CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

Ronson Bush
Petitioner,

v.
Tommy Sharp, Interim Warden,
Oklahoma State Penitentiary,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX B

Decision of the U.S. District Court Denying Habeas Relief

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

RONSON KYLE BUSH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CIV-13-266-R
	)	
TERRY ROYAL, Warden,	)	
Oklahoma State Penitentiary,	)	
	)	
Respondent.[1]	)	

MEMORANDUM OPINION

Petitioner, a state court prisoner, has filed a petition for writ of habeas corpus seeking relief pursuant to 28 U.S.C. § 2254. Doc. 20. Petitioner challenges the convictions entered against him in Grady County District Court Case No. CF-08-371. Petitioner was charged with murder in the first degree and possession of a firearm after a former conviction of a felony. In the midst of the guilt stage of his jury trial, Petitioner pled guilty to the firearm charge and entered an *Alford* plea to the murder charge.[2] After a sentencing proceeding before a judge, Petitioner was sentenced to death. In support of his death sentence, the judge found three aggravating circumstances, namely, (1) the murder was especially heinous,

[1] Pursuant to Fed. R. Civ. P. 25(d), Terry Royal, who currently serves as warden of the Oklahoma State Penitentiary, is hereby substituted as the proper party respondent in this case.
[2] An *Alford* plea allows a defendant to enter a plea without admitting his participation in the acts constituting the crime. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

atrocious, or cruel, (2) there exists a probability that Petitioner would commit criminal acts of violence such that he would constitute a continuing threat to society, and (3) the murder was committed by the Petitioner while he was serving a sentence of imprisonment on a conviction for a felony. Criminal Appeal Original Record (hereinafter "O.R.") 5 at 842-43.

Petitioner presents fifteen grounds for relief. Respondent has responded to the petition and Petitioner has replied. Docs. 20, 34, and 39. In addition to his petition, Petitioner has filed a motion for an evidentiary hearing. Doc. 22. After a thorough review of the entire state court record (which Respondent has provided), the pleadings filed in this case, and the applicable law, the Court finds that, for the reasons set forth below, Petitioner is not entitled to his requested relief.

I. Procedural History.

Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"), which affirmed in a published opinion. *Bush v. State*, 280 P.3d 337 (Okla. Crim. App. 2012). Petitioner sought review of the OCCA's decision by the United States Supreme Court, which denied his writ of certiorari on March 4, 2013. *Bush v. Oklahoma*, 133 S. Ct. 1497 (2013). Petitioner also filed a post-conviction application, which the OCCA denied. *Bush v. State*, No. PCD-2010-399 (Okla. Crim. App. Oct. 1, 2012) (unpublished).

II. Facts.

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

> On the evening of December 22, 2008, while at Billy Harrington's home, Ronson Bush shot Harrington six times with Harrington's .357 caliber revolver. Harrington made it to the front yard of the home, where he collapsed. Bush then tied Harrington to the back of his pickup and dragged him into a field near the house.
>
> By all accounts, Harrington and Bush had been best friends for a number of years. Harrington did what he could to aid Bush who dealt with addictions, paranoia, and other related mental illnesses. Harrington's final attempts to assist Bush came just days before the shooting. On December 18, Harrington attempted to take Bush to Griffin Memorial Hospital in Norman, Oklahoma but Bush was exceedingly drunk, and the two men fought during the trip. Harrington left Bush in a parking lot in Norman, and drove on to Tulsa for work. Bush hitched a ride back to Harrington's trailer. When Harrington arrived home that evening, accompanied by Jimmy Barrington, they found Bush passed out on the couch with Harrington's firearms purposefully placed around the house.
>
> After calling the sheriff's office to send someone to the house, Harrington again agreed to take Bush back to Griffin Memorial Hospital, where Bush voluntarily admitted himself for treatment. Bush, however, on December 22, checked himself out of the hospital, called Harrington for a ride, and returned to Harrington's home. Bush drank vodka from a pint bottle purchased in Blanchard on the way home. Once home, both

men shot guns off the porch and played with Harrington's dog. Harrington also gave Bush a haircut.

Sometime around 7:15 p.m., Harrington was talking on the phone with his girlfriend who could hear Bush in the background. Bush took a photograph of Harrington and nothing seemed amiss; minutes later, however, Bush shot and killed Harrington.

Bush explained that things started downhill when he mentioned getting Christmas presents for Stephanie Morgan, an ex-girlfriend, and her son. Bush said that Harrington told him that he should forget about Morgan as she was sleeping with other people. According to Bush, Harrington went on to say that even he had "fucked" her. Bush said he then snapped, picked up the .357 revolver, and started shooting Harrington. Bush kept shooting as Harrington got up, went to the kitchen, collapsed, then got up and walked outside.

At around 7:44 p.m. Harrington's mother, Kathy Harrington, tried to call Harrington's cell phone, but Bush answered. Bush kept putting Mrs. Harrington off, probably because Harrington was already dead. Mrs. Harrington called friends who went to the home and discovered Harrington's body in the field.

Bush, in the mean time, left the trailer in Harrington's truck, bought some beer, and drove to Ms. Morgan's home. Bush kicked in the back door and entered Morgan's unoccupied home. He waited on her to arrive and drank some alcohol from a commemorative bottle she had stored in her bedroom.

Morgan arrived home and was unable to turn on the bedroom lights. She heard Bush say that he heard her come in. Bush was in the bedroom lying on the bed. Morgan tried to get away by walking out and getting in her car. Bush, however, got in the passenger side. Morgan was finally able to let someone know that Bush was there, get him out of the car, and drive away.

Authorities arrived at Morgan's home, and Bush was arrested for violating a protective order Morgan had against him. Bush, at the time of the arrest, confessed to shooting Harrington.

Bush, 280 P.3d at 342-43.

III. Standard of Review.

A. Exhaustion as a Preliminary Consideration.

The exhaustion doctrine is a matter of comity. It provides that before a federal court can grant habeas relief to a state prisoner, it must first determine that he has exhausted all of his state court remedies. As acknowledged in *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), "in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." While the exhaustion doctrine has long been a part of habeas jurisprudence, it is now codified in 28 U.S.C. § 2254(b). Pursuant to 28 U.S.C. § 2254(b)(2), "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."

B. Procedural Bar.

Beyond the issue of exhaustion, a federal habeas court must also examine the state court's resolution of the presented claim. "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that 'is independent of the federal question and adequate to support the judgment.'" *Cone v. Bell*, 556 U.S. 449, 465 (2009) (quoting *Coleman*, 501 U.S. at 729). "The doctrine applies to bar

federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30.

C. Merits.

When a petitioner presents a claim to this Court, the merits of which have been addressed in state court proceedings, 28 U.S.C. § 2254(d) governs the Court's power to grant relief. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (acknowledging that the burden of proof lies with the petitioner). Section 2254(d) provides as follows:

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

The focus of Section 2254(d) is on the reasonableness of the state court's decision. "The question under AEDPA [Antiterrorism and Effective Death Penalty Act of 1996] is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

"Under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Relief is warranted only "*where there is no possibility* fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Id*. (emphasis added). The deference embodied in "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (citation omitted). When reviewing a claim under Section 2254(d), review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181.

IV. Analysis.

A. Ground One: Validity of Petitioner's *Alford* plea.

During his trial's guilt stage, Petitioner decided to enter an *Alford* plea to his murder charge. Petitioner also wished to plead guilty to his firearm charge. The judge carefully questioned Petitioner, who explained that he did not want to put his family or the victim's family through the "pain and suffering of being on the stand." Trial. Tr. vol. V, 984-91. The trial court accepted the plea, dismissed the jury, and commenced the sentencing proceedings as a bench trial. *Id*. at 995, 997-99. After

four sentencing witnesses, Petitioner told the trial court that he wished to withdraw his pleas. Trial Tr. vol. VI, 1129-31. The trial court denied the request and advised Petitioner to wait until after the sentencing proceedings. *Id*. at 1131.

Petitioner filed a motion to withdraw his pleas after the sentencing stage, alleging that (1) he pled through inadvertence, ignorance, mistake, or coercion, (2) the sentence was excessive and contrary to the evidence presented, (3) he was not mentally competent either to enter a plea or at the time the murder occurred, (4) the plea was not knowingly or voluntarily entered, and (5) he received ineffective assistance of counsel. O.R. V at 804-05. The trial court set a hearing and appointed conflict counsel for Petitioner. *Id*. at 806, 827. At the hearing, counsel told the trial court that Petitioner wanted him to stand on the motion and not call any witnesses. *Bush*, 280 P.3d at 343. Petitioner testified at the hearing, disavowed the claims in the motion, and told the trial court that he did not wish to withdraw his pleas. *Id*. The trial court denied the motion. *Id*.

Petitioner sought a writ of certiorari from the OCCA, arguing that the trial court should not have denied his motion. The OCCA found that Petitioner waived his right to appeal the denial because he explicitly disclaimed the motion to withdraw his pleas. *Id*. at 344. While not cited in that portion of the opinion, the OCCA later referenced Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*. *Id*. at 345. Rule 4.2(B) provides that issues not raised in an application to withdraw a

guilty plea cannot be raised in a petition for a writ of certiorari. The OCCA later reiterated on post-conviction that Petitioner waived appeal of the plea-related claims. *Bush*, No. PCD-2010-399, slip op. at 3. Petitioner argues that the OCCA erred because his plea was not entered voluntarily, knowingly, or intelligently, and that the plea was a result of misunderstanding and confusion.

The OCCA barred Petitioner's plea-related claim based on a state procedural rule. When a state court applies a state procedural bar, the petitioner must either show that the bar is inadequate or dependent on federal law, or provide a reason to excuse the default. *Cone*, 556 U.S. at 465; *Coleman*, 501 U.S. at 750. A procedural bar is adequate if it is "strictly or regularly followed and applied evenhandedly to all similar claims." *Fairchild v. Workman*, 579 F.3d 1134, 1141 (10th Cir. 2009) (internal quotation marks omitted). The bar is independent if "it relies on state law, rather than federal law, as the basis for the decision." *Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012). A petitioner can still avoid an adequate and independent procedural bar by establishing either cause for the default and actual prejudice from the alleged violation of federal law, or that failure to consider the claims would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. Petitioner does not challenge the independence or adequacy of the bar or present any reason to excuse the default.

Instead, Petitioner challenges the OCCA's application of the bar. Petitioner first claims that the OCCA's ruling did not clearly and expressly rest on the procedural bar because the OCCA addressed the claim on its merits. Petitioner also challenges the OCCA's factual finding that he waived the claims in his motion to withdraw his guilty plea and waived his appellate rights. Neither argument defeats the procedural bar.

Regarding the first argument, the Supreme Court has held that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). The OCCA stated in no uncertain terms that Petitioner "waived his right to appeal the denial of his motion to withdraw." *Bush*, 280 P.3d at 344. The OCCA later repeated that ruling. *Bush*, No. PCD-2010-399, slip op. at 3. Petitioner argues that the OCCA still analyzed his competency claim on its merits, but that particular discussion was in no way related to Petitioner's underlying claim. Instead, the OCCA addressed Petitioner's competency because Petitioner argued that even if he waived his appeals at the hearing, the trial court should have made an independent determination regarding Petitioner's competency to waive appeals. *Bush*, 280 P.3d at 344. The OCCA only examined whether Petitioner properly

waived his appeals, not the underlying question of whether his plea was valid. The competency discussion was therefore separate from the merits of Petitioner's claims and does not undermine the OCCA's application of the procedural bar.

Petitioner's second argument attacks as unreasonable the OCCA's finding that Petitioner waived the claims and his appellate rights. Petitioner misconstrues this Court's powers of review under AEDPA. 28 U.S.C. § 2254(a) allows federal courts to entertain habeas actions "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." "'Federal habeas corpus relief does not lie for errors of state law,'" and federal courts cannot "reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)).

