes were directed at more than just Ms. Bloomer, as he attacked her on at least one occasion, resulting in her filing an assault and battery complaint against him. Third, Sheryl contended Mr. Tryon had

lied to his expert witnesses when accusing one of her sisters of sexually molesting him. Fourth, consistent with her comments to the prosecution's investigator, Sheryl never implored the jury to spare Mr. Tryon's life and not to return a verdict in favor of the death penalty. Notably, Sheryl was the only non-expert witness called by Mr. Tryon who did not ask the jury for mercy. Fifth, and maybe most striking and damaging, Sheryl blamed Mr. Tryon for her youngest son, Rico Wilson, joining the Outlaw 30s Bloods Gang, suggesting Mr. Tryon helped recruit Rico, and dehumanizing Mr. Tryon by calling him "*that one over there*" when testifying about the matter. *Id.* at 2001 (emphasis added).

3. Verdict

The trial court identified the State as having presented evidence on four aggravating circumstances, and Mr. Tryon does not challenge the trial court's instructions on any of the aggravating circumstances. The trial court also identified Mr. Tryon as presenting evidence on twenty-two mitigating circumstances for the jury's consideration: (1) remorse; (2) mental illness—depression with suicidal ideation; (3) being on a drug binge in the days before the murder; (4) childhood neglect and abuse; (5) mercy for Mr. Tryon's son; (6) mercy for Mr. Tryon's family; (7) mercy for Mr. Tryon; (8) "low functioning IQ"; (9) PTSD from when he was stabbed and from his childhood; (10) multiple head traumas affecting impulse control/decision-making; (11) suicidal history; (12) hyper-attachment disorder; (13) witness to spousal abuse; (14) violent neighborhood in childhood—gang violence, shootings; (15) young age (twenty-two) at time of offense; (16) mercy

generally; (17) mother's drug use during pregnancy; (18) parental drug use; (19) poverty; (20) family members' criminality; (21) victim of childhood sexual abuse; and (22) residential instability. The jury found the State proved all the aggravating circumstances. The jury also selected the death penalty as Mr. Tryon's punishment. The trial court issued a Death Warrant.[7]

C. Direct Appellate Proceedings

Mr. Tryon filed a direct appeal from his conviction and sentence to the OCCA. On appeal, Mr. Tryon raised twenty claims of error, of which twelve challenged aspects of the sentencing trial. In summary form, Mr. Tryon's twelve challenges to his sentence were: (1) the trial court limited his presentation on mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978); (2) as applied, the sentence violated the Eighth Amendment's provision against cruel and unusual punishment given that Mr. Tryon suffers from mental illness; (3) the State's reliance on a single prior conviction to support three aggravating circumstances violated the Eighth Amendment; (4) the commission of the offense while serving a term of imprisonment

[7] In addition to issuing the Death Warrant, the trial court completed a Capital Felony Report. In the report, the trial judge discussed the performance of each member of Mr. Tryon's defense team. The trial judge wrote, lead counsel "was very thorough with her cross-examination of witnesses and very thorough with her mitigation witnesses as well. [She] was very professional and did a great job." State Criminal Appeal Original Record at 1268. The second co-counsel, the trial judge commented, "was very thorough with his voir dire questions and did a great job with the jury selection. He fought hard for his client." *Id.* at 1272. Finally, the trial judge noted the third lead counsel "was very thorough with her cross-examination of witnesses and very thorough with the presentation of her mitigation stage . . . did a great job with her closing arguments." *Id.* at 1276.

aggravating circumstance was inapplicable because Mr. Tryon was serving a suspended sentence; (5) insufficient evidence supported the heinous, atrocious, and cruel aggravating circumstance; (6) application of the heinous, atrocious, and cruel aggravating circumstance was overbroad and violated the Eighth Amendment; (7) the trial court erred by not declaring a mistrial following Mr. Tryon's outburst that he wanted the death penalty; (8) prosecutorial misconduct infected the sentencing stage of the trial;[8] (9) imposition of the death penalty violates the Eighth Amendment generally; (10) the sentencing phase jury instructions placed greater emphasis on the aggravating factors than the mitigating factors; (11) the cumulative effect of errors warranted a new trial; and (12) the OCCA should use its mandatory sentence review authority to vacate the sentence of death. None of these twelve challenges are directly at issue in Mr. Tryon's current appeal, but some of the OCCA's conclusions are relevant to our analysis of the ineffective assistance of appellate counsel claims now raised by Mr. Tryon.

First, of the twelve challenges Mr. Tryon brought to his sentence, the OCCA agreed with Mr. Tryon on one—his challenge to application of the aggravating circumstance for committing the offense while serving a term of imprisonment. *Tryon I*, 423 P.3d at 649–50. Specifically, the OCCA concluded that because

[8] As part of this argument, Mr. Tryon accused the prosecutor of asking "misleading" questions on cross-examination, including "suggest[ing] that [Mr.] Fabian had diagnosed Mr. Tryon as being mentally retarded when in fact he had not." Brief for and on Behalf of Isaiah Glenndell Tryon at 88 (Okla. Crim. App. May 12, 2016) (*Tryon I*).

Mr. Tryon had not been imprisoned at any point on the conviction and because his sentence was unexecuted and suspended, the aggravating circumstance could not apply. *Id.* To address this error, the OCCA determined, as part of its mandatory sentence review, it needed to reweigh the evidence absent the improperly included aggravating circumstance. *Id.* at 650, 656. Ultimately, though, the OCCA concluded inclusion of the improper aggravating circumstance was harmless because the evidence used to support the aggravator was admissible toward and supported two of the other aggravators—that Mr. Tryon was a person previously convicted of a felony involving violence against a person and that he was a continuing threat. *Id.* at 656–57.

Second, the OCCA generally praised defense counsel's mitigation effort, stating broadly that the jury was "presented a plethora of mitigation evidence by the defense" and that a "large amount of mitigating evidence [was] presented about every aspect of [Mr. Tryon's] life." *Id.* at 645, 647. In discussing the mitigation evidence in more detail, the OCCA started by stating that Mr. Tryon "presented numerous first-hand accounts from several relatives and family members—including Sheryl Wilson and Roy Tryon—concerning the physical abuse and violence Roy inflicted on [him], Sheryl and [his] siblings as well as the turbulent, drug-fueled nature of Roy and Sheryl's relationship." *Id.* at 645. The OCCA then identified each category of mitigation evidence presented by Mr. Tryon:

> [Mr. Tryon] presented mitigation evidence from the family witnesses concerning virtually every aspect of his life. This included first-hand accounts concerning [his] drug abuse; learning disabilities; educational

> background; prior incarcerations; prior head injuries; suicide attempts; family background; mental health treatment and institutionalization; prior incarcerations of his mother, father and siblings; gang involvement; the crowded conditions at the family home; the fact the family constantly moved, the non-stop drug activity at the family home; the routine absence of [his] mother from the family home while on multi-day drug binges; [his] mother buying drugs from [him] and his brother; Sheryl's physical abuse of her children; [his] drug dealing; [his] love for his son; the nature of [his] relationship with the victim; and the nature of [his] relationship with his mother.

Id. The OCCA went on to state that defense counsel (1) "elicited from the various family members extensive testimony concerning the domestic abuse [Mr. Tryon] witnessed as a child as well as the dynamics of his parents' relationship" and (2) "elicited a great deal of testimony concerning Sheryl Wilson's drug use, *including evidence concerning the drugs she ingested while pregnant with [Mr. Tryon]*." *Id.* at 646 (emphasis added).

Third, the OCCA made some mention of Mr. Tryon's mental state and intellect. Specifically, the OCCA stated that Mr. Tryon "presented expert testimony that he was *low functioning* and suffered both from mental illness (most prominently depression) *and brain damage*." *Id.* at 646–47 (emphasis added). However, the OCCA noted that Mr. Fabian "testified [Mr. Tryon] *was not mentally retarded*." *Id.* at 647 (emphasis added).

Fourth, the OCCA discussed some of the evidence supporting the aggravating circumstances. In support of the "especially heinous, atrocious, or cruel" aggravator, the OCCA described the murder as follows:

> Although brief, the conscious physical suffering endured by the victim was extreme and qualitatively separates this case from the many

> murders where the death penalty was not imposed. The sheer brutality of the injuries, combined with the victim's active and on-going resistance together with the mental anguish of being stabbed repeatedly, further separates this case from virtually all other murders.