The OCCA's application of the state procedural bar is a state court determination of a state law issue that this Court cannot second-guess under habeas review. The Court also cannot question that decision on factual grounds. Title 28 U.S.C. § 2254(d)(2) prevents federal courts from granting a writ of habeas corpus on claims that were adjudicated on the merits in state court proceedings unless the adjudication "resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding." Title 28 U.S.C. § 2254(e) provides that determinations of factual issues made by a State court shall be presumed to be correct, and that the petitioner must rebut that presumption

with clear and convincing evidence. The context of these subsections indicate that challenges to a state court's factual determinations must relate to a claim that the state court addressed on the merits, not factual determinations supporting the application of a state procedural bar. Supreme Court and the Tenth Circuit precedent bears out that distinction.

In *Wilson v. Corcoran*, the Supreme Court emphasized that questions of state law, absent federal violations, are not subject to habeas review. 562 U.S. 1, 5 (2010). The petitioner in *Wilson* challenged his death sentence, arguing that the state trial court violated state law by considering nonstatutory aggravators. *Id*. at 2-3. The state trial court stated in its sentencing order that it only relied on proven statutory aggravators, and the state supreme court accepted that statement. *Id*. at 3.[3] The Seventh Circuit granted habeas relief, holding that the state supreme court made an "unreasonable determination of facts" by accepting the trial court's representation that it relied only on statutory aggravators. *Id*. at 4-5.

The Supreme Court reversed, stating that "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." *Id*. at 5. The Supreme Court observed that the Circuit's opinion lacked any indication that the trial court's alleged consideration of the

[3] *Wilson* detailed a fairly extensive procedural back-and-forth within the state and federal court systems. That procedural history is not relevant to the issue at hand.

nonstatutory aggravators violated federal law. *Id*. The Court also criticized the Circuit's application of the "unreasonable determination of facts" standard, emphasizing that the standard applied to federal claims adjudicated on the merits and explaining that the "unreasonable determination of facts" provision did not relax the requirement that habeas relief was only appropriate for violations of federal law. *Id*. at 5-6. The Tenth Circuit has reiterated *Wilson's* holdings. *See Trujillo v. Hartley*, 406 F. App'x 280, 282 n.2 (10th Cir. 2010) (even if a state court made unreasonable factual determinations, federal habeas relief is not merited absent a violation of federal law); *Spradling v. Addison*, 367 F. App'x 938, 941 (10th Cir. 2010) (challenge to OCCA's factual determinations in applying its state election rule is not cognizable in habeas).[4]

The Tenth Circuit has extended that reasoning to challenges to the procedural bar. The Circuit held in *Beauclair v. Goddard* that a state's misapplication of the procedural bar relates to a state court determination of a state law question, and is therefore not an issue that federal habeas courts can address. 530 F. App'x 781, 785 (10th Cir. 2013). The Court has located only one case where the Tenth Circuit clearly applied the "unreasonable determination of facts" standard to a state court's procedural ruling. *Bradford v. McKune*, 160 F. App'x 738, 741 (10th Cir. 2005).

[4] The Tenth Circuit noted in a footnote in *Spradling* that even if Section 2254(d)(2) "somehow applied," the petitioner would still have to show that the factual determination was unreasonable. 367 F. App'x at 941 n.*.

There, the petitioner argued that even though he previously raised a claim in his first appeal, the state court improperly barred the claim on the grounds that he never raised the claim until his second appeal. *Id*. The Tenth Circuit rejected the challenge, stating that the state court's finding that the petitioner did not raise the claim was a finding entitled to the presumption of correctness. *Id*. While the wording shows that the Circuit applied the AEDPA standard to the factual basis for the procedural bar, *Bradford* lacks persuasive value because it predated *Wilson's* clarification that the AEDPA standards only apply to alleged violations of federal law.

Section 2254 and the recent cases defining its boundaries reveal that a state court's factual findings supporting a procedural bar are not reviewable in federal habeas, nor are they subject to attack as unreasonable. The Court must leave that state law determination to the state courts.

Even if the AEDPA standard did apply to the OCCA's application of the procedural bar, Petitioner still fails to show by clear and convincing evidence that the OCCA's factual determinations were unreasonable. Petitioner's counsel told the trial court that he had explained the appeals procedure thoroughly to Petitioner. Mot. to Withdraw Plea Hr'g Tr. 4-5, Dec. 3, 2009. Counsel asked Petitioner whether it was his desire "just to stand on the motion as is it [sic] and have the mandatory review," and Petitioner replied, "Yes." *Id*. at 6. Counsel asked if Petitioner

understood that "after mandatory review if you go and say, 'I waive appeals,' you're done." *Id*. at 8. Petitioner said that he understood. *Id*. While Petitioner claims that the comments are ambiguous, the Court is not convinced. Petitioner indicated that he wanted only mandatory review of his sentence. And although the question about waiving appeals could be read two ways due to the clumsy phrasing, it is not unreasonable to conclude that Petitioner intended to waive his appeals. Therefore, Petitioner fails to rebut the OCCA's factual determinations on that issue.

The OCCA applied an adequate and independent state procedural bar to Petitioner's challenge to the validity of his *Alford* plea. This Court cannot question the OCCA's application of the bar and Petitioner has not presented any reason to excuse his default. Therefore, Ground One is denied as procedurally barred.

B. Ground Two: Insufficient Factual Basis for the Plea.

Petitioner claims that the trial court lacked a sufficient factual basis to support his *Alford* plea. Petitioner argues that while the evidence shows he shot Mr. Harrington, there was no evidence establishing that the shooting was deliberate. Petition at 39. The OCCA denied the claim as procedurally barred on direct appeal because Petitioner did not argue the point at his hearing to withdraw his plea and because he told the trial court he did not want to withdraw his plea. *Bush*, 280 P.3d

at 345. The OCCA also noted that the evidence was sufficient to support Petitioner's *Alford* plea. *Id*.

This claim raises the same issue addressed in Ground One. *Supra p.* 10-11. Again, Petitioner argues that the OCCA ruled on the merits of the claim, rather than applying the procedural bar. But state courts can "look to federal law…as an alternative holding while still relying on an independent and adequate state ground" for denial of a claim. *Coleman*, 501 U.S. at 733. In those situations, federal courts "must acknowledge and apply the [state court's] procedural bar ruling, even though the [state court], on an alternative basis, briefly addressed and rejected the merits of [the petitioner's] claim." *Thacker v. Workman*, 678 F.3d 820, 834 n.5 (10th Cir. 2012).

The OCCA's opinion clearly and expressly states that Petitioner waived the issue, citing Rule 4.2(B) of the Rules of the Oklahoma Court of Criminal Appeals. *Bush*, 280 P.3d at 345. The OCCA's ruling rests on a state procedural bar, and the Court is therefore obligated to apply that bar. As with Ground One, Petitioner does not challenge the bar's independence or adequacy, nor does he seek to excuse his default. Ground Two is denied as procedurally barred.

C. Ground Three: Ineffective Assistance of Counsel at Hearing on Motion to Withdraw Plea.

Petitioner claims that his counsel for the hearing on his motion to withdraw his *Alford* plea was ineffective for not presenting evidence that his plea was not voluntary or knowing. Petition at 34-35. Petitioner argues that the record reflected his confusion when entering his plea, therefore counsel should have presented that evidence to attack the validity of the plea instead of standing on the motion. *Id*. Petitioner raised this claim on direct appeal. *Bush*, 280 P.3d at 350. The OCCA rejected the claim, finding that Petitioner clearly did not want to withdraw his plea, and that after consulting with Petitioner, counsel "did all he was required to do under the circumstances." *Id*. at 350-51.

1. *Clearly Established Law.*

Counsel is constitutionally ineffective when counsel's deficient performance prejudices the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On habeas review, courts must apply the *Strickland* and AEDPA standards to the facts of the case and decide whether "there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 101, 105. Federal courts cannot disturb a state court's ruling unless the petitioner demonstrates that the state court applied the highly deferential *Strickland* test in a way that every fairminded jurist would agree was incorrect. *Id*.

Courts analyze counsel's performance for "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. The Supreme Court shuns specific

guidelines for measuring deficient performance, as "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel, or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id*. at 688-89. Instead, courts must be highly deferential when reviewing counsel's performance, and the petitioner must overcome the presumption that the "challenged action[s] might be considered sound trial strategy." *Id*. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)) (internal quotation marks omitted).

Even if a petitioner shows deficient performance, he must also show prejudice by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. When a defendant pleads guilty, the question is whether there is a reasonable probability that counsel's error caused the defendant "to plead guilty rather than go to trial . . . ." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Counsel's reasonableness also depends on what is and is not a decision for the client to make. Certain decisions can only be made by the client, namely "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The client has ultimate authority over those decisions. *Id*. But counsel is not obligated to "obtain the [client's] consent to 'every tactical decision.'" *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quoting

Taylor v. Illinois, 484 U.S. 400, 417-418 (1988)). Decisions as to which witnesses to call and how to cross-examine witnesses are generally left to trial counsel's discretion. *See United States v. Pena*, 920 F.2d 1509, 1520 (10th Cir. 1990); *United States v. Miller*, 643 F.2d 713, 714 (10th Cir. 1981).

2. *Analysis.*

Petitioner challenges the OCCA's determination that counsel acted reasonably, arguing that prevailing norms required counsel to attack the voluntariness of the plea in spite of his contrary wishes. The Court cannot agree that the OCCA's decision was unreasonable.

Crawley v. Dinwiddie, 584 F.3d 916 (10th Cir. 2009), is an instructive case on this issue. In *Crawley*, the petitioner's counsel, concerned that petitioner was incompetent, requested a competency determination. *Id*. at 917-18. Even though a medical expert found him incompetent, the petitioner insisted he was competent and wanted to go to trial. *Id*. at 918. The trial court conducted a competency hearing before a jury where petitioner's counsel argued, according his client's wishes, that petitioner was competent. *Id*. Counsel did not call any witnesses in support. *Id*. The state argued that petitioner was incompetent, relying on testimony by the medical expert. *Id*. The jury found petitioner competent, and another jury later

convicted and sentenced him to twenty-five years in prison. *Id*. at 918-19. The OCCA affirmed the conviction and sentence on appeal. *Id*. at 919.

The petitioner argued on habeas review that counsel was ineffective for "accommodating his preference to be found competent despite counsel's personal misgivings and the contrary opinions of [the expert] and the prosecutor." *Id*. The Tenth Circuit applied the *Strickland* test, and found that the OCCA's determination that counsel performed reasonably was itself reasonable. *Id*. at 923. The Tenth Circuit observed that

> [counsel] was on the horns of a dilemma. He could abide [petitioner's] fervent and clearly-stated wishes, even though they were ill-considered . . . or he could override [petitioner's] preferences and advocate for what he considered to be his client's "best interest." . . . It was, indeed, an unenviable position. [Counsel] made a judgment call, which the OCCA determined not to be professionally deficient. We might disagree, but we cannot say the OCCA unreasonably applied *Strickland* when it concluded [counsel's] fully informed decision to comply with [petitioner's instructions did not constitute ineffective assistance of counsel.
>
> *Id*.

Like the attorney in *Crawley*, Petitioner's counsel at the motion to withdraw hearing found himself in a dilemma. Petitioner testified that he did not want to withdraw his plea and instead wanted to stand on the motion without calling any witnesses. Mot. to Withdraw Plea Hr'g Tr. 6, 14. Petitioner denied he was incompetent and disavowed the motion to withdraw his plea. *Id*. at 13-14. Counsel

thus faced the choice between abiding by Petitioner's wishes or presenting evidence against Petitioner's will. The OCCA found that counsel's decision to follow Petitioner's direction did not amount to deficient performance. This Court cannot say that the OCCA's conclusion is unreasonable.