Id. at 651. The OCCA went on the state that Mr. Tryon's "attack on Tia Bloomer in the downtown bus station was pitiless and showed no feeling or mercy towards the victim as he thwarted the efforts of both bystanders and the victim to resist his onslaught." *Id.* at 652. The OCCA also discussed one piece of evidence that both supported the continuing threat aggravator and is relevant to an issue Mr. Tryon raises in his appeal before this court, being that Mr. Tryon "engaged in fights with other inmates in the county jail, one of which was captured on surveillance video and shows [Mr. Tryon] beating up inmate Dartangan Cotton." *Id.* at 656.

Fifth, the OCCA conducted its mandatory sentence review, stating:

> In the present case, three aggravating circumstances remain: the prior violent felony aggravator; the continuing threat aggravator; and the especially heinous, atrocious or cruel aggravator. The evidence supporting all three aggravating circumstances was strong. The evidence detailed earlier showed not only [Mr. Tryon's] prior felony convictions for four counts of Assault with a Dangerous Weapon but also numerous instances of prior violent acts towards police officers, family members, the victim, other inmates and the public supporting the continuing threat aggravator. [Mr. Tryon's] murder of Tia Bloomer in a crowded public place while serving a sentence of supervised probation likewise supports this aggravator as does the callous and brutal nature of the killing itself. Moreover, as discussed in Proposition XIII, the evidence showed the victim endured conscious physical suffering as [Mr. Tryon] stabbed her repeatedly in the bus station, thus supporting the especially heinous, atrocious, or cruel aggravator.
>
> [Mr. Tryon] presented abundant mitigation evidence from his family members covering virtually every aspect of his life. This included first-hand accounts concerning [Mr. Tryon's] drug abuse; learning disabilities; educational background; prior

> head injuries; suicide attempts; family background; mental health treatment and institutionalization; prior incarcerations of his mother, father and siblings; gang involvement; the crowded conditions at the family home; the fact the family constantly moved; the non-stop drug activity at the family home; the routine absence of [Mr. Tryon's] mother from the family home while on multi-day drug binges; [Mr. Tryon's] mother buying drugs from [him] and his brother; Sheryl's physical abuse of her children; [Mr. Tryon's] drug dealing; [Mr. Tryon's] love for his son; the nature of [Mr. Tryon's] relationship with the victim; and the nature of [Mr. Tryon's] relationship with his mother.
>
> The defense also presented expert testimony from [Mr.] Fabian, a neuropsychologist, that [Mr. Tryon] was low functioning (but not mentally retarded) and suffered both from mental illness and brain damage. [Mr. Tryon] presented this testimony along with anecdotal evidence from family members concerning his cognitive and developmental limitations, his mental health treatment and his experience taking—then discontinuing—medications prescribed specifically for his mental issues. [Professor] Musick, a sociology professor, was presented by the defense as an expert witness to discuss the risk factors and events from [Mr. Tryon's] life history which impacted his development. This was offered to explain [Mr. Tryon's] pattern of illegal behavior culminating in his murder of Tia Bloomer.

Id. at 657 (citations omitted). Ultimately, the OCCA concluded that "the aggravating circumstances outweighed the mitigating evidence and supported the death sentence. Had the jury considered only these valid aggravating circumstances, we find beyond a reasonable doubt the jury would have imposed the same sentence of death." *Id.*

The OCCA affirmed Mr. Tryon's conviction and death sentence. *Id.* at 657–58. Mr. Tryon filed a petition for a writ of certiorari, which the United States Supreme Court denied. *Tryon v. Oklahoma*, 139 S. Ct. 1176 (2019). Such concluded Mr. Tryon's direct appellate proceedings.

D. State Post-Conviction Proceedings

In state court, Mr. Tryon filed an Original Application for Post-Conviction Relief-Death Penalty Case and a Successive Application for Post-Conviction Relief-Death Penalty.[9] We discuss each in turn.

1. Original Application for Post-Conviction Relief

Mr. Tryon's original application for post-conviction relief advanced two propositions of error, ineffective assistance of appellate counsel for not raising claims of ineffective assistance of trial counsel and cumulative error. Relative to the ineffective assistance claim at the sentencing stage, Mr. Tryon argued appellate counsel should have raised arguments on direct appeal that trial counsel was ineffective for (1) not objecting to evidence regarding Mr. Tryon shooting at Ms. Bloomer while she held their child; (2) not objecting to evidence regarding the 2009 jail fight; (3) failing to investigate, develop, and present evidence regarding Mr. Tryon's head injuries; (4) failing to obtain neuroimages; (5) failing to pursue an *Atkins* defense and obtain adaptive functioning testing; and (6) failing to adequately prepare Sheryl Wilson for testimony. As issues two, four, and five relate to the issues Mr. Tryon raises in this appeal, we summarize his arguments to the OCCA, as well as the OCCA's rulings.

[9] Mr. Tryon filed his successive application for post-conviction relief after he filed the § 2254 petition underlying this appeal. Nonetheless, because the OCCA resolved the successive application before the federal district court reached the merits of Mr. Tryon's § 2254 petition, we discuss the successive application in this section of our opinion.

a. 2009 jail fight

In his post-conviction application, Mr. Tryon argued further investigation into the 2009 jail fight to which Mr. Hart testified revealed a report that Mr. Tryon "was found not guilty of misconduct," that he was "'jumped'" by the other inmate, and that he was "defending himself." Original Application for Post-Conviction Relief at 18–19, *Tryon II* (Okla. Crim. App. Apr. 27, 2017). To support this, Mr. Tryon offered a jail misconduct report. Mr. Tryon contended these omitted facts showed the prosecutor impermissibly presented evidence regarding the 2009 jail fight. And Mr. Tryon argued this was particularly prejudicial because it supported the conclusion that, if sentenced to life without parole, he would still be a threat in the prison setting.

The OCCA determined this claim "lack[ed] merit" for two reasons. *Tryon II* at 8. First, the OCCA concluded the jail misconduct report on which Mr. Tryon relied was hearsay and could not have been used to impeach Mr. Hart because Mr. Hart was not the author of the report and his name did not even appear in the report. *Id.* at 9–10. Thus, the OCCA held trial counsel was not ineffective for not presenting the misconduct report and appellate counsel was not deficient for not arguing trial counsel was ineffective. Second, the OCCA concluded Mr. Tryon failed to satisfy the prejudice prong of *Strickland* because there was other strong evidence supporting the continuing threat aggravator, including Mr. Tryon's lengthy criminal record and the video of his 2013 attack on an inmate. *Id.* at 10. On this second point, the OCCA stated:

> Even if evidence concerning [Mr. Tryon's] [2009] jailhouse fight . . . was suppressed, in light of the State's strong evidence showing [Mr. Tryon's] recurring violence in a variety of contexts, there is no reasonable probability either that the jury would not have found existence of the continuing threat aggravator or chosen a sentence less than death. There is no *Strickland* prejudice. Appellate counsel thus was not ineffective for failing to raise this meritless claim.

Id. at 10.

b. Brain scan evidence

In this claim, Mr. Tryon argued appellate counsel was ineffective for failing to argue trial counsel was ineffective for not obtaining funding for neuroimages given that Mr. Fabian recommended a brain scan to determine the presence or extent of brain damage. More to this point, Mr. Tryon contended, "[t]here is nothing in the record to show that trial counsel made a request for a brain scan and nothing to show if they did that their request was denied." Original Application for Post-Conviction Relief at 30. And Mr. Tryon hypothesized that the brain scans would have corroborated the expert testimony and provided tangible evidence that Mr. Tryon had brain damage. However, Mr. Tryon was unable to provide the OCCA with any brain scans because the Oklahoma Indigent Defense System denied his post-conviction request for funding to perform them.

The OCCA rejected the claim, concluding Mr. Tryon could not satisfy either prong of *Strickland* where he had not produced any brain scan imaging showing that he suffered from brain damage. *Tryon II* at 15. In more detail, the OCCA stated that Mr. Tryon:

> fails to present any evidence showing us what such a brain scan would have shown assuming *arguendo* the district court authorized funding for this purpose. This is fatal to his claim of ineffectiveness. Bare allegations, without supporting facts from the record, do not warrant relief. [Mr. Tryon] is obligated to make an affirmative showing as to what the missing evidence would have been and prove that its admission at trial would have led to a different result.