Petitioner argues that since counsel controlled the strategic decisions, counsel should have pursued a strategy to invalidate Petitioner's plea. While strategic decisions generally rest with attorneys rather than clients, that principle is not boundless. Petitioner essentially claims that attorneys can and must pursue strategies that, if successful, undermine decisions that are for the client alone. That theory turns the attorney-client relationship on its head and renders the client's decision-making powers a nullity. Criminal defense attorneys find themselves in these untenable positions regularly, but this Court cannot insist that those attorneys are ineffective if they decline to use their tactical decision-making to subvert their clients' wishes. Such a step would not only pervert the roles of the attorney and client, but would distort the prevailing standards of reasonableness.

Nor can Petitioner find support for his argument in *Florida v. Nixon*. The attorney in *Nixon* explained his proposed strategy to his client numerous times, but his client never objected or consented. 543 U.S. at 186. The Supreme Court held that there is no blanket rule requiring a defendant's explicit consent to counsel's strategy *when the defendant is unresponsive*. *Id*. at 178, 192. *Nixon* does not address

the situation here, where counsel consulted with Petitioner and Petitioner objected to presenting evidence at the hearing.

The record shows that Petitioner did not want to present evidence or withdraw his plea. Faced with the choice of assenting to Petitioner's wishes or working against him to undermine his decision, counsel opted for the former. The OCCA found that choice reasonable under the prevailing norms, and this Court cannot say that the OCCA's conclusion was unreasonable.

Even if counsel did act deficiently by not presenting evidence to attack the voluntariness of Petitioner's plea, this Court cannot determine that the decision prejudiced Petitioner. Petitioner would have to show a reasonable probability that if counsel had presented evidence at the hearing, the trial court would have allowed Petitioner to withdraw his *Alford* plea. Petitioner only points to one piece of evidence that he claims counsel should have presented to the trial court: misleading advice from his trial counsel about the plea, contained in an affidavit from Petitioner's post-conviction application. Petition at 35-36. Petitioner argues that counsel should have asked him about the advice he received from trial counsel about the plea. But that information does not raise a reasonable probability that the trial court would have allowed Petitioner to withdraw his pleas.

The affidavit shows that trial counsel explained to Petitioner that the trial court would hear victim impact statements. *Original Appl. for Post-Conviction Relief*, Ex. 8. This contradicts Petitioner's claim that he did not know that Mr. Harrington's family would still have to endure a trial or take the stand. And whatever confusion Petitioner may have had about the sentencing stage proceedings, he still testified at the withdrawal hearing that he pled voluntarily, he knew what he was doing at the time, and he did not want to withdraw his plea.[5] This Court can find no reasonable probability that testimony about trial counsel's advice would have altered the trial court's ruling in the face of Petitioner's insistence that he knew what he was doing. Because Petitioner fails to show that counsel acted unreasonably or that counsel's performance prejudiced his case, this Court finds that the OCCA's decision was not contrary to or an unreasonable application of clearly established federal law. Relief is denied as to Ground Three.

[5] The record also supports the conclusion that Petitioner was competent when he entered his plea and when he decided that he did not want to withdraw his plea. When Petitioner first entered his plea, the trial court questioned him at length regarding his understanding of the plea, whether he was on medications that might disrupt his understanding, and whether he was taking the medications that were prescribed for him. Trial Tr. vol. V, 984-89. The trial court concluded that Petitioner was competent for the purpose of that hearing. *Id*. at 995. At the withdrawal hearing, Petitioner's counsel informed the trial court that he believed Petitioner was competent. Mot. to Withdraw Plea Hr'g Tr. 5. Counsel questioned Petitioner at length regarding his understanding of the proceedings, and the trial court concluded that he was competent for the purpose of the withdrawal hearing. *Id*. at 5-8, 16.

D. Ground Four: Improper Consideration of the Nash Offer of Proof.

Plaintiff claims that the trial court improperly considered a prejudicial and inflammatory offer of proof in determining his sentence, violating his Sixth, Eighth, and Fourteenth Amendment rights. Petition at 38. During the sentencing stage, the prosecution called Jackie Nash, a jailhouse informant, to testify against Petitioner. *Id*. at 18. The trial court sustained the defense's objection to the testimony for lack of notice, and barred Nash from testifying. *Bush*, 280 P.3d at 348. The prosecution then asked to make an offer of proof as to what Nash would say, which the trial court allowed over a defense objection. *Id*.

The prosecution stated that Nash would have testified that Petitioner confessed to deliberately killing Mr. Harrington in a horrific manner, which included yelling and screaming at Harrington while trying to goad him into admitting a sexual affair with Ms. Morgan. Trial Tr. vol. VII, 1314-15. Nash would have told the court about Petitioner's actions after the murder, including intentionally drinking alcohol to establish an intoxication defense. *Id*. at 1316. Nash also would have testified that Petitioner bragged about his escape attempts, attempted to escape by manipulating his toilet and shower, and planned to escape on the way to court. *Id*. Finally, Nash would have described Petitioner laughing about Mr. Harrington's death and showing

no remorse. *Id*. at 1317. After the offer, the attorneys and the judge had the following exchange:

> [Defense Counsel]: Judge the potential problem with this is –
>
> [Prosecutor]: Judge I object. I gave the proffer. I don't think they can object –
>
> The Court: What are you objecting?
>
> [Defense Counsel]: Judge, I – I in an abundance of caution this is a proffer and you're sitting off [sic] of our judgment of facts and I would just ask that the Court please consider it and put it in it's [sic] proper place.
>
> The Court: Any argument or statement by counsel is not evidence.
>
> *Id*.

Petitioner claimed on direct appeal that the trial court violated his due process rights by considering the offer of proof when sentencing him. *Bush*, 280 P.3d at 348. Petitioner also argued, in a cursory manner, that the offer of proof violated his Sixth Amendment right to confront witnesses against him. Br. of Pet. 53. The OCCA rejected the due process claim, finding that Petitioner failed to show that the trial court considered the offer of proof when sentencing him. *Bush*, 280 P.3d at 349. The OCCA did not address the Sixth Amendment claim. Petitioner argues that the OCCA's decision was unreasonable.

1. *Clearly Established Law.*

The Due Process Clause applies to the sentencing stage of capital trials. *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). When examining whether evidence violates the Due Process Clause, courts must ask "whether the admission of [the] evidence . . . so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id*. Relief is only warranted when the error is "so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Willingham v. Mullin*, 296 F.3d 917, 928 (10th Cir. 2002)(quoting *Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000).

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." The Confrontation Clause applies not only to live witnesses, but also to testimonial statements, including affidavits, depositions, prior testimony, or confessions. *Crawford v. Washington*, 541 U.S. 36, 50-52 (2004). Testimonial statements of absent witnesses can only be admitted when "the declarant is unavailable and the defendant has had a prior opportunity to cross-examine." *Id*. at 59.

2. *Analysis.*

Petitioner gives short shrift to his Confrontation Clause argument, only mentioning the Sixth Amendment in a heading and discussing the claim that he

raised on direct appeal. Petition at 38. Petitioner gave the claim equally sparse treatment on direct appeal. Still, this Court will address and dispose of the claim.[6]

"[I]t is far from clear whether the Confrontation Clause even applies at capital sentencing proceedings." *Wilson v. Sirmons*, 536 F.3d 1064, 1111-12 (10th Cir. 2008) (internal quotation marks omitted). But even if it does apply to the sentencing stage generally, it does not apply in this scenario. The Confrontation Clause bars admission of testimonial statements when the criminal defendant has no chance to cross-examine the person that made the statement. In this case, Nash never testified, nor was any testimonial statement ever admitted. The trial court made clear that the offer of proof was an argument, not evidence. The Sixth Amendment does not give Petitioner a right to confront non-evidence. And even if Petitioner did have that right, he still fails to show that the trial court considered the offer of proof in determining sentence for the reasons discussed below. Any error would therefore be harmless.

Petitioner's due process claim also fails. "In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346 (1981). Where a judge decides a

[6] The Court is skeptical that Petitioner's one-sentence argument on direct appeal "fairly presented" the claim to the OCCA. Regardless, the Court need not conduct a full procedural analysis, as the claim is easily disposed of on the merits, even under *de novo* review.

case instead of a jury, "it is presumed, absent an affirmative showing to the contrary, that only the material and competent evidence is considered." *Havelock v. United States*, 427 F.2d 987, 991 (10th Cir. 1970). To show that a judge improperly considered inadmissible evidence, the petitioner must rebut that well-established presumption. *See Harris*, 454 U.S. at 346-47; *Havelock*, 427 F.2d at 991.

The OCCA determined that Petitioner failed to rebut the presumption that the trial court only considered proper evidence, instead finding "little indication that the trial court utilized [the objectionable] evidence in making a sentencing decision." *Bush*, 280 P.3d at 349. Petitioner now faces a double obstacle: he must rebut the presumption that the trial court only considered competent evidence in making the sentencing determination with sufficient clear and convincing evidence to rebut the OCCA's factual finding that the trial court did not utilize the offer of proof. Petitioner fails to overcome either presumption.

Petitioner only points to two pieces of evidence indicating that the trial court considered the offer of proof: the trial court's reliance on Petitioner's escape attempts to support the continuing threat aggravator and one person's observation of the judge's reaction to the offer. Petition at 38-39; Reply at 10. But that evidence is not sufficient to show that the OCCA's ruling was unreasonable.

Regarding the escape attempts, the offer of proof did provide some information that Petitioner sought to escape custody. However, the prosecution introduced extensive admissible evidence on that point. Inmate Delwin Haney told the court that Petitioner and Inmate Canon Luney used a metal rod to pry off a screen and chip out the window of their cell. Trial Tr. vol. VI, 1195-96. Haney testified that the rod came from the cell's drain grate, which was consistent with photographs showing the grate with a missing rod. *Id*. at 1196; State's Ex. 211. Jolley also testified to reviewing surveillance footage of Petitioner and Luney making prying motions at the window. *Id*. at 1219. Grady County Jail employees testified that the video showed Petitioner and Luney at the window frequently. Trial Tr. vol. VII, 1344, 1360-61. One of those employees, jail administrator Shane Wyatt, also testified that Petitioner admitted to tampering with a towel bar in his cell. *Id*. at 1353. Wyatt described damage to the toilet in Petitioner's cell and to a shower, both of which were partially pried away from the wall. *Id*. at 1355-57.

Petitioner disagrees that this evidence shows that he tried to escape and attacks the credibility of the witnesses. But the evidence is at least sufficient to have given the trial court a reasonable basis to conclude that Petitioner attempted to escape without considering the offer of proof.

Petitioner's reference to the judge's reaction also fails to rebut the presumption. According to an investigator for the trial team, "the judge's whole

body language and demeanor changed during the offer and that he was visibly affected by the information. I observed him turn his whole body away from the prosecutor and the gallery. He appeared to be shocked and troubled by the contents of the offer." Original Appl. for Post-Conviction Relief, Ex. 9. This testimony is unpersuasive. The investigator's observations and opinions only represent his interpretation of the judge's behavior, not evidence that the judge actually considered the offer of proof when sentencing Petitioner. And the investigator's interpretations might not even be accurate. The affidavit also says that the victim's family began to cry during the offer. *Id*. The judge might have turned from the gallery to avoid seeing the emotional display and to preserve his impartiality. Perhaps not. But the ambiguous observations and opinions of the investigator fail to rebut the dual presumptions in this case.

The OCCA determined that Petitioner failed to rebut the presumption that the trial court only considered admissible evidence when sentencing him. Petitioner has failed to show by clear and convincing evidence that the OCCA's factual determination on that matter was unreasonable. Therefore, relief is denied on Ground Four.