Id.

c. *Claim under* Atkins v. Virginia

Mr. Tryon devoted a significant portion of his post-conviction brief to his argument that appellate counsel was ineffective for not contending that trial counsel was ineffective for not pursuing a defense under *Atkins*. Mr. Tryon noted that Mr. Fabian had recommended follow-up adaptive functioning testing, but that counsel did not pursue such because of a lack of funding. Mr. Tryon further argued trial counsel's ineffective assistance was prejudicial because even though he had a prior IQ score of 81, which precluded an *Atkins* defense under Oklahoma law, counsel could have argued the score was inflated because it was based on an outdated test likely to produce norm obsolescence. As part of this argument, Mr. Tryon stated "[a]ny conclusion that [he] is not developmentally disabled based solely on his I.Q. score of 81 is inconsistent with the tenets of *Atkins v. Virginia*, 536 U.S. 304 (2002), as confirmed by *Hall* and *Moore*."[10] Original Application for Post-Conviction Relief at 35. Furthermore, Mr. Tryon argued the score of 81, obtained when he was fourteen, did not reflect the impact subsequent head injuries had on his IQ. Finally,

[10] *See Moore v. Texas*, 581 U.S. 1 (2017).

Mr. Tryon presented a new report from Mr. Fabian in which Mr. Fabian concluded a new round of intellectual and adaptive functioning tests revealed "significant evidence of intellectual disability." *Id.* at 41.

The OCCA rejected this claim. First, the OCCA viewed Mr. Fabian's new report with skepticism, noting it was contrary to his trial testimony that Mr. Tryon was not intellectually disabled and his testimony that the score of 68 on the test he administered was below Mr. Tryon's actual IQ. *Tryon II* at 16. Second, the OCCA rejected Mr. Tryon's arguments that his IQ score of 81 was inflated by norm obsolescence and concluded that any adjustment to the score would only lower it to 78, which still would preclude an intellectual disability finding under Oklahoma law. *Id.* at 17. Third, and following from these two findings, the OCCA held that trial and appellate counsel were not ineffective for failing to pursue issues related to an *Atkins* defense because Mr. Tryon did not fit the criteria for an *Atkins* defense. *Id.* at 18–19.

2. Successive Application for Post-Conviction Relief

After filing his § 2254 petition, Mr. Tryon returned to state court to exhaust claims he raised in his § 2254 petition. In his successive application for post-conviction relief, Mr. Tryon raised three claims relevant to his present appeal: (1) appellate counsel was ineffective for not arguing that trial counsel should have investigated and presented evidence related to FASD; (2) appellate counsel was ineffective for not presenting an argument about trial counsel's failure to address the state's evidence regarding the jail fights; and (3) cumulative error. We discuss below each claim and the OCCA's rulings.

a. FASD claim

Through post-conviction investigation, Mr. Tryon developed several expert reports that supported the conclusion he suffered from FASD. First, Dr. Kenneth Lyons Jones examined Mr. Tryon and diagnosed him as suffering from Alcohol Related Neurodevelopmental Disorder attributed to his mother's prenatal alcohol usage. A second expert, Stephen Greenspan, Ph.D., augmented Mr. Tryon's FASD argument, opining that "Mr. Tryon was born with a seriously compromised brain, a condition which causes many intellectual, adaptive and mental health impairments." Successive Application for Post-Conviction Relief—Death Penalty—at 20, *Tryon v. State*, No. PCD-2020-231 (Okla. Crim. App. Mar. 13, 2020) (*Tryon III*) (quoting *id.* At Attach. 24 at 12). A third expert, Dr. Richard Adler, performed a Quantitative Electroencephalogram ("QEEG") scan on Mr. Tryon's brain, which revealed abnormalities in each lobe, consistent with early prenatal exposure to alcohol. Dr. Adler's expert report also contended that Mr. Tryon's Brain Optimization Index scores based on the QEEG scans placed five of his functioning abilities in the lowest or next to lowest category and that his overall score placed him in the "moderately impaired range." *Id.* at Attach. 12 at 21. Based on these expert analyses, Mr. Tryon contended trial counsel had a duty to investigate FASD as there were "red flags that [he] suffered adverse effects from FASD throughout his young life; his mother's use of alcohol and drugs during pregnancy; his low intellectual and academic functioning; his impulse control difficulties throughout childhood; his inability to live independently; and neuropsychological test results that indicated deficits in executive functioning." *Id.* at 21. Mr. Tryon further faulted appellate counsel for not

raising an ineffective assistance of trial counsel argument on this ground. The OCCA denied relief, concluding this claim was procedurally barred.[11] *Tryon III* at 6–7.

b. 2009 jail fight claim

Mr. Tryon argued additional and newly discovered evidence bolstered his claim that trial counsel was ineffective for not countering the prosecution's evidence regarding the 2009 jail fight.[12] The new evidence, however, was only a declaration

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[11] Pursuant to an Oklahoma statutory right, the OCCA did consider whether post-conviction counsel was ineffective for not raising an FASD claim. The OCCA rejected Mr. Tryon's contention that post-conviction counsel rendered ineffective assistance, concluding Mr. Tryon did not suffer any prejudice from trial counsel not further developing an FASD argument where the jury heard significant evidence about Sheryl Wilson's "use of harmful substances during pregnancy." *Tryon v. State*, No. PCD-2020-231, at 19 (Okla. Crim. App. Mar. 11, 2021) (*Tryon III*). In rejecting this ineffective assistance of post-conviction counsel claim, the OCCA went on to state:

> Had [Mr. Tryon's] jury wanted to impose a sentence of less than death based upon the prenatal harm inflicted by Sheryl Wilson's use of harmful substances during her pregnancy with [Mr. Tryon], it had a plethora of evidence from the expert and lay witnesses presented at trial to make that finding. . . . The evidence marshaled by [Mr. Tryon] in his current application to show the harm from fetal alcohol exposure is hardly more convincing than the evidence presented at trial to show the harm to [Mr. Tryon] inflicted by his mother's prenatal drug use, his own use of illegal drugs or the head injuries discussed by his family members. [Mr. Tryon] fails to show a reasonable probability of a different outcome of his original post-conviction proceeding had the brain neuroimaging evidence been presented in support of his claims challenging trial and appellate counsel's ineffectiveness.

Id. at 20–21.

[12] Mr. Tryon also raised an argument regarding the 2013 jail fight. This argument is not part of the present appeal, so we do not discuss the details of the argument or the OCCA's resolution of the matter.

from the disciplinary officer authenticating the report acquitting Mr. Tryon of misconduct. The OCCA concluded it had already adjudicated the 2009 jail fight claim in Mr. Tryon's first post-conviction petition. *Id.* at 22. The OCCA further concluded the new affidavit from the disciplinary officer did not demonstrate post-conviction counsel was ineffective because the 2009 jail fight was a small piece of the evidence supporting the continuing threat aggravator and the jury was already aware that Mr. Hart did not know who started the fight. *Id.* at 23.

c. Cumulative error claim

Mr. Tryon also asserted the cumulative effect of ineffective assistance of counsel prejudiced him. The OCCA, having rejected Mr. Tryon's claims of ineffective assistance of appellate counsel on procedural bar grounds, had no instances of deficient performance by appellate counsel to cumulate.

E. Federal Habeas Proceeding

Mr. Tryon filed a § 2254 petition in federal court, raising eleven grounds of error. The district court denied relief on all grounds and denied a COA. We discuss the district court's reasoning, as needed, when analyzing each of Mr. Tryon's claims that are before us. In this court, Mr. Tryon sought a COA on several issues: (1) ineffective assistance regarding developing evidence of Mr. Tryon's brain damage, including a diagnosis of FASD; (2) ineffective assistance regarding presentation of an intellectual disability defense consistent with *Atkins*; (3) ineffective assistance in responding to the jail fight evidence supporting the continuing threat aggravator; (4) cumulative ineffective assistance of counsel; (5) the

trial court improperly limited his ability to present mitigating evidence; and (6) cumulative error.

Through a case management order, this court granted Mr. Tryon a COA on three issues:

> A. Whether trial counsel provided ineffective assistance of counsel by failing to obtain neuroimaging (a brain scan) of [Mr.] Tryon's brain, and whether appellate counsel provided ineffective assistance by failing to raise this issue on direct appeal (Petition, Ground 1(G));
>
> B. Whether trial counsel provided ineffective assistance of counsel by failing to present mitigating evidence concerning a 2009 jail fight, and whether appellate counsel provided ineffective assistance by failing to raise this issue on direct appeal (Petition, Ground V(B)); and
>
> C. Whether the cumulative effect of errors in this case resulted in a violation of [Mr.] Tryon's constitutional rights (Petition, Ground XI).

Order at 1. The case management order further permitted Mr. Tryon ten days to file a renewed request for a COA. In accord with this, Mr. Tryon filed a motion to expand the COA, in which he renewed his request for a COA regarding counsel's ineffectiveness in presenting an intellectual disability defense under *Atkins*. That motion, along with the three issues on which a COA was granted, are now before us.

II. DISCUSSION

We first discuss several legal principles governing § 2254 petitions. Then we address Mr. Tryon's motion to expand the COA. Finally, we turn our attention to the three issues on which this court granted Mr. Tryon a COA.

A. Legal Principles Governing Mr. Tryon's § 2254 Claims

Several important legal principles govern Mr. Tryon's claims and how federal courts must adjudicate § 2254 petitions.

1. Procedural Bar to Federal Review

A frequent obstacle to federal review of a claim is a § 2254 petitioner's failure to properly present the claim to a state court. As a "general principle . . . federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). A state procedural rule is "adequate" if it is "firmly established and regularly followed." *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009)). "A procedural rule is independent if it is based upon state law, rather than federal law." *Anderson v. Atty. Gen. of Kan.*, 342 F.3d 1140, 1143 (10th Cir. 2003). And as long as the state court clearly and expressly relies on state law to invoke a state procedural rule, that invocation does not lose its independence merely because the state court also relies upon federal law in reaching an alternative holding, including an alternative holding on the merits. *Coleman v. Thompson*, 501 U.S. 722, 733–34 (1991); *see also Harris v. Reed*, 489 U.S. 256, 264 n.10 (1989). Rather, in such situations, the federal court must still "acknowledge and apply" the procedural bar relied upon by the state court. *Thacker v. Workman*, 678 F.3d 820, 834 n.5 (10th Cir. 2012).

Further, the concept of procedural bar sometimes works in tandem with the issue of exhaustion. Specifically, where a claim advanced in a § 2254 petition has not

been exhausted, the claim is subject to an anticipatory procedural bar. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) ("Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." (quotation marks omitted)).

A procedural bar or an anticipatory procedural bar creates an affirmative defense which the state may raise. *Hooks v. Ward*, 184 F.3d 1206, 1216 (10th Cir. 1999). Once the state raises the affirmative defense, the burden shifts to the petitioner, who must "at a minimum" advance "specific allegations . . . as to the inadequacy of the state procedure." *Id.* at 1217.

In addition to demonstrating that a state rule is not 'adequate and independent,' a petitioner may overcome the assertion of a procedural bar or an anticipatory procedural bar by demonstrating cause and prejudice or a fundamental miscarriage of justice. *Medlock v. Ward*, 200 F.3d 1314, 1323 (10th Cir. 2000). "Cause for a procedural default exists where 'something *external* to the petitioner, something that cannot fairly be attributed to him, impeded his efforts to comply with the State's procedural rule.'" *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (quoting *Coleman*, 501 U.S. at 753). Notably, "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'" *Id.* Thus, a § 2254 petition is "bound by the oversight" of post-conviction counsel and cannot rely on the error to establish cause. *Id.* at 281.

2. AEDPA Deference to State Court Rulings on the Merits

The review of a § 2254 petition from a state prisoner is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Hanson v. Sherrod*, 797 F.3d 810, 824 (10th Cir. 2015). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). "Under AEDPA, when a state court has considered a claim on the merits, this court may grant a habeas petition only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Hanson*, 797 F.3d at 824 (quoting 28 U.S.C. § 2254(d)(1)). "The AEDPA standard is highly deferential and requires that we give state-court decisions the benefit of the doubt." *Id.* (internal quotation marks and ellipsis omitted).

"To analyze a § 2254 claim, we first determine whether the petitioner's claim is based on clearly established federal law, focusing exclusively on Supreme Court decisions." *Id.* "If so, then we consider whether the state court's decision was contrary to or an unreasonable application of that law." *Id.* (internal quotation marks omitted). A state court decision is 'contrary to' clearly established federal law if (1) "'the state court applies a rule that contradicts the governing law set forth in Supreme Court cases'" or (2) "'the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless

arrives at a result different from' the result reached by the Supreme Court." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). "[A] state court decision involves an 'unreasonable application' of clearly established federal law if it identifies the correct governing legal principle but unreasonably applies that principle to the facts of the petitioner's case." *Andrew v. White*, 62 F.4th 1299, 1311 (10th Cir. 2023) (internal quotation marks and ellipsis omitted). "Whether an application of a rule is unreasonable depends in part on the rule's specificity. 'The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations.'" *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Further, "[f]or 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 (quoting *Williams*, 529 U.S. at 410). As a result, "[a] state court's application of federal law is unreasonable only if '*every* fairminded jurist' would 'reach a different conclusion.'" *Andrew*, 62 F.4th at 1311 (quoting *Brown v. Davenport*, 142 S. Ct. 1510, 1530 (2022)). Put another way, a § 2254 petitioner must demonstrate that the state court's rejection of his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

3. *Strickland v. Washington* Ineffective Assistance of Counsel Standard

The standard from *Strickland v. Washington*, 466 U.S. 668 (1984), typically governs ineffective assistance of counsel claims. Under that standard, a defendant

"must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced thereby," which entails demonstrating a "reasonable probability" of a more favorable outcome absent counsel's deficient performance. *United States v. Holder*, 410 F.3d 651, 654 (10th Cir. 2005) (citing *Strickland*, 466 U.S. at 688–89).

Regarding the deficient performance prong, "[o]ur review of counsel's performance under the first prong of *Strickland* is a highly deferential one." *Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012) (internal quotation marks omitted). In accord with this deference, "we 'must indulge 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 . . . strategy.'" *Holder*, 410 F.3d at 654 (quoting *Strickland*, 466 U.S. at 689). To satisfy this prong of the *Strickland* analysis and support a constitutional claim, a defendant must show that "[c]ounsel's performance [was] completely unreasonable . . . not merely wrong." *Wilson v. Sirmons*, 536 F.3d 1064, 1083 (10th Cir. 2008) (internal quotation marks omitted).

Regarding the second prong of *Strickland*, "to show that the outcome of his trial was prejudiced by counsel's error, the defendant must show that those 'errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Hanson v. Sherrod*, 797 F.3d at 826 (quoting *Strickland*, 466 U.S. at 687). Thus, "[t]o establish prejudice, he must demonstrate 'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting

guilt.'" *Id.* (quoting *Strickland*, 466 U.S. at 695). "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

Finally, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). In accord with this principle, within the context of a § 2254 petition, "we defer to the state court's determination that counsel's performance was not deficient and, further, defer to the attorney's decision in how to best represent a client." *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (brackets and quotation marks omitted). In this sense, "our review of ineffective-assistance claims in habeas applications under § 2254 is 'doubly deferential.'" *Hooks*, 689 F.3d at 1187 (quoting *Mirzayance*, 556 U.S. at 123).

B. Motion to Expand COA

In a motion before this court, Mr. Tryon requests a COA on the issue of whether appellate counsel rendered ineffective assistance by not arguing that trial counsel was ineffective for not (1) challenging the constitutionality of Oklahoma's statute governing the death penalty and intellectual disability and (2) presenting an intellectual disability defense under *Atkins*. *See* Petitioner's Motion for Modification of Certificate of Appealability by the Merits Panel at 2, 5 ("Motion") (contending that appellate counsel rendered ineffective assistance by not raising ineffective assistance of trial counsel claims and then arguing "[t]rial counsel did not raise a

challenge to the constitutionality of the statute, and did not provide their psychology expert with the funds to conduct an *Atkins* evaluation"). We start by discussing Supreme Court decisions, starting with *Atkins*, addressing intellectual disability and the death penalty. Then we summarize the district court's ruling and the arguments raised before this court. Next, we state the standard for granting a COA. Finally, we analyze whether Mr. Tryon has satisfied that standard.