E. Ground Five: Improper Victim Impact Statements.

Petitioner complains that the victim impact statements from Mr. Harrington's family violated his right to fair sentencing. Petition at 41. Petitioner raised this issue on direct appeal. *Bush*, 280 P.3d at 349. The OCCA held that Petitioner waived the claim because defense counsel failed to raise the issue at trial. *Id*. The OCCA then addressed the claim on the merits and found that Petitioner failed to rebut the presumption that the trial judge only considered proper evidence in determining his sentence. *Id*. at 349-50.

Petitioner concedes that the OCCA found the victim impact claim waived. Reply at 11. Petitioner does not challenge the adequacy or independence of the procedural bar, nor does he present any reason to excuse the default. Instead, Petitioner argues that this Court should address the merits because the OCCA performed a merits analysis. *Id*. As explained in Grounds One and Two, this Court must acknowledge and apply the procedural bar, even when the OCCA reached an alternative merits analysis. Ground Five is denied as procedurally barred.[7]

F. Ground Six: Impermissible Sentencing Factors.

[7] Even if the Court were to address the merits, this claim would fail for the reasons set out in Ground Seven, *infra* pp. 42-44.

Petitioner's sixth ground is a combination of his Grounds Four and Five. Petitioner claims that his sentence rests on impermissible factors of passion and prejudice due to the Nash offer of proof and the victim impact statements. To the extent that Petitioner is challenging the OCCA's decision after it's mandatory sentence review, the Court is uncertain that such a challenge is even cognizable in habeas. The OCCA's mandatory sentence review decision is a state court determination of a state law issue, therefore it likely falls outside the purview of federal habeas. Nonetheless, the claim fails on its merits. Neither claim warrants relief individually, as explained in Grounds Four and Seven, *supra* pp. 23-30, *infra* pp. 42-44. Combining those claims does not alter this Court's analysis. Relief is denied on Ground Six.

G. Grounds Seven and Eight: Ineffective Assistance of Trial Counsel.

Petitioner raises eight ineffective-assistance-of-trial-counsel claims in Grounds Seven and Eight. In Ground Seven, Petitioner claims that trial counsel (1) failed to properly marshal evidence during closing arguments or recall an expert witness, (2) failed to object to inadmissible hearsay, (3) failed to object to inadmissible victim impact statements, and (4) failed to present additional mitigation evidence. Petition at 52-60. Petitioner's Ground Eight alleges that counsel (1) failed to seek disqualification of a prosecutor, (2) failed to fully litigate continuance requests, (3) failed to investigate and present rebuttal evidence to the Nash offer of

proof, and (4) failed to request jury sentencing. *Id*. at 65-73. Petitioner raised the Ground Seven claims on direct appeal and the OCCA denied all claims on their merits. *Bush*, 280 P.3d at 351-52. Petitioner raised the Ground Eight claims in his post-conviction application. Original Appl. for Post-Conviction Relief at 21-33. The OCCA noted those claims were waived, but addressed the underlying merits to determine whether ineffective assistance of appellate counsel provided cause to excuse the default. *Bush*, No. PCD-2010-399, slip op. at 3-4. The OCCA concluded that Petitioner failed to show cause and denied relief. *Id*. at 7-8, 12.

1. *Procedural Bar.*

The OCCA barred Petitioner's Ground Eight claims because he did not raise them on direct appeal. Petitioner does not challenge the adequacy or independence of the procedural bar. Petitioner does seek to avoid the default by arguing that appellate counsel was ineffective for not raising those claims on direct appeal. Petition at 74. As discussed in Ground Nine, appellate counsel was not ineffective for omitting the Ground Eight claims from his direct appeal. *Infra*, pp. 49-62. Petitioner cannot establish cause to avoid default of his Ground Eight claims, therefore the claims are denied as procedurally barred.

2. *Clearly Established Law.*

Because the OCCA addressed the merits of Petitioner's Ground Seven claims, the Court reviews those claims under AEDPA. As noted in Ground Three, counsel's performance is measured according to the *Strickland* standard. *Supra* p. 17. Petitioner must show that counsel's performance was deficient and that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 687, 694. On habeas review, this Court does not decide whether counsel's performance was reasonable, but whether the OCCA's evaluation of counsel's performance was itself reasonable. *Harrington*, 562 U.S. at 101, 105. This standard is doubly deferential, and the Court can only grant relief if fairminded jurists could not disagree that the OCCA's decision was correct. *Id*.

3. *Analysis.*

a. *Failure to Marshal Evidence*

Petitioner claims that trial counsel should have countered the prosecution expert's testimony, as it cast doubt on his own expert's findings. Trial counsel called Dr. Gayle Poyner to explain Petitioner's mental issues, substance abuse problems, and reactions to medications. Trial Tr. vol. IX, 1684, 1728-29, 1740. Dr. Poyner opined that, based on his symptoms, Petitioner likely suffered from undiagnosed bipolar disorder. *Id*. at 1684. In rebuttal, the prosecution called Dr. Therese Hall, who noted that Dr. Poyner's report did not distinguish between the similar symptoms

of bipolar disorder and substance abuse. *Id*. at 1839-40. On cross-examination, defense counsel asked Dr. Hall whether one could conclude that a person was suffering from bipolar disorder if the person exhibited the symptoms when they did not have alcohol or drugs in their system. *Id*. at 1847. Dr. Hall replied in the affirmative. *Id*. Trial counsel did not raise the issue in closing arguments and did not recall Dr. Poyner to emphasize that Petitioner exhibited the relevant symptoms while not on drugs or alcohol. Petitioner claimed on direct appeal that this omission amounted to ineffective assistance of counsel.

The OCCA rejected the claim, finding that the trial court heard sufficient evidence on Petitioner's mental condition through the testimony and that counsel was not ineffective. *Bush*, 280 P.3d at 351. The OCCA's decision is not unreasonable. Petitioner fails to show that counsel's decision not to emphasize or bolster Dr. Poyner's diagnosis was unreasonable, or that counsel's failure prejudiced Petitioner's defense.

Presenting testimony and evidence is a matter of strategy. Petitioner therefore must overcome the presumption that counsel's actions could be considered sound trial strategy. *Strickland*, 466 U.S. at 689. Petitioner has failed to do so. First, counsel faced a unique situation. The prosecution waived their first closing argument, leaving trial counsel clueless as to what evidence the prosecution would highlight or attack. Trial Tr. vol. IX, 1849. Counsel could have decided to discuss

the issues in a way that would avoid an attack from the prosecution. Counsel kept her closing arguments straightforward, and her discussion of Petitioner's disorder pointed the Court to Dr. Poyner's testimony. *Id*. at 1853-54. This decision paid dividends, as the prosecution did not address the bipolar diagnosis in closing arguments. Counsel managed to tell the trial court about Petitioner's disorder without the prosecution attacking that diagnosis. While Petitioner claims that trial counsel could not have a strategic reason for this approach, the Court disagrees. Counsel's decision to briefly touch on the bipolar disorder and direct the trial court back to the actual testimony is a conceivably reasonable method of shielding the diagnosis from attack.

Second, the issue was not so vital or hotly contested that trial counsel would be unreasonable for not addressing it further. Over the course of Petitioner's trial, both sides raised contradictions and inconsistencies about various evidentiary matters. Attorneys cannot devote significant time and attention to every weakness in their case or turn aside every attack. Instead, reasonable attorneys must recognize and prioritize which areas are vital to their case.

The friction between the experts' testimony did not demand clarification. Dr. Poyner's testimony revealed that Petitioner exhibited many of the symptoms while not under the influence of drugs or alcohol. Dr. Poyner testified that Petitioner was given antidepressants in custody. Trial Tr. vol. IX, 1700-01. Also, records from

Petitioner's time at Griffin Memorial Hospital showed that Petitioner was severely mentally ill and required treatment. *Id*. at 1701. Dr. Poyner testified that Petitioner struggled with symptoms of bipolar disorder while incarcerated by the Department of Corrections. *Id*. at 1730. Dr. Poyner found the same symptoms while Petitioner was in the Grady County Jail. *Id*. at 1731, 1733, 1735-36. This testimony indicated that Petitioner exhibited symptoms of bipolar disorder while in prison, jail, and in a mental institution, where he would likely not be under the influence of drugs or alcohol.

Dr. Hall's testimony, by contrast, was brief. Dr. Hall admitted that she had only reviewed Dr. Poyner's report and had not evaluated Petitioner. *Id*. at 1839. And although Dr. Hall expressed concern that the report did not distinguish between the symptoms attributable both to substance abuse and bipolar disorder, she conceded that Dr. Poyner may have made that distinction, but she did not know. *Id*. at 1840. Dr. Hall did not discuss Petitioner's symptoms while in custody, but did admit that if a patient exhibited the symptoms of bipolar disorder while there were no drugs or alcohol in their system, one could conclude that the patient suffered from the disorder. *Id*. at 1847. The disagreement on this issue was marginal. Putting the issue in the context of the entire trial and considering the myriad of issues that trial counsel needed to address, it was not unreasonable to prioritize other matters instead

of presenting evidence or extensive argument on that discrete point. The OCCA's decision was therefore reasonable.

Even if trial counsel's performance was deficient, Petitioner still cannot show prejudice from counsel's failure to clarify this point. The judge, sitting as the trier of fact, heard all of the evidence, including Dr. Poyner's extensive testimony that Petitioner exhibited the relevant symptoms when he was likely not under the influence of drugs or alcohol. Dr. Hall's testimony, while questioning Dr. Poyner's report, was not the type of devastating blow that would hinder the court's consideration of Dr. Poyner's testimony. And the prosecutor did not even address the mental health issue in his closing argument. There is therefore no reasonable probability that, had counsel addressed this issue in closing argument or recalled Dr. Poyner, the judge would not have sentenced Petitioner to death.

b. *Failure to object to hearsay.*

Petitioner next complains that trial counsel did not object on hearsay grounds to testimony about some of Mr. Harrington's statements. Jimmy Barrington testified on direct examination that Mr. Harrington asked him to come to Mr. Harrington's trailer a few days before the murder. Trial Tr. vol. VI, 1022. Mr. Harrington said that he and Petitioner had a fight earlier in the day and was concerned that Petitioner was waiting for him at the trailer. *Id*. Mr. Harrington asked Mr. Barrington to bring

his gun. *Id*. The two met at the trailer and entered to find Petitioner passed out on a couch. *Id*. at 1023. Mr. Barrington testified that Mr. Harrington accused Petitioner of breaking into the house through the window. *Id*. at 1023-24. Mr. Barrington said that a shotgun and rifle were leaning by the front door, a rifle lay on a bed in a bedroom, and another rifle was leaning against the wall in the bedroom. *Id*. at 1025-26. Mr. Barrington testified that the guns were normally put away. *Id*. at 1026. Mr. Barrington said that Mr. Harrington later told him Petitioner had put out the guns. *Id*. at 1030. When the police arrived, Mr. Barrington told them Petitioner had spread the guns around the trailer. *Id*. Trial counsel did not object to the recitation of Mr. Harrington's statements.

When defense counsel cross-examined Mr. Barrington about Mr. Harrington's statements, the prosecution objected on hearsay grounds. *Id*. at 1048-49. Defense counsel responded that she "let every bit of that hearsay in about what Jimmy [sic] said and now I'm crossing." *Id*. at 1049. The trial court sustained the objection. *Id*. On appeal, Petitioner claimed that trial counsel's failure on direct examination to object to Mr. Harrington's statements as hearsay amounted to ineffective assistance of counsel because it allowed evidence showing that Petitioner placed the guns around the trailer. Br. of Pet. at 74. The OCCA denied the claim, and found that counsel had allowed the hearsay evidence to go unchallenged so she could then use the statements to show that the incident was not violent in nature.

Bush, 280 P.3d at 351. The OCCA held that Petitioner failed to show that counsel's failure to object was not a valid sentencing strategy. *Id*.