1. Background Law: *Atkins* and its Progeny

In 1989, the Supreme Court considered and rejected an argument that it categorically violated the Eighth Amendment to impose the death penalty on an individual who is intellectually disabled. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). Thirteen years later, citing an evolving consensus in the states, the Supreme Court reversed course and held that it violated the Eighth Amendment for a state to impose the death penalty on an individual who is intellectually disabled. *Atkins*, 536 U.S. at 306–07. *Atkins*, however, did not define who qualifies as intellectually disabled. *See id.* at 317. Rather, it "le[ft] to the [s]tate[s] the task of developing appropriate ways to enforce the constitutional restriction upon the[] execution of sentences." *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986) (leaving it to the states to define insanity)). But *Atkins* did paint in broad strokes that the method adopted by a state for assessing intellectual disability needed to be based on the "clinical definitions of mental retardation" which required "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as

communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318.

Since *Atkins*, the Supreme Court has issued several decisions rejecting efforts by states establishing criteria for when an individual qualifies as intellectually disabled. *See Moore v. Texas*, 581 U.S. 1 (2017); *Brumfield v. Cain*, 576 U.S. 305 (2015); *Hall v. Florida*, 572 U.S. 701 (2014). First, in *Hall*, the Supreme Court rejected a Florida law that required an IQ score of 70 or less to qualify as intellectually disabled. *Hall*, 572 U.S. at 704. It did so because a firm cutoff of 70 did not properly account for the margin of measurement error when calculating an IQ score, which was well recognized in medical community opinions. *Id.* at 711–13. In so holding, the Supreme Court stated that:

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

Id. at 712. Conversely, though, the Supreme Court recognized that where a state accounts for the standard error of measurement in setting IQ score criteria, the state provides the necessary "objective indicia of society's standards" to comply with the Eighth Amendment's prohibition on executing the intellectually disabled. *Id.* at 714 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). The Supreme Court also acknowledged that its holding applied only to state statutes with IQ score cutoffs

below 75 and that Mr. Hall had not questioned "the rule in States which use a bright-line cutoff at 75 or greater." *Id.* at 715.

The Supreme Court in *Brumfield* and *Moore* applied and reaffirmed the primary tenets of *Hall* and *Atkins*. First, in *Brumfield*, the Supreme Court held that a state court must permit an evidentiary hearing on intellectual disability where the defendant "raise[s] a reasonable doubt as to [his] intellectual disability." 576 U.S. at 313. And, where the defendant had a reported IQ score of 75, he met this criteria because that score, when accounting for the standard measurement of error of five points, fell within range of intellectual disability. *Id.* at 315. Second, in *Moore*, the Supreme Court rejected Texas's use of criteria adopted in the 1990s to determine intellectual disability rather than more recent standards adopted by the expert community. 581 U.S. at 8, 13–14. And, like in *Brumfield*, the Supreme Court emphasized that "*Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's 'standard error of measurement,'" which the Court identified as five points. *Id.* at 13; *see also id.* at 14 (identifying an IQ score of 74 as having a range from 69 to 79 once standard error of measurement is considered). Overall, the Court stated a general standard by cautioning that "being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards." *Id.* at 13.

2. District Court Ruling and Arguments on Issue

The district court concluded the OCCA broadly addressed Mr. Tryon's ineffective assistance of counsel claim on the merits by concluding neither trial nor appellate counsel were ineffective where Mr. Tryon had scored an 81 on an IQ test and, therefore, was statutorily precluded from advancing an intellectual disability defense. The district court further concluded the OCCA did not unreasonably apply federal law when rejecting Mr. Tryon's constitutional challenge because none of the Supreme Court cases addressed a state statute, like Oklahoma's, with a cutoff that accounted for the standard error of measurement by excluding only those defendants who scored above a 75 on an IQ test. Likewise, the district court concluded it was reasonable for appellate counsel to cull out a challenge to the constitutionality of Oklahoma's statute given that nothing would have compelled the OCCA to invalidate the Oklahoma statutory criteria for intellectual disability. This was particularly true in the district court's view where Mr. Fabian stated at numerous places in his testimony that Mr. Tryon was not intellectually disabled.

In his motion before this court, Mr. Tryon argues that Oklahoma's statutory scheme governing intellectual disability violates *Atkins* because it establishes a firm cutoff for anyone with any IQ score above 76, even where the individual may have a second IQ score below 76 and well into a recognized intellectual disability range. Relatedly, Mr. Tryon argues trial counsel should have presented arguments on the

Flynn Effect.[13] Finally, Mr. Tryon faults trial counsel for not obtaining funding for adaptive functioning testing and for permitting Mr. Fabian to opine that Mr. Tryon was not intellectually disabled. In support of these arguments, Mr. Tryon relies upon Mr. Fabian's state post-conviction opinion that concludes Mr. Tryon is intellectually disabled.

3. Standard Governing Issuance of COA

Without a COA, we do not possess jurisdiction to review the dismissal of a petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where a district court denies relief and denies a COA, an appellate court will issue a COA only "if the applicant has made a substantial showing of the denial of a constitutional right." *Charlton v. Franklin*, 503 F.3d 1112, 1114 (10th Cir. 2007) (quoting 28 U.S.C. § 2253(c)(2)). "This standard requires 'a demonstration that includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

[13] The Flynn Effect hypothesizes that older IQ tests produce higher, or inflated, IQ scores because they are normed to a different generational population and individuals in society have become more intelligent over time, at an alleged rate of 0.3 points per year. James R. Flynn, Massive IQ Gains in 14 Nations: What IQ Tests Really Measure, 101 Psychol. Bull. 171, 172–77 (1987).

4. Analysis

As noted earlier, Mr. Tryon's claim of ineffective assistance of appellate counsel based on his intellectual disability has two parts, that counsel should have argued trial counsel was ineffective for not (1) challenging the constitutionality of Oklahoma's statute governing the death penalty and intellectual disability and (2) presenting an intellectual disability defense. We discuss each sub-issue in turn.

a. Constitutional challenge

In accord with *Atkins* and its progeny, the Oklahoma statute governing intellectual disability and the death penalty broadly states "no defendant who is intellectually disabled shall be sentenced to death; provided, however, the onset of the intellectual disability must have been manifested before the defendant attained the age of eighteen (18) years." Okla. Stat. tit. 21, § 701.10b(B). In greater depth, the statute goes on to state:

> The defendant has the burden of production and persuasion to demonstrate intellectual disability *by showing significantly subaverage general intellectual functioning*, significant limitations in adaptive functioning, and that the onset of the intellectual disability was manifested before the age of eighteen (18) years. *An intelligence quotient of seventy (70) or below* on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of eighteen (18) years. *In determining the intelligence quotient, the standard measurement of error for the test administrated shall be taken into account.*

Okla. Stat. tit. 21, § 701.10b(C) (emphasis added). This same provision, however, goes on to state that "in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test . . . be considered intellectually disabled." *Id.* Mr. Tryon, having scored an 81 on an IQ test, contends counsel should have challenged the constitutionality of this last provision. For three reasons, we conclude the district court's rejection of Mr. Tryon's ineffective assistance of appellate counsel claim regarding trial counsel's failure to challenge the constitutionality of Oklahoma's statute is not debatable or wrong.

First, Mr. Tryon's claim rests on a faulty premise. The record shows that the trial court overruled trial counsel's attempt to challenge the constitutionality of Oklahoma's statute governing the death penalty and intellectual disability. *See* Vol. V, Tr. Transcript at 1191–92 (trial counsel renewing her argument that the Oklahoma statute was unconstitutional in light of *Hall*, 572 U.S. 701, and the trial court stating "[y]our objection is noted and denied"). Accordingly, appellate counsel could not have argued in good faith that trial counsel failed to raise any challenge to the constitutionality of the Oklahoma statute. Rather, at best, appellate counsel could have argued that (1) the district court ruled incorrectly on trial counsel's constitutional challenge or (2) trial counsel's constitutional challenge was somehow deficient or incomplete. But Mr. Tryon, in failing to recognize that trial counsel *did* challenge the constitutionality of the Oklahoma statute, does not raise ether of these discrete claims of ineffective assistance of appellate counsel.

Second, a court considers the decisions of counsel at the time counsel acts in representation of the defendant. *See Rompilla v. Beard*, 545 U.S. 374, 381 (2005) ("In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made and by giving a 'heavy deference to counsel's judgments.'" (quoting *Strickland*, 466 U.S. at 689, 691)). Based on the record before appellate counsel, appellate counsel had little incentive to consider whether Oklahoma's statute governing the death penalty and intellectually disabled individuals was constitutional. This is because Mr. Tryon's own expert, Mr. Fabian, stated numerous times during his testimony that Mr. Tryon was not intellectually disabled. Vol. VII, Tr. Transcript at 1684 (stating Mr. Tryon is "low functioning and *certainly not mentally retarded . . . not so low as to be considered mentally retarded*" (emphasis added)). Furthermore, Mr. Fabian, in both his report and his trial testimony, concluded that Mr. Tryon's IQ was "around 80," Fabian Report (Court Ex. 6) at 19; *see also* Vol. VII, Tr. Transcript at 1683, well above the cutoff for an intellectual disability, even when accounting for the standard error of measurement. And these conclusions by Mr. Fabian were consistent with the two IQ scores from tests Mr. Tryon took prior to turning eighteen, as well as the academic performance percentiles Mr. Tryon fell into on testing administered by Ms. Ferguson.[14] Thus, even

[14] At the time of the direct appeal, Mr. Fabian had not drafted his about-turn report that concluded Mr. Tryon is intellectually disabled. Accordingly, that report is not part of the calculus in determining if appellate counsel rendered ineffective

if appellate counsel could have presented a persuasive argument for the Oklahoma statute being unconstitutional, the OCCA could have easily sidestepped the argument by concluding Mr. Tryon was not intellectually disabled as a matter of fact. Such is quite apparent from the OCCA specially recognizing that Mr. Fabian concluded and testified that Mr. Tryon was not intellectually disabled. Therefore, appellate counsel did not render ineffective assistance by failing to raise an argument certain to be unsuccessful based on the record available to appellate counsel.[15] *United States v. Babcock*, 40 F.4th 1172, 1177 (10th Cir. 2022).

Third, and in a similar vein to the second reason, even if appellate counsel had challenged the constitutionality of the Oklahoma statute, the OCCA was certain to reject the argument. This is because the OCCA had already upheld the statute's constitutionality against a challenge based on the Flynn Effect. *See Smith v. State*, 245 P.3d 1233, 1237 n.6 (Okla. Crim. App. 2010) (describing the Flynn Effect as a "theory" that the Oklahoma Legislature had not adopted and for which courts should not account when determining a defendant's IQ score for purposes of the Oklahoma

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assistance. Nor did appellate counsel have a constitutional duty to develop such evidence where Mr. Fabian unequivocally testified that Mr. Tryon was not intellectually disabled.

[15] This is particularly true where counsel had other meritorious arguments to advance, including the successful argument that one of the four aggravating circumstances found by the jury was inapplicable to Mr. Tryon. Furthermore, any effort by counsel to argue that Mr. Tryon was intellectually disabled despite Mr. Fabian's testimony to the contrary would have run counter to counsel's effort to advance a prosecutorial misconduct claim, which in part contended the prosecutor asked misleading questions by suggesting Mr. Tryon was intellectually disabled.

statute's cutoff of 76). And, even after decisions of the United States Supreme Court in *Atkins*'s progeny, *see Brumfield*, 576 U.S. 305; *Hall*, 572 U.S. 701, the OCCA has reaffirmed its ruling in *Smith*. *Fuston v. State*, 470 P.3d 306, 316 n.3 (Okla. Crim. App. 2020). Furthermore, we have concluded the OCCA has not unreasonably applied federal law by declining to adopt the Flynn Effect and upholding the constitutionality of its statute. *See Postelle v. Carpenter*, 901 F.3d 1202, 1212–13 (10th Cir. 2018) (concluding OCCA "rendered sound analysis to reach a permissible result" when rejecting application of Flynn Effect); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("Mr. Smith has failed to show that the OCCA's refusal to apply the Flynn Effect to his IQ scores was contrary to or an unreasonable application of clearly established federal law."). Thus, appellate counsel could not even have preserved this issue in hopes of success on federal habeas review.

For these three independent and sufficient reasons, we conclude the district court's determination that appellate counsel did not perform deficiently by failing to raise a challenge related to the constitutionality of the Oklahoma statute governing the death penalty and intellectual disability is not debatable or wrong.

b. Failure to present intellectual disability defense

Mr. Tryon also faults appellate counsel for not arguing that trial counsel was ineffective for failing to present an intellectual disability defense during the second stage trial—the penalty phase. As demonstrated by the preceding discussion about the constitutionality of the Oklahoma statute, this argument is a non-starter. First, due to Mr. Tryon's score of 81 on the full-scale IQ test administered by Ms. Ferguson, the

Oklahoma statute precluded Mr. Tryon from presenting an intellectual disability defense. Okla. Stat. tit. 21, § 701.10b(B)–(C). Second, the statute bound the trial court to exclude any intellectual disability defense Mr. Tryon might attempt to raise, as did binding OCCA precedent upholding the statute. Third, even if the statute and OCCA precedent had not foreclosed an intellectual disability defense, trial counsel lacked evidentiary support and a good faith basis to raise such a defense where Mr. Tryon's own expert witness had concluded Mr. Tryon was not intellectually disabled and had an IQ "around 80."[16] Fabian Report (Court Ex. 6) at 19; *see also* Vol. VII, Tr. Transcript at 1683. Accordingly, reasonable jurists could not debate the district court's rejection of Mr. Tryon's claim that appellate counsel was ineffective for failing to argue that trial counsel should have presented an intellectual disability defense.

3. Summation

Mr. Tryon has not demonstrated that the district court reached a debatable or wrong conclusion when rejecting his claims of ineffective assistance of appellate counsel based on trial counsel's failure to challenge the Oklahoma statute governing the death penalty and intellectual disability and failure to present an intellectual disability defense. Accordingly, we DENY Mr. Tryon's motion to expand the COA.

[16] Mr. Tryon faults trial and appellate counsel for not obtaining funding to perform adaptive functioning tests. All the funding and testing, however, would not have changed the fact that Mr. Tryon scored an 81 on an IQ test and therefore, was statutorily precluded from raising an intellectual disability defense.

C. Issues on which Mr. Tryon has a COA

The appellate case management order granted Mr. Tryon a COA on two ineffective assistance of appellate counsel claims, one involving brain scans and a second involving evidence about the 2009 jail fight, and a claim of cumulative error. We discuss each in turn.

1. Brain Scans

The case management order granted Mr. Tryon a COA on the following issue: "Whether trial counsel provided ineffective assistance of counsel by failing to obtain neuroimaging (a brain scan) of [Mr.] Tryon's brain, and whether appellate counsel provided ineffective assistance by failing to raise this issue on direct appeal (Petition, Ground 1(G)[?]" Order at 1. In his opening brief, Mr. Tryon argues both that counsel was deficient for not obtaining brain scans and for not presenting a FASD defense. We consider the scope of the COA and our jurisdiction to entertain Mr. Tryon's arguments before analyzing the merits.

a. Scope of COA and jurisdiction

Before the district court, Mr. Tryon presented his ineffective assistance claims for failure to obtain neuroimaging and failure to investigate and present a FASD defense as *TWO* separate claims—with the neuroimaging claim being Ground 1(G) and his FASD claim being Ground 2. *See* ROA Vol. 2 at 6–7. Mr. Tryon's choice to do so in the district court is unsurprising where Mr. Tryon's original application for post-conviction relief to the OCCA made no mention of FASD such that the brain scan claim and the FASD claim were subject to different procedural hurdles. *See*

Original Application for Post-Conviction Relief—Death Penalty Case. Furthermore, the district court treated the claims as two distinct claims, reaching the merits of the neuroimaging claim but concluding the FASD claim was procedurally barred, and Mr. Tryon failed to attempt to overcome the procedural bar. *Compare* ROA Vol. 3 at 474–75 (rejecting merits of neuroimaging claim), *with id.* at 475–76 (rejecting FASD claim, in three sentences, based on procedural bar).