This Court cannot find the OCCA's decision unreasonable. *Strickland* generally requires courts to presume that counsel's actions "might be considered sound trial strategy." 466 U.S. at 689. Failure to object to evidence can be part of a reasonable trial strategy. *Yarrington v. Davies*, 992 F.2d 1077, 1080 (10th Cir. 1993). Therefore, courts must presume that an attorney's failure to object to inadmissible evidence is part of a trial strategy. This strong presumption is bolstered even more when an attorney lodges similar objections to other inadmissible evidence. *Id*. (petitioner cannot overcome the presumption that a failure to object to hearsay was strategic when counsel objected to hearsay on at least one other occasion). And even if attorneys fail to recognize that evidence is inadmissible or assume that inadmissible evidence will nevertheless be admitted, courts can still find their performance reasonable when a fully informed attorney could have concluded that the inadmissible evidence yielded a strategic advantage to their client. *See Bullock v. Carver*, 297 F.3d 1036, 1053-54 (10th Cir. 2002).

The record indicates that counsel made a strategic decision not to object to the hearsay statements. First, defense counsel raised at least seventeen different hearsay objections during the course of the trial, many of which were sustained. Trial Tr. vol. IV, 908; vol. V, 962; vol. VI, 1034-35, 1056, 1058, 1135-36, 1139, 1141, 1144,

1160; vol. VII, 1253, 1283, 1288, 1345, 1353. Counsel was obviously vigilant in preventing hearsay, therefore counsel's silence on Mr. Barrington's testimony appears strategic. Second, when the prosecutor objected to counsel's cross-examination, counsel stated that she "let every bit of that hearsay in about what Jimmy [sic] said and now I'm crossing." Trial Tr. vol. VI, 1049. This statement indicates that not only did counsel recognize that the statements amounted to hearsay, but that her failure to object was a strategic decision.

Petitioner attacks the OCCA's factual finding that counsel pursued this strategy to show that the incident at Mr. Harrington's home was not violent. Petition at 57. But Petitioner's arguments do not overcome AEDPA's presumption that the OCCA's factual determinations and inferences drawn from the record are reasonable. The record reflects that shortly after saying that she "let" the hearsay statements into the record without objection, counsel then questioned Mr. Barrington as to whether the episode was violent, or whether Mr. Harrington seemed concerned for his safety. Trial Tr. 1049-50. While not explicit, the record does lend support to the OCCA's conclusion as to counsel's strategy. This factual conclusion is not unreasonable.

Petitioner argues that the strategy was still unreasonable because the incident would not have seemed violent without the hearsay information. But the admissible, non-hearsay evidence established that Petitioner placed the guns around the house.

Mr. Barrington described the placement of the guns, and testified that Mr. Harrington usually kept his guns in his bedroom closet. Trial Tr. vol. VI, 1025-26. Mr. Barrington said that on the very seldom occasions when a gun was out of the closet, it was leaned against the bedroom wall in a corner. *Id*. at 1026. Mr. Barrington's testimony of Mr. Harrington's typical storage of the guns clashed with the way the guns were scattered all over the house after Petitioner forcibly entered. Also, Mr. Barrington testified that Petitioner actually had ammunition in his pocket at the time. *Id*. at 1025. Mr. Barrington's testimony, even without the hearsay statements, raised a strong inference that Petitioner placed the guns around the house. Counsel sought to negate the testimony by demonstrating that Mr. Harrington was not afraid of Petitioner and that the incident was not violent. The OCCA found that counsel was not ineffective for pursuing that strategy. The Court cannot find the OCCA's decision itself unreasonable.

The admissible, non-hearsay evidence also shows that the strategy did not prejudice Petitioner's defense. As discussed above, Mr. Barrington's testimony provided the trial court plenty of admissible evidence that Petitioner forcibly entered Mr. Harrington's trailer and spread the guns throughout the trailer. Those aggressive acts of criminality indicated that Petitioner could pose a continuing threat to society. And that incident was just one of many reasons that the trial court determined that Petitioner posed a continuing threat. The trial court further found two aggravators

in addition to the continuing threat aggravator. There is no reasonable probability that, had counsel objected to the hearsay testimony, the trial court would not have sentenced Petitioner to death. Relief is denied on this issue.

c. *Failure to object to victim impact statements.*

Several of Mr. Harrington's relatives gave victim impact statements. Those statements were lengthy, and spoke to the nature of the crime and the characteristics of Petitioner. Trial Tr. vol. VIII, 1407-50. The statements also recommended the death penalty. *Id*. Petitioner argued on direct appeal that the testimony violated his due process rights and that counsel was ineffective for not objecting to the impermissible statements. *Bush*, 280 P.3d at 349-51. The OCCA noted that the State admitted that "the victims did stray beyond a simple opinion about a recommended sentence and elaborated on their reasons for asking for a sentence of death." *Id*. at 350. However, the OCCA found that Petitioner failed to rebut the presumption that the trial court ignored the improper victim impact evidence. *Id*. at 350. The OCCA denied Petitioner's ineffective assistance of counsel claim on the same basis, concluding that Petitioner failed to show any prejudice from the victim impact statements because he could not show that the trial court relied on the impermissible information. *Id*. at 351.

That conclusion is not unreasonable. Doubtless the victim impact statements went well beyond what the Supreme Court has deemed acceptable. Federal precedent reveals that the statements were even more egregious than the OCCA acknowledged. *See Selsor v. Workman*, 644 F.3d 984, 1026-27 (10th Cir. 2011) (characterizations of the crime and the defendant or sentence recommendations are still precluded under *Booth v. Maryland*, 482 U.S. 496 (1987)).[8] However, even if counsel acted unreasonably by not objecting to the statements, Petitioner cannot show prejudice. As explained in Ground Four, judges sitting in bench trials routinely hear inadmissible evidence. *Supra* p. 27. There is therefore a strong presumption that the trial court did not consider these improper statements when deciding Petitioner's sentence.

Petitioner tries to rebut the presumption by referencing the trial court's statement that he hoped "that some confidence has been regained in the legal system . . . ." Trial Tr. vol. X, 1875. Petitioner argues that the trial court's statement was in response to Kathy Harrington's victim impact statement in which she said, "I pray

[8] The Court notes that the Supreme Court has recently reaffirmed that sentence recommendations by victims' families violate the Eight Amendment. *Bosse v. Oklahoma*, 580 U.S. ____ (2016). The Tenth Circuit and this Court have followed that reasoning for some time, and have always treated such recommendations as error. *Bosse* does not have a direct effect on this case, however. The Court is focused not on whether the victim impact statements were in error (which they were) or whether counsel acted unreasonably for not objecting (which is likely). Instead, the Court focuses on whether the errors prejudiced the defense. Therefore, while *Bosse* does confirm the approach this Court has taken regarding victim impact statements, it does not materially affect the outcome in this case.

that my faith may be reassured in the justice system." Trial Tr. vol. VIII, 1449. Despite the correlation between the trial court's statement and Mrs. Harrington's testimony, Petitioner has not overcome the presumption that the trial court ignored the improper evidence. Petitioner's argument assumes that the trial court made that statement only because he considered the victim impact testimony. That assumption has no support in the record. The trial court's statement preceded the court's findings, and was not given in context of presenting evidence supporting the death sentence. Nor did the statement of comfort to the victim's family indicate that the victim impact testimony had a causal effect on the sentence. The trial court could have heard the inadmissible evidence and spoken to it for the family's benefit without actually weighing the evidence in the sentencing determination. The OCCA presumed that, in the absence of other evidence, the trial court did just that. The OCCA decided that Petitioner did not rebut the presumption that the trial court only considered proper evidence, and therefore determined that any failure by counsel to object to the improper evidence could not have prejudiced the defense. This Court does not find those factual and legal conclusions unreasonable.

d. *Failure to present mitigation evidence.*

Petitioner claims that counsel should have presented more mitigation evidence regarding his bipolar disorder and his reactions to the drug Celexa. Petition at 60. Specifically, Petitioner argues that counsel should have (1) retained and called a

neuropharmacologist to testify about the interaction between bipolar disorder and the drug Celexa; (2) called additional witnesses and gathered medical records to establish that Petitioner's grandfather suffered from bipolar disorder; and (3) discussed with Dr. Poyner how Petitioner's bipolar disorder could account for his actions while in jail. *Id*. at 61-63. Petitioner raised these same arguments on direct appeal and sought an evidentiary hearing. *Bush*, 280 P.3d at 352. The OCCA denied the claim, stating that the trial court heard much of the evidence that the additional witnesses would present and the evidence clearly showed that Petitioner's actions while in jail were escape attempts, not symptoms of mental illness. *Id*. The OCCA's ruling was not unreasonable.

i. Failure to retain and call a neuropharmacologist.

Petitioner criticizes trial counsel for only presenting Dr. Poyner to testify about his bipolar disorder and its interaction with the anti-depressant Celexa. He argues that a neuropharmacologist would have been more qualified to discuss those issues. Petitioner cites a report authored by Dr. Jonathan Lipman, a neuropharmacologist, which "describes in great detail the effects of Celexa on [Petitioner] and states that it is his opinion that Celexa caused [Petitioner] to lose control and shoot Mr. Harrington." Petition at 62. Petitioner does not cite any other information that Dr. Lipman or another neuropharmacologist could have

provided, but simply states that a neuropharmacologist would be the appropriate expert to discuss that theory.

Other than Petitioner's conclusory statement that Dr. Poyner was unqualified to discuss the effects of Celexa on a bipolar individual, Petitioner does not present the Court with any indication that trial counsel acted unreasonably by relying on Dr. Poyner. The record shows that Dr. Poyner discussed Selective Serotonin Reuptake Inhibitors ("SSRIs"), including Celexa, at length. Trial Tr. IX, 1720-29, 1778. Dr. Poyner testified to how the drugs worked and the dangers they posed to individuals with bipolar disorder. *Id*. at 1722-27. Dr. Poyner cited an FDA black-box warning and other information showing that those with bipolar disorder may act aggressive, impulsive, or violent when taking SSRIs. *Id*. at 1723-27. She also testified that Petitioner exhibited signs of bipolar disorder, was given an SSRI, and the SSRI "activated his brain and he became very violent." *Id*. at 1727.

While Dr. Lipman or another neuropharmacologist could have perhaps given a more technically accurate description of exactly how SSRI's cause violent reactions, the Court cannot agree that counsel was ineffective for relying on Dr. Poyner's testimony. Drs. Poyner and Lipman both conclude that the interaction of Celexa and Petitioner's bipolar disorder led to the shooting. Petitioner is not entitled to the most qualified, most persuasive, or most technically correct expert. He is entitled to competent, reasonable representation. The OCCA determined that he

received that type of representation regarding expert testimony on this issue, and this Court does not find that determination unreasonable.

ii. Failure to present additional witnesses and medical records.

Petitioner claims that trial counsel should have called additional mitigation witnesses and obtained medical records to establish that his grandfather suffered from bipolar disorder. Petition at 62. The OCCA ruled that counsel was not ineffective for not presenting the additional information because the evidence at trial sufficiently established that Petitioner's grandfather suffered from bipolar disorder. *Bush*, 280 P.3d at 352.

This conclusion is not unreasonable. Dr. Poyner testified that Petitioner's grandfather was diagnosed with bipolar disorder. Trial Tr. vol. IX, 1686. Petitioner's father also testified that his father, Petitioner's grandfather, was bipolar. Trial Tr. vol. VIII, 1575. The prosecution never questioned whether the grandfather suffered from bipolar disorder. Counsel was not ineffective for not bolstering unchallenged evidence from an expert witness and Petitioner's father.

iii. Failure to discuss Petitioner's behavior in jail with Dr. Poyner.