In his case management briefing to this court, Mr. Tryon, for the first time, attempted to combine his brain scan claim and his FASD claim into a single claim, presenting an issue entitled: "Counsel Provided Ineffective Assistance Regarding Mr. Tryon's Brain Damage, Including His Fetal Alcohol Spectrum Disorder." Appellant Isaiah Glenndell Tryon's Case Management Statement of Issues Regarding Certificate of Additional Issues for Appeal at ii. The case management order granting a COA, however, identified only Ground 1(G)—counsel's failure to obtain brain scans—without reference to FASD or Ground 2 from Mr. Tryon's petition before the district court. We conclude this omission was intentional and meaningful. We see no room for debating the district court's recognition that the OCCA concluded that Mr. Tryon's ineffective assistance of appellate counsel claim based on FASD was procedurally barred because Mr. Tryon did not raise it in his original application for post-conviction relief. And Mr. Tryon has never attempted to satisfy the cause and prejudice standard for overcoming the procedural bar. Nor could he rely on ineffective assistance of post-conviction counsel to do so. *Maples*, 565 U.S. at 280–81. Accordingly, considering how Mr. Tryon has presented his brain scan and FASD

claims at the various stages of state and federal court proceedings and considering the language of the COA and that it specifically identified Ground 1(G) without identifying Ground 2, we conclude the COA covers only Mr. Tryon's brain scan claim, as presented in the district court, and does not cover his FASD claim. Accordingly, we conclude we lack jurisdiction over the FASD arguments Mr. Tryon presents in his merits briefing on appeal.[17] *See Miller-El*, 537 U.S. at 342 ("Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims.").

b. Merits analysis of brain scans claim

Before the OCCA, Mr. Tryon's brain scan claim evolved. In his original application for post-conviction relief, Mr. Tryon argued appellate counsel was ineffective for not arguing trial counsel was ineffective for not obtaining brain scan images that might have helped frame Mr. Tryon's mental impairment and head injury mitigation arguments. Mr. Tryon, however, did not present any brain scan images to the OCCA in support of this argument. In the absence of such evidence, the OCCA concluded Mr. Tryon had not sustained his burdens under *Strickland* because the imaging might or might not have supported his mitigation effort. Then, in his successive application for post-conviction relief, Mr. Tryon presented brain scan

[17] By combining his ineffective assistance claims premised on the brain scan images and FASD into a single claim, Mr. Tryon arguably presents a new claim to this court that he did not present to the district court. Because this is a capital case, rather than consider whether this incongruence creates a preservation problem, we exercise our discretion and separate Mr. Tryon's ineffective assistance of counsel claims to reach the merits of his claim premised on the brain scan images.

images, accompanied by expert reports indicating there were abnormalities in the imaging. However, by this juncture in the process, the OCCA deemed Mr. Tryon's ineffective assistance of appellate counsel claim procedurally barred on the ground that Mr. Tryon could have presented the brain scan images and expert reports in his original application for post-conviction relief.

Two principles governing federal court review in § 2254 proceedings guide our analysis: (1) AEDPA deference is due to state court adjudications on the merits; and (2) where a state court forecloses a claim by relying on an adequate and independent state law procedural rule, we will respect the procedural ruling absent a showing of cause and prejudice. We start our analysis with the latter of these two principles.

In his merits brief to this court, Mr. Tryon presents arguments about the brain scan images and expert reports he offered to the OCCA as part of his successive application for post-conviction relief. The OCCA, however, held that Mr. Tryon's ineffective assistance of appellate counsel claim premised on this evidence was procedurally barred. Mr. Tryon does not acknowledge this ruling no less advance a cause and prejudice argument, seemingly conflating the OCCA's analysis of his statutory-based ineffective assistance of post-conviction counsel claim with a merits determination on his constitutional-based ineffective assistance of appellate counsel

claim.[18] Accordingly, we enforce the procedural bar adopted by the OCCA and exclude from merits consideration all aspects of Mr. Tryon's brain scan claim which were not raised in his original application for post-conviction relief.[19]

Having properly defined the scope of the brain scan claim Mr. Tryon may advance under § 2254(d)(1), we have little difficulty concluding the OCCA did not unreasonably apply *Strickland* when it rejected his ineffective assistance of appellate counsel claim. In his original application for post-conviction relief, Mr. Tryon did not present the OCCA with any brain scan images or expert reports. Thus, at that juncture, while it was possible that the brain scans would support Mr. Tryon's claim, it was also possible they would show nothing significant such that trial counsel was not ineffective for failing to pursue the brain scans. As a result, the OCCA did not unreasonably apply federal law when it concluded that, in the absence of supporting evidence, Mr. Tryon had not sustained his burden under *Strickland*. *See Cannon v.*

[18] Notably, Mr. Tryon cannot rely on any ineffective assistance of post-conviction counsel to satisfy the cause and prejudice requirement. *See Davila v. Davis*, 582 U.S. 521, 524 (2017) ("Because a prisoner does not have a constitutional right to counsel in state postconviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default.").

[19] This approach is in accord with both the rules governing procedural default and with the principle from *Cullen v. Pinholster* that "review under § 2254(d)(1) is limited to the record that was before *the state court that adjudicated the claim on the merits*." 563 U.S. 170, 181 (2011) (emphasis added). Here, only the OCCA's decision on Mr. Tryon's original application for post-conviction relief adjudicated the merits of his ineffective assistance of appellate counsel claim based on the brain scans and, at that time, Mr. Tryon had not created a record containing the brain scan images or the expert reports on which he attempts to rely in support of his § 2254 petition.

Mullin, 383 F.3d 1152, 1165 (10th Cir. 2004), *abrogated on other grounds by Cullen v. Pinholster*, 563 U.S. 170 (2011) ("It is not apparent to us, nor has Mr. Cannon indicated, what helpful testimony would . . . have been elicited by any of the additional experts he suggests. On this record we cannot say that trial counsel was ineffective for failing to engage additional experts."); *see also Cummings v. Sirmons*, 506 F.3d 1211, 1233 (10th Cir. 2007) (rejecting ineffective assistance claim based on failure to consult and call expert where petitioner "never identified precisely what these purported experts would have testified to"); *cf. Boyle v. McKune*, 544 F.3d 1132, 1138–39 (10th Cir. 2008) (to establish prejudice on ineffective assistance claim, petitioner must identify non-speculative, favorable proposed evidence not advanced by trial counsel).

2. 2009 Jail Fight

The case management order granted Mr. Tryon a COA on the issue of "[w]hether trial counsel provided ineffective assistance of counsel by failing to present mitigating evidence concerning a 2009 jail fight, and whether appellate counsel provided ineffective assistance by failing to raise this issue on direct appeal[?]" Order at 1. Like with his brain scans claim, Mr. Tryon's 2009 jail fight claim has evolved over time. We provide a brief refresher regarding the factual and procedural history of this claim, before analyzing the claim.

a. Factual and procedural refresher

At the second stage trial, Ty Hart, a jail employee, testified that he observed Mr. Tryon and another inmate fighting. Mr. Hart, however, acknowledged he did not

know who started the fight and that both inmates ceased fighting in accordance with commands. As part of the post-conviction investigation, Mr. Tryon discovered a jail misconduct hearing report that exonerated him of wrongdoing in the fight and concluded the other inmate had "jumped" him. Original Application for Post-Conviction Relief—Death Penalty at Attach. 16.

Based on this, in his original application for post-conviction relief, Mr. Tryon argued appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not presenting the misconduct report and objecting to the State's presentation of evidence on the 2009 jail fight. The OCCA rejected the claim, first concluding that the misconduct report was not admissible where Mr. Hart was not the author of the report and Mr. Tryon failed to take additional steps to authenticate the report. In the alternative, the OCCA relied on the prejudice prong of *Strickland* and concluded that, even if the report had been presented to the jury, other strong evidence supported the continuing threat aggravator, and the jury already knew there was uncertainty as to Mr. Tryon's role in the 2009 jail fight.