Petitioner claims that counsel should have questioned Dr. Poyner about the connection between Petitioner's behavior in jail and his bipolar disorder. Petition at 62-63. Petitioner argues that Dr. Poyner would have attributed his behavior to the

disorder rather than an attempt to escape. *Id*. The OCCA rejected this argument on direct appeal, finding overwhelming evidence that the damage done in the jail cells were the result of escape attempts, not a mental disorder. *Bush*, 280 P.3d at 352. The OCCA's ruling is not unreasonable.

Petitioner did not simply "tamper[] with fixtures" at the county jail, as Dr. Poyner's affidavit states. The record showed that, among other things, he pried a steel rod loose from a floor grate and, along with another inmate, used the rod to pry metal screen from the cell window and chip at the window. Trial Tr. vol. VI, 1195-96. Dr. Poyner's description of that incident as mere "tampering" indicates either that she did not consider that specific behavior, or that she was willing to chalk up any type of escape attempt, no matter how extensive, to his disorder. Neither conclusion shows that counsel should have questioned Dr. Poyner on that point. And even if Petitioner's actions stemmed from his disorder, the OCCA still reasonably characterized the actions as escape attempts. Regardless of whether Petitioner was trying to leave his cell due to mental illness or due to clear-headed criminality, Petitioner still tried to escape his cell. The OCCA could reasonably conclude that counsel was not ineffective for not pursuing that argument.

4. *Conclusion.*

Four of the eight ineffective assistance of trial counsel claims are procedurally barred. The OCCA's denials of the remaining four claims are not contrary to or an unreasonable application of clearly established federal law. Therefore, Grounds Seven and Eight are denied in their entirety.

H. Ground Nine: Ineffective Assistance of Appellate Counsel.

Petitioner claims that his appellate counsel was ineffective for not raising his Ground Eight claims on direct appeal. Petition at 74. The OCCA addressed these claims on their merits in Petitioner's post-conviction proceeding and denied relief. *Bush*, No. PCD-2010-399, slip op. at 6-10.

1. *Clearly Established Law.*

The *Strickland* standard applies to ineffective assistance of appellate counsel claims. *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014). To establish deficient performance, the petitioner must show that appellate counsel "unreasonably failed to discover [a] nonfrivolous issue[] and to file a merits brief raising [it]." *Id*. (quoting *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). Attorneys are not required to "raise every nonfrivolous issue on appeal," especially since weak claims tend to detract from stronger issues in the appeal. *United States v. Cook*, 45 F.3d 388, 394-95 (10th Cir. 1995) (abrogated on other grounds). While a petitioner can bring a *Strickland*

claim "based on counsel's failure to raise a particular claim…it is difficult to demonstrate that counsel was incompetent" in that situation. *Robbins*, 528 U.S. at 288. And even if a petitioner succeeds in that difficult task, he must still demonstrate that, absent the appellate counsel's deficient performance, there is a reasonable probability that the petitioner would have prevailed on appeal. *Id*. at 285.

2. *Analysis.*

The OCCA found that appellate counsel was not ineffective because the underlying trial counsel claims, which Petitioner argues appellate should have raised, lacked merit. That conclusion was not unreasonable.

a. *Failure to seek prosecutor's disqualification.*

Petitioner claims that District Attorney Bret Burns displayed personal bias against him, therefore appellate counsel should have raised an ineffectiveness claim on appeal because trial counsel did not seek disqualification of Burns and his office. Petitioner cites the following examples of the alleged bias.

Mr. Burns prosecuted Petitioner for other crimes before the murder. Petitioner notes that during sentencing on one of those crimes, he and Mr. Burns engaged in a dialogue that indicated personal animosity between the two. Petition at 93-94. While questioning Petitioner about an interview with a detective, Mr. Burns brought up Petitioner's comment to the detective that he would go to court and say

that he was "fucking Bret Burns' wife." Original Appl. for Post-Conviction Relief, Ex. 3. After an objection, Mr. Burns explained that Petitioner's statements went to his ongoing disrespect for the law and law enforcement. *Id*. Petitioner interjected that he had apologized for that incident but that Mr. Burns still held it against him. *Id*.

Mr. Burns also objected to Petitioner's early parole on a past crime. Petition at 94. Petitioner provides several statements from his trial attorneys that reveal their concerns about Mr. Burn's participation in the murder case. *Id*. at 95. Finally, Petitioner describes the prosecution's withdrawal of a plea offer after Petitioner was prepared to accept the agreement. *Id*. at 95-96. Petitioner claims that after Mr. Burns offered him a plea deal that he decided to accept, a different prosecutor informed him that the victim's family had a change of heart and wanted the State to seek the death penalty. *Id*. The plea deal was withdrawn.

In his post-conviction application Petitioner claimed that the trial court should have disqualified Mr. Burns. *Bush*, No. PCD-2010-399, slip op. at 8. And he claimed that trial counsel was ineffective for not seeking the disqualification. *Id*. Petitioner argued that appellate counsel should have raised an appellate claim on trial counsel's failure. *Id*. The OCCA held that Mr. Burns did not act vindictively and concluded that Petitioner failed to show that Mr. Burns' participation prejudiced

his case. Having rejected the underlying trial counsel claims as meritless, the OCCA found that the appellate ineffectiveness claim failed.

The OCCA's decision was not unreasonable. As discussed below, Petitioner fails to show that Mr. Burns or any other prosecutor should have been disqualified from his case, or that Mr. Burns' participation prejudiced his defense. Since Petitioner cannot meet *Strickland's* high standard on the trial counsel claim, appellate counsel was not ineffective for omitting that claim from the appeal.

"Disqualification of Government counsel is a drastic measure and a court should hesitate to impose it except where necessary." *United States v. Bolden*, 353 F.3d 870, 878 (10th Cir. 2003). The limited circumstances that merit disqualification include actual conflicts of interest where the appointed prosecutor also represented another party, bona fide allegations of bad faith performance, and situations where a prosecutor will act as a witness at trial. *Id*. (citing *Young v. United States*, 481 U.S. 787, 807 (1987); *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir.1985); *United States v. Heldt*, 668 F.2d 1238, 1275 (D.C.Cir. 1981)). Prior experience between a prosecutor and criminal defendant is not sufficient to show bias. In *Levin v. Romero*, a defendant claimed that the prosecutor vindictively pursued charges against him because he had testified on behalf of another defendant in an unrelated case. 485 F. App'x 301, 305 (10th Cir. 2012). The Tenth Circuit observed that the state court's conclusion that a "defendant does not have a right to a

prosecutor that has no previous knowledge of [him]" was beyond debate. *Id*. Even showing that a prosecutor was the victim of the defendant's crime is not enough, by itself, to disqualify that prosecutor. *Avila v. United States*, 153 F.3d 726 at *2 (10th Cir. Aug. 4, 1998) (unpublished table opinion) (explaining that a defendant must still show actual prejudice stemming from alleged bias).

Petitioner fails to present meritorious grounds for disqualification of Mr. Burns. Mr. Burns' multiple prosecutions of Petitioner are not unusual, especially in small communities with a limited number of prosecutors. And Mr. Burns' previous verbal sparring with Petitioner is also not indicative of ill will. While Petitioner argued that Mr. Burns "held it against him," the record shows that the questions were fair in the context of criminal sentencing, as they addressed Petitioner's general attitude and culpability. Petitioner cannot claim bias just because the prosecutor used his own careless words against him. Even if Mr. Burns harbored some preconceived notions based on his past interactions with Petitioner, they do not render him impermissibly biased. Familiarity may breed contempt, but it is not grounds for disqualification.

Mr. Burns' objection to Petitioner's early parole likewise fails to show actual bias. Prosecutors often object to early parole, and therefore an objection alone is not enough. And considering Petitioner's criminal tendencies, which resulted in Mr. Harrington's murder, Mr. Burns' objection seems prescient, not vindictive.

Petitioner's attorney's comments about Mr. Burns also do not indicate that Mr. Burns was biased. First, some of Petitioner's evidence consists of one attorney stating what another attorney said. Original Appl. for Post-Conviction Relief, Ex. 5 at 1. The Court will not credit such hearsay. And even considering all the statements, they still do not establish that Mr. Burns should have been disqualified or that Mr. Burns' participation actually prejudiced Petitioner's case. The statements only show that the attorneys were concerned about Mr. Burns' zealous prosecution.

Finally, the prosecution's decision to withdraw the plea deal does not show bias. Petitioner does not introduce any evidence that the prosecution withdrew the offer because of an improper motive. The documents Petitioner presents show that the prosecution scuttled the plea agreement because the victim's family had a change of heart and wanted to push for the death penalty. *Id*. at 1-2.[9] The family made that decision, and Mr. Burns cannot be deemed biased for following their wishes. None of these incidents support a finding of bias.

Petitioner's reliance on *Young v. United States*, does not alter the analysis. In *Young*, a district court appointed a private special prosecutor to pursue contempt charges against a civil defendant. 481 U.S. at 791-92. The district court had

[9] Petitioner challenges the OCCA's finding that he had not yet accepted the plea. The Court need not decide that issue, because Petitioner fails to show that Mr. Burns or anyone from his office orchestrated the withdrawal of the offer for an improper reason.

previously entered an agreed-upon injunction that prevented the defendant from infringing on Louis Vuitton's trademark. *Id*. at 790-91. Based on allegations that the defendant had violated the injunction, one of Louis Vuitton's attorneys was appointed as a special prosecutor to pursue the contempt charges. *Id*. at 791-92. The Supreme Court found the appointment improper because the prosecutor would be the beneficiary of the desired order. *Id*. at 809.

Young has no application in this case. Petitioner does not claim any conflict of interest. There are no allegations that Mr. Burns represented any entity but Grady County and the State of Oklahoma in his prosecution of Petitioner. Instead, Petitioner's claim rests solely on the weak anecdotal evidence discussed above.[10]

Any attempt to disqualify Mr. Burns or his office would have been baseless. Therefore trial counsel did not act unreasonably in not pursuing that line of attack. Petitioner also fails to show that if Mr. Burns had been disqualified, Petitioner's would not have pled guilty or received a death sentence. Petitioner's ineffective-assistance-of-trial-counsel claim regarding the disqualification issue lacks merit. The OCCA found that appellate counsel was not ineffective for omitting that

[10] The Court also finds it telling that throughout his state appellate proceedings, Petitioner never raised a single claim of prosecutorial misconduct, a death penalty litigation staple. That Petitioner cannot scrape together a single instance where the prosecution acted even arguably out of line is a strong indicator that any supposed bias played no role in Petitioner's trial.

meritless claim from the direct appeal. The Court does not find that decision unreasonable.

b. *Failure to fully litigate continuance requests.*

Prior to Petitioner's trial, his attorneys twice requested a continuance. O.R. 1 at 152-174; 2 at 358-60. The trial court denied both requests. Mot. for Continuance Hr'g Tr.10, July 2, 2009; Mot. for Continuance Hr'g Tr. 52, 83, October 8, 2009. Counsel did not pursue those requests further, but did announce at the beginning of trial that they were not ready to proceed. Trial Tr. vol. I, 17-18.

In his post-conviction proceeding, Petitioner claimed that the trial court erred by not granting the continuances. *Bush*, No. PCD-2010-399, slip op. at 8. Petitioner also claimed that trial counsel was ineffective for not fully litigating that issue and that appellate counsel was ineffective for not challenging trial counsel's ineffectiveness on appeal. *Id*. at 8-10. The OCCA found that the lack of the continuances did not prejudice his defense during either the first or second stage. *Id*. at 9. Because the trial counsel ineffectiveness claim would fail for lack of prejudice, the OCCA held that appellate counsel was not ineffective for failing to raise that meritless claim. *Id*. at 10.

The Court agrees that this trial counsel ineffectiveness claim did not warrant inclusion on direct appeal. Regardless of whether trial counsel should have pursued

further action on the continuance requests, the failure to obtain a continuance did not prejudice Petitioner's defense.[11] Two different standards are at play in this analysis, because Petitioner entered an *Alford* plea during the guilt stage of his trial and was sentenced to death after a full sentencing stage. To show that trial counsel's failure prejudiced him in the first stage, Petitioner must demonstrate his attorney's errors "caus[ed] him to plead guilty rather than go to trial…." *Hill*, 474 U.S. at 59. To show prejudice in the sentencing stage, Petitioner must demonstrate that there was a reasonably probability that, absent trial counsel's failures, he would not have been sentenced to death. *See Strickland*, 466 U.S. at 694.

Petitioner fails to show that the lack of a continuance caused him to enter his *Alford* plea during the first stage of his trial.[12] The trial record does not show any connection between a lack of preparation time and Petitioner's plea decision. Instead, Petitioner repeatedly said that he entered the *Alford* plea to avoid putting his family or the victim's family through a trial. Petitioner argues that the time limitations strained his relationship with counsel, but the record does not reflect any strain in conjunction with the continuance requests. Instead, those problems arose when Petitioner decided to enter a plea against his attorneys' wishes, well into the

[11]The Court need not decide whether trial counsel acted reasonably, as the second *Strickland* element is dispositive on this issue.

[12] It is likely that the OCCA would have found that Petitioner waived trial counsel ineffectiveness claims related to the first stage for the reasons in Grounds One and Two. Any appellate counsel claim would then be a sure loser due to the procedural bar. However, this Court need not anticipate the procedural issues that might have arisen, because the trial counsel claim is meritless.

trial and after the continuance issue was settled. And while one of Petitioner's attorneys stated in an affidavit that she believed that the lack of time contributed to Petitioner's plea, that type of post-hoc speculation does not establish actual prejudice.

Petitioner likewise fails to show prejudice in the second stage. Petitioner argues that the time constraints prevented trial counsel from obtaining a neuropharmacologist to testify about interactions between Petitioner's bipolar disorder and anti-depressants. As explained in detail in Ground Seven, *supra* p. 45-47, Dr. Poyner's testimony adequately conveyed this information, therefore the lack of a neuropharmacologist did not prejudice Petitioner's defense. Also, Petitioner does not point to any evidence that, given more time, counsel would have consulted and retained a neuropharmacologist to testify. And although Petitioner argues more generally that his experts were not ready, he fails to cite any omissions or mistakes that could be attributed to the time constraints.

Since Petitioner cannot show that trial counsel's failure to fully litigate the continuance issue prejudiced the defense, any trial counsel ineffectiveness claim would fail. The OCCA determined that appellate counsel was not ineffective for omitting this meritless claim from Petitioner's appeal. That determination was reasonable and relief is denied on this issue.

c. *Failure to rebut Nash offer of proof.*

In addition to his claim that the Nash offer of proof violated his due process rights, Petitioner claims that trial counsel was ineffective for not rebutting the offer of proof. Petition at 68. Petitioner also claims that appellate counsel was ineffective for not raising an appellate claim on trial counsel's failure to rebut the offer. *Id*. at 74. Petitioner raised the ineffectiveness claims in his post-conviction proceeding. *Bush*, No. PCD-2010-399, slip op. at 9. The OCCA rejected both claims, finding that trial counsel was not ineffective because the Nash evidence was not admitted, and therefore did not warrant rebuttal. *Id*. Since the OCCA found no merit in the trial counsel claim, it determined that appellate counsel was not ineffective for omitting that claim on appeal. *Id*.

As the Court concluded in Ground Four, *supra* p. 23-30, Petitioner cannot overcome the presumption that the trial court did not consider the offer of proof. For the same reasons, Petitioner cannot show that trial counsel's failure to rebut that offer of proof caused any prejudice to his defense. Petitioner could not have been prejudiced by not rebutting evidence that the trial court is presumed to have ignored. And when trial counsel did attempt to discuss the offer, the trial court explained that "[a]ny argument or statement by the counsel is not evidence," clearly indicating that no further evidence or argument on the point was required or warranted. Trial Tr. vol. VII, 1317. Without prejudice, any claim that trial counsel was ineffective would

be without merit, and therefore appellate counsel was not ineffective for not raising that claim on appeal. The OCCA's rejection of the appellate claim was reasonable.

d. *Failure to request jury sentencing.*

Petitioner claims that appellate counsel should have raised a trial counsel ineffectiveness claim based on trial counsel's failure to seek jury sentencing. Petition at 73-74. In his post-conviction proceeding, Petitioner argued that Oklahoma's sentencing procedure violates federal law because it provides for sentencing by a judge when a defendant waives his right to a jury trial. *Bush*, No. PCD-2010-399, slip op. at 6. He also argued that trial counsel should have requested jury sentencing or challenged the statute and that appellate counsel should have challenged trial counsel's failures on direct appeal. *Id*. at 6-7. The OCCA denied all three claims, holding that Petitioner voluntarily waived any right for jury sentencing. *Id*. at 6. The OCCA noted that Petitioner never requested jury sentencing, nor did he indicate that he was "being forced to make a 'Hobson's choice' in deciding to take his right to enter a plea versus his perceived right to have a jury determine his sentence." *Id*. The OCCA concluded that since Petitioner waived his right to a jury sentencing, trial and appellate counsel were not ineffective for not pursuing jury sentencing. *Id*. at 6-7.

Nothing in the Constitution prevents criminal defendants from voluntarily waiving their Constitutional rights, including their rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Blakely v. Washington*, 542 U.S. 296, 310 (2004). The Supreme Court has stated that "[i]f appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. *Id*. Oklahoma has decided to do just that. The Court need not determine whether Oklahoma's procedural scheme violates *Apprendi* and *Blakely*, because Petitioner waived his right to jury sentencing. The trial court clearly explained that his plea would be a waiver of his "right to have the jury hear the State's aggravating circumstances and the mitigating circumstances put on by your defence [sic] team." Trial Tr. vol. V, 994-95. Petitioner responded that he understood. *Id*. at 995. And when Petitioner had an opportunity to later withdraw that plea, he told the trial court that he did not want to withdraw his plea. Mot. to Withdraw Hr'g Tr. at 14. The OCCA reasonably determined that Petitioner's waiver was voluntary and knowing based on the trial record.

Because Petitioner willingly gave up his right to jury sentencing, trial counsel cannot be faulted for not pursuing jury sentencing.[13] And if trial counsel was not ineffective for not challenging the sentencing procedures, appellate counsel was not

[13] The underlying assumption of this claim is that trial counsel or Petitioner wanted a jury sentencing, or that there was no reasonable strategic justification for opting for judicial sentencing. That assumption does not find any support in the record or any of the arguments.

ineffective for omitting that claim on appeal. The OCCA's decision on that issue was reasonable.

3. *Conclusion.*

Because the underlying trial counsel claims in Ground Eight are meritless, appellate counsel was not ineffective for failing to present those claims on direct appeal. The OCCA's disposition of the appellate counsel claims was therefore not contrary to or an unreasonable application of clearly established federal law. Relief is denied as to Ground Nine.

I. Ground Ten: Insufficient Evidence to Support the Aggravators.

Petitioner claims that the trial court lacked sufficient evidence to support two of the three aggravators that it found at sentencing. Petitioner argues that the state failed to establish that the murder was especially heinous, atrocious and cruel and that Petitioner posed a continuing threat to society. Petition at 75, 77. The OCCA rejected this claim on direct appeal, finding that the evidence supported both aggravators. *Bush*, 280 P.3d at 346-48.

1. *Clearly Established Law.*

Federal courts reviewing whether evidence supports an aggravating circumstance are not to "peer majestically over the [state] court's shoulder so that

[they] might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language." *Lewis*, 497 U.S. at 780-81 (1990) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 450 (1980)). State courts must use the reasonable fact-finder standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979), and determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating circumstances beyond a reasonable doubt. *Id*. at 782; *LaFevers v. Gibson*, 182 F.3d 705, 723 (10th Cir. 1999) (applying the *Jackson* standard in the aggravating circumstance context). Where there are "conflicting facts in the record that permit disparate inferences, the court 'must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Wilson v. Sirmons*, 536 F.3d at 1105 (quoting *Messer v. Roberts*, 74 F.3d 1009, 1013 (10th Cir. 1996)). AEDPA adds another layer of deference, therefore a federal court can only grant relief if it finds that the state court applied the *Jackson* standard unreasonably. *Hooks v. Workman*, 689 F.3d 1148, 1165-66 (10th Cir. 2012).

The sufficiency question is a mixed question of law and fact, and is thus governed by 28 U.S.C § 2254(d)(1) and (d)(2). *Maynard v. Boone*, 468 F.3d 665, 673 (10th Cir. 2006). This Court must presume that the OCCA's factual determinations are correct unless the petitioner rebuts that presumption by clear and

convincing evidence. 28 U.S.C. § 2254(e)(1). On the legal question, this Court evaluates the OCCA's sufficiency determination by looking at the state law requirements for the aggravating circumstances, and cannot overturn that determination unless that it was objectively unreasonable. *Parker v. Matthews*, 132 S. Ct. 2148, 2152 (2012). The Supreme Court has described this standard as "twice-deferential." *Id*.

2. *Analysis.*

Employing the deference due under AEDPA, the Court finds that the OCCA's determination that the evidence supported these two aggravators is reasonable.

a. *Especially heinous, atrocious, or cruel aggravator*.

The especially heinous, atrocious, or cruel aggravator requires proof that "the victim's murder was preceded by torture or serious physical abuse, including great physical anguish or extreme mental cruelty." *Browning v. Oklahoma*, 134 P.3d 816, 841-42 (Okla. Crim. App. 2006). "A finding of serious physical abuse requires proof that the victim consciously suffered before death." *Id*. at 842. However, Oklahoma law does not specifically define "serious physical abuse" or "conscious physical suffering." *Id*. at 843.

Petitioner argued on direct appeal, as he does here, that the evidence did not support the especially heinous, atrocious, or cruel aggravator. He claims that there

was no evidence that Mr. Harrington was conscious when he was dragged behind the truck, and that the suffering stemming from the shooting itself cannot support the aggravator. *Bush*, 280 P.3d at 346.

Petitioner mistakenly assumes that the OCCA found insufficient evidence to show that Mr. Harrington was conscious while being dragged. The OCCA's opinion only mentions that Petitioner challenged the sufficiency of that evidence, and then proceeds to find that the murder was especially heinous, atrocious, or cruel even if Mr. Harrington was not conscious during the dragging. *Id*. The record contains evidence that could support the inference either that Mr. Harrington was conscious or that he was not. The OCCA did not resolve this issue, but there is no doubt that the evidence of Mr. Harrington being dragged behind a truck after being shot multiple times, while still conscious, qualifies as serious physical abuse.

And even if the Court assumes, like the OCCA did, that Mr. Harrington was not conscious when he was dragged behind the truck, the OCCA still reasonably determined that the circumstances of the shooting satisfied the aggravator. The OCCA rejected Petitioner's argument that the physical abuse must be separate from the actual act of murder. The OCCA explained that while it had noted in another case that "serious physical abuse could be gratuitous violence beyond the act of killing," it never adopted that statement as a definition of serious physical abuse, nor did it hold that only abuse outside of the act of killing could support the aggravator.

Id. Instead, the OCCA discussed the extent of the pain and suffering and length of time the victim was conscious, comparing Petitioner's case to other OCCA cases. *Id*. The OCCA then concluded that the evidence showed Mr. Harrington survived the gunshot wounds for a period of time, and the wounds themselves would be painful and cause difficult and uncomfortable breathing. *Id*. at 346-47. The OCCA also observed that neither the individual wounds, nor the culmination of all of the wounds, would have rendered Mr. Harrington immediately unconscious. *Id*. at 347. These facts led the OCCA to find that the evidence supported the aggravator.