In his successive application for post-conviction relief, Mr. Tryon attempted to reraise his argument about the 2009 jail fight by providing the OCCA a declaration from the author of the misconduct report. The OCCA rejected Mr. Tryon's argument, concluding it had already ruled on the matter in its decision rejecting the original application for post-conviction relief and that argumentation on the additional declaration was procedurally barred and did not change the prejudice calculus.

b. Analysis

As an initial matter, Mr. Tryon's 2009 jail fight claim suffers from the same partial procedural bar issue as his brain scan claim in that his argument on appeal includes issues and relies on evidence he did not present to the OCCA until his successive application for post-conviction relief. Specifically, Mr. Tryon, in pursuit of § 2254 relief, relies upon the declaration authenticating the misconduct report, a declaration Mr. Tryon did not produce until his successive application for post-conviction relief before the OCCA.[20] Accordingly, where the OCCA viewed argumentation based on the declaration as procedurally barred and the State has invoked the procedural bar, we must apply the procedural bar.[21] Therefore, we consider Mr. Tryon's 2009 jail fight claim only to the extent that it advances

[20] Mr. Tryon also argues that trial counsel should have presented testimony from a witness who could "explain the circumstances of the fight or conditions of the Oklahoma County Jail that Mr. Tryon was navigating." Appellant's Br. at 46. From our review of the record before the OCCA, we do not see where Mr. Tryon ever raised this argument before a state court. Accordingly, this aspect of Mr. Tryon's argument is unexhausted and subject to an anticipatory procedural bar. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) ("Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." (quotation marks omitted)); *see also* Okla. Stat. tit. 22 § 1089(D)(8)(b) (creating procedural bar for claims in death penalty case that could have been raised in original application for post-conviction relief).

[21] Although the OCCA's decision arguably includes an alternative adjudication on the merits, once a state court relies on a procedural bar that satisfies the adequate and independent state rule requirement, a federal court must apply the procedural bar even if the state court alternatively reached the merits of the claim. *Thacker v. Workman*, 678 F.3d 820, 834 n.5 (10th Cir. 2012).

arguments and relies upon evidence presented in his original application for post-conviction relief.

In considering that claim, we start with the OCCA's ruling, for the task of a federal court reviewing a § 2254 petition is to determine whether the state court unreasonably applied federal law.[22] 28 U.S.C. § 2254(d)(1). As noted earlier, the OCCA rejected Mr. Tryon's 2009 jail fight claim for two independent and sufficient reasons (1) Mr. Tryon had not established deficient performance where he had not demonstrated a path for admitting the misconduct report and (2) Mr. Tryon had not established prejudice because presentation of the misconduct report would not create a reasonable probability of a different outcome given the other evidence. We hold that neither of these conclusions by the OCCA is an unreasonable application of federal law.

On the first conclusion, a petitioner cannot premise an ineffective assistance claim on counsel's failure to present to the jury a piece of evidence that is not admissible. *See Parker v. Scott*, 394 F.3d 1302, 1326 (10th Cir. 2005) (concluding counsel was not deficient for failing to introduce evidence akin to that which the trial court already ruled was inadmissible). Yet, in his *original application for post-*

[22] Mr. Tryon also includes a line in his opening brief that the OCCA acted unreasonably by denying his motion for an evidentiary hearing and limiting factual development of this claim. Mr. Tryon, however, fails to further expand on this argument. And a passing reference to a matter is insufficient to present an issue for appellate review. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (discussing Federal Rule of Appellate Procedure 28 and stating "we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief").

conviction relief, Mr. Tryon did not identify a means by which counsel could admit the report, such as an exception to the hearsay rule and the proffer of testimony from a witness who could authenticate the report. *See, e.g.,* Okla. Stat. tit. 12, § 2803(6) (creating exception to hearsay rule for business records where such a record is introduced through a "custodian or other qualified witness" or is accompanied by a certificate). Accordingly, the OCCA did not unreasonably apply *Strickland* when it concluded Mr. Tryon had not established deficient performance because he had not demonstrated that trial counsel could have admitted the misconduct report.

Second, even if one viewed the OCCA's performance prong and evidentiary ruling as hyper-technical and a narrow construction of Mr. Tryon's argument, the OCCA's analysis did not stop there. Rather, the OCCA alternatively determined Mr. Tryon did not demonstrate prejudice from any deficient performance. And we conclude the OCCA did not unreasonably apply *Strickland* in reaching this determination. While a capital-murder defendant's conduct in detention can be an important consideration for the jury at the sentencing stage, *Grant v. Trammell*, 727 F.3d 1006, 1017 (10th Cir. 2013), the 2009 jail fight was not only a small part of the State's evidence, but also the weaker of two pieces of evidence regarding Mr. Tryon's conduct while in a detention facility.

As to the overall picture painted by the State, the State presented numerous witnesses who established Mr. Tryon's penchant, from an early age, for impulsive violent behavior. This included evidence about Mr. Tryon throwing a chair at a girl in rehabilitation, attacking family members, blocking the efforts of officers to aid

individuals in a home, attempting to pull a firearm on an officer who stopped him for smoking a cigarette while underage, and discharging a weapon toward a crowd of fleeing individuals outside a hotel. Mr. Tryon's propensity for violence did not end there as the State presented significant evidence of instances of domestic violence against Ms. Bloomer, most strikingly the incident where he fired a gun in Ms. Bloomer's direction while she was holding their child. And the cruel and heinous nature of the murder of Ms. Bloomer, including the seven stab wounds Mr. Tryon inflicted over efforts by Ms. Bloomer and bystanders to stop the attack, further demonstrated Mr. Tryon's propensity for violence.

Turning more specifically to the State's evidence about Mr. Tryon's conduct within institutions of confinement, the 2009 jail fight was the older of two incidents presented by the State. Furthermore, Mr. Hart, on cross-examination, openly conceded that he did not know which inmate started the 2009 jail fight and that Mr. Tryon obeyed commands when ordered to cease fighting. Thus, although trial counsel did not introduce the misconduct report into evidence, trial counsel did effectively minimize the aggravating value of the 2009 jail fight evidence. However, trial counsel had little ability to minimize the aggravating value of the 2013 jail fight evidence. This is because the 2013 jail fight evidence included a striking video of Mr. Tryon approaching a fellow detainee and beating the detainee seemingly without any provocation. Thus, in comparison to the 2009 jail fight evidence, the 2013 jail fight evidence was significantly more persuasive regarding Mr. Tryon's propensity to engage in violent conduct while in an institution of confinement.

Ultimately, given the relatively weak nature of the 2009 jail fight evidence compared to the strength of the 2013 jail fight evidence and the other evidence of Mr. Tryon's impulsively violent nature, we cannot say the OCCA made an unreasonable determination when it held that there was no reasonable probability the jury would not have found the continuing threat aggravator if it had been presented with the misconduct report. We, likewise, conclude the OCCA did not make an unreasonable determination when it held there was no reasonable probability that the jury would have chosen a sentence less than death had trial counsel presented it with the misconduct report.[23] We reach this conclusion not only based on the strength of the State's case but also based on the reasonableness of the OCCA's observation that

[23] Mr. Tryon contends the OCCA unreasonably applied federal law by considering only whether the jury would have found the continuing threat aggravator had trial counsel presented the misconduct report and not examining whether the jury would have still weighed all the evidence and returned a verdict of death had trial counsel presented the misconduct report. Mr. Tryon, however, is incorrect to contend that the OCCA did not examine this latter question, for the OCCA stated:

> Even if evidence concerning [Mr. Tryon's 2009] jailhouse fight . . . was suppressed, in light of the State's strong evidence showing [Mr. Tryon's] recurring violence in a variety of contexts, there is no reasonable probability either that the jury would not have found existence of the continuing threat aggravator *or chosen a sentence less than death*.

Tryon II at 10 (emphasis added).

defense counsel presented a myriad of mitigating evidence but the jury still opted to impose the death penalty.[24] Accordingly, we deny relief on this claim.

3. Cumulative Error

Finally, Mr. Tryon received a COA on the issue of "[w]hether the cumulative effect of errors in this case resulted in a violation of [Mr.] Tryon's constitutional rights." Order at 1. Having found no instances of deficient performance of appellate counsel, we have no prejudice to cumulate. Accordingly, we deny relief on this claim.

III. CONCLUSION

We DENY Mr. Tryon's motion to expand the COA. We also DISMISS this matter in part for lack of jurisdiction and AFFIRM the district court's denial of relief on the three issues on which Mr. Tryon received a COA.

[24] We further note the OCCA's observation is in accord with the trial court's impressions of defense counsel's thorough mitigation effort, as discussed in the Capital Felony Report.