This Court does not find the OCCA's conclusions unreasonable. Petitioner does not challenge the factual basis for the OCCA's ruling, but only reargues that the actions of the murder itself cannot be used to support the aggravator. Petitioner does not cite to any applicable federal authority on that issue and the OCCA's precedent precludes that argument. Petitioner therefore cannot show that the OCCA's ruling is objectively unreasonable in light of clearly established federal law. Relief is denied on this issue.

b. *Continuing Threat*.

Petitioner also argues that the evidence at trial did not establish a probability that he posed a continuing threat to society. On direct appeal, the OCCA considered the nature of the crime, Petitioner's criminal history, his history of substance abuse

and paranoid and obsessive behavior, and his escape attempts. *Id*. at 347-48. OCCA examined the evidence at length and concluded that the prosecution presented sufficient evidence to support the aggravator.[14] *Id*. Viewing the evidence in the light most favorable to the prosecution, the Court cannot say that the OCCA's decision was unreasonable.

The record reveals several factors supporting the continuing threat aggravator, including Petitioner's previous crimes, troublesome behavior regarding his ex-girlfriend, his forced entry into Mr. Harrington's trailer, his behavior in prison, and the callous nature of the murder.

Petitioner committed forgery, credit card theft, burglary, theft of property, and possession of stolen property before he escalated to murder. *Id*. at 347. Although these crimes were not violent and thus cannot support the aggravator alone, they can be considered in conjunction with other factors. *See Boltz v. Mullin*, 415 F.3d 1215, 1231 (10th Cir. 2005). The crimes show Petitioner's disregard for the law and his willingness to violate it.

[14] Petitioner claims that the OCCA did not apply the proper standard, because it stated that the "trial court could not take a chance and say that there was no probability that [Petitioner] would commit criminal acts of violence that would constitute a continuing threat to society." However, the OCCA stated the proper standard earlier in that portion of the opinion. *Id*. at 345. Because the OCCA is presumed to know and apply the law correctly, and because it clearly stated the applicable standard, the Court cannot say, based on an isolated sentence, that the OCCA abandoned the proper standard.

Petitioner's relationship with his ex-girlfriend, Stephanie Morgan, gives indications of Petitioner's violent tendencies. After the two ended their relationship, Ms. Morgan sought a protective order against Petitioner, claiming that she was scared and that Petitioner "drinks and does drugs and becomes very violent." Trial Tr. vol. V, 950-51. Ms. Morgan testified that while Petitioner never hit her, he did push her "around a little bit . . . ." *Id*. at 943-44. Petitioner violated the protective order numerous times by contacting Ms. Morgan, and told her that if he ever saw her dating someone else, he would kill that individual. Trial Tr. vol. VII, 1378. Mr. Bush proved that this was no empty threat when he later gunned down Mr. Harrington for his alleged involvement with Ms. Morgan.

The OCCA also relied on evidence that, on the night of the murder, Petitioner kicked in Ms. Morgan's back door, "disabled the bedroom lights, reclined on the bed, and waited for her in the dark." *Bush*, 280 P.3d at 347. When Ms. Morgan came home and tried to turn on the lights, she encountered only darkness, at which point Petitioner said, "I heard you come in." Trial Tr. vol. V, 968. Ms. Morgan was afraid and went to her car, but Petitioner followed her. *Bush*, 280 P.3d at 347. Petitioner argues that the incident was not violent, as he "merely came in and drank whiskey while he waited to talk to her." But Petitioner's characterization of the incident is an excessively sunny and innocent way to describe Petitioner's act of lurking in the darkness of Ms. Morgan's home in violation of a protective order.

And in any event, Petitioner's sanitized version has no bearing on whether the evidence actually introduced could support a finding that he posed a continuing threat. The OCCA viewed the evidence in the light most favorable to the prosecution. Viewed in that light, this incident indicates that Petitioner exhibited violent criminal tendencies.

Petitioner also minimizes the incident in which he broke into Mr. Harrington's trailer. Petitioner claims that he did not spread the guns around the trailer for any violent reason. But the evidence indicated that Petitioner threw a cinder block through the window, put Mr. Harrington's guns around the trailer, and placed ammunition in his pocket. Trial Tr. vol. VI at 1024-26. That evidence allows the inference that Petitioner at least intended to commit an act of violence. Viewed in the light most favorable to the prosecution, that incident lends support for the continuing threat aggravator.

Petitioner's behavior while awaiting trial supplied more evidence to support the aggravator. Petitioner damaged a window, a toilet, and a shower, apparently attempting to escape. *Bush*, 280 P.3d at 347. He admitted to tampering with a towel bar and officials discovered a paper shank in his cell. *Id.*; Trial Tr. vol. VII, 1352-53. Petitioner scoffs at the paper shank, but photos of the object show that rather than just being a "rolled up piece of toilet paper," the shank was apparently crafted and fashioned into a hard object, similar to paper mâché. State's Ex. 211. The jail

officials considered the object significant, and this Court will not gainsay their expertise with prison weaponry. Petitioner argues that he was not trying to escape, but viewed in the light most favorable to the prosecution, the evidence supports the inference that Petitioner was attempting to escape the jail.

Finally, Petitioner's behavior after shooting Mr. Harrington indicates his callousness. To avoid detection, he dragged Mr. Harrington to a pasture with a truck. He then took Mr. Harrington's cell phone and credit card. Trial Tr. vol. V, 964; vol. VI, 1160-61. He used the credit card to buy alcohol and used the cell phone to call Ms. Morgan. Trial Tr. vol. V, 964, vol. VI, 1160-61; vol. VII, 1325-27. When Mr. Harrington's family called, Petitioner told them that Mr. Harrington was with him and was trying to help mend Petitioner's relationship with Ms. Morgan. Trial Tr. vol. VI, 1063-67. Petitioner kept Mr. Harrington's family at bay with his falsehoods for some time, all the while stoking their anxiety. *Id*. When the police arrested Petitioner, he did not express remorse, but instead talked about his crime and dragging Mr. Harrington with the truck. State's Ex. 2 at 17. Petitioner argues that there was also evidence that he was remorseful. While there is evidence of his remorse in the record, where the evidence shows that Petitioner was both remorseful and not remorseful, it is assumed that the trier of fact resolved that conflict in favor of the prosecution. The evidence of Petitioner's callous attitude therefore supports the continuing threat aggravator.

Petitioner argues that the OCCA's decision was unreasonable because it acknowledged that the prosecution failed to identify "any particular violent act that [Petitioner] committed prior to this crime," yet still found a probability that Petitioner posed a continuing threat based on the nature of the offense and his *prior* behavior. Petition at 82; *Bush*, 280 P.3d at 347. This argument glosses over the fact that while the OCCA did not find a violent act, it still found behavior that indicated violent tendencies. The OCCA is not constitutionally required to ignore Petitioner's demonstrated violent tendencies just because they did not mature into overt physical manifestations until the murder. Those tendencies supported the continuing threat aggravator, and the OCCA was not unreasonable for relying on them. These pieces of evidence, taken together and viewed in the light most favorable to the prosecution, show that a rational factfinder could have found the continuing threat aggravator beyond a reasonable doubt.

3. *Conclusion.*

Petitioner fails to show that no rational factfinder could have found the especially heinous, atrocious, and cruel aggravator or the continuing threat aggravator beyond a reasonable doubt. The OCCA's determination that the evidence supported these aggravating circumstances was therefore reasonable.

J. Grounds Eleven, Twelve, Thirteen, and Fourteen.

Petitioner claims in Ground Eleven that the trial court abused its discretion by denying his continuance requests. In Ground Twelve, Petitioner claims that Oklahoma's death penalty procedures violated his right to a jury trial. Ground Thirteen challenges Mr. Burns' participation in the trial. Ground Fourteen alleges that Petitioner cannot be executed because he is mentally ill. Petition at 83, 89, 92, 96. Petitioner raised these claims in his post-conviction proceeding. *Bush*, No. PCD-2010-399, slip op. at 5-8. Petitioner also raised ineffective assistance of trial counsel claims based on counsel's failure to pursue the claims in Grounds Eleven, Twelve, and Thirteen at trial, and ineffective assistance of appellate counsel claims based on appellate counsel's failure to raise those claims on appeal. *Id*. at 3-4. The OCCA rejected all four substantive claims as waived. *Id*.

The OCCA applied a state procedural bar to these claims. Petitioner has not challenged the bar as being inadequate or dependent on federal law or presented any reason to excuse the bar, except for his ineffectiveness claims. Because the Court has already found the trial counsel claims procedurally barred, and because the Court concluded that appellate counsel was not ineffective, Petitioner cannot establish cause to avoid procedural default on these four claims.[15]

[15] Petitioner did not raise any ineffectiveness claim regarding Ground Fourteen, therefore he cannot avoid procedural bar on that claim. In any event, Petitioner's argument that *Atkins v. Virginia*, 536 U.S. 304 (2002) prohibits the execution of the mentally ill lacks merit. *Atkins* only speaks to criminal defendants that are mentally retarded, not mentally ill. This Court has rejected

K. Ground Fifteen: Cumulative Error.

Petitioner claims that even if individual errors in his trial were harmless, these errors were not harmless in the aggregate. Petition at 99. Petitioner raised this claim on direct appeal. *Bush*, 280 P.3d at 352. The OCCA denied the claim, finding that even when viewing "these alleged errors in a cumulative fashion, we find that no relief is required." *Id*. The cumulative-error analysis addresses the possibility that two or more individually harmless errors might "prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). But the cumulative-error analysis requires at least two errors. *Hooks v. Workman*, 689 F.3d 1148, 1194-95 (10th Cir. 2012). The OCCA did not find error related to any of the claims raised in this case. This Court has not found error. Therefore, the cumulative error analysis is unwarranted. Relief is denied as to Ground Fifteen.

L. Motion for Evidentiary Hearing.

Petitioner requests an evidentiary hearing with respect to his Grounds Three (ineffective assistance of trial counsel), Four (improper offer of proof), Seven, and Eight (ineffective assistance of trial counsel). Doc. 22 at 4-18. "The purpose of an

---

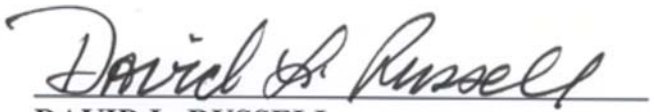
this argument before and will continue to do so in the absence of clearly established federal precedent on this issue. *See Underwood v. Duckworth*, No. CIV-12-111-D, 2016 WL 4059162, at *32 (W.D. Okla., July 28, 2016); *Lockett v. Workman*, No. CIV-03-734-F, 2011 WL 10843368 at *37 (W.D. Okla. Jan. 19, 2011).

evidentiary hearing is to resolve conflicting evidence." *Anderson v. Attorney General of Kansas*, 425 F.3d 853, 860 (10th Cir. 2005). If there is no conflict, or if the claim can be resolved on the record before the Court, then an evidentiary hearing is unnecessary. *Id.* at 859. An evidentiary hearing is unwarranted on Grounds Three, Four, Seven, and Eight to resolve the legal issues. The Court has examined those claims and has taken into account the information that Petitioner presents. But no information gained from an evidentiary hearing would affect the legal findings on those claims. The request for evidentiary hearing is denied.

VI. Conclusion.

After a thorough review of the entire state court record, the pleadings filed herein, and the applicable law, the Court finds that Petitioner is not entitled to the requested relief. Accordingly, Petitioner's Petition (Doc. 20) and motion for an evidentiary hearing (Doc. 22) are hereby **DENIED**. A judgment will enter accordingly.

IT IS SO ORDERED this 17th day of October, 2016.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE