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

ALFRED BRIAN MITCHELL,

Petitioner,

v.

TOMMY SHARP, Warden, Oklahoma State Penitentiary,

Respondent

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

APPENDIX

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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALFRED BRIAN MITCHELL,

Petitioner - Appellant,

v.

TOMMY SHARP, Interim Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 16-6258
(D.C. No. 5:11-CV-00429-F)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, **MATHESON**, and **McHUGH**, Circuit Judges.

Alfred Brian Mitchell appeals from the federal district court's denial of his application for a writ of habeas corpus under 28 U.S.C. § 2254. In 1992, Oklahoma charged Mr. Mitchell with first degree murder, robbery with a dangerous weapon, larceny of an automobile, first degree rape, and forcible anal sodomy. The jury found him guilty on all counts and sentenced him to death.

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed his convictions and sentence on direct appeal. *See Mitchell v. State* (*Mitchell I*), 884 P.2d 1186 (Okla. Crim.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

App. 1994).[1] In a previous § 2254 habeas proceeding, this court found that the Oklahoma prosecutors failed to provide the defense with exculpatory DNA evidence before his guilt trial. We reversed Mr. Mitchell's rape and sodomy convictions under *Brady v. Maryland*, 373 U.S. 83 (1963), and vacated his sentence. *See Mitchell v. Gibson* (*Mitchell III*), 262 F.3d 1036 (10th Cir. 2001). We did not disturb Mr. Mitchell's murder conviction.

A newly constituted jury sentenced Mr. Mitchell to death a second time. On direct appeal, the OCCA reversed, citing "serious error in numerous aspects of [Mr.] Mitchell's resentencing." *Mitchell v. State* (*Mitchell IV*), 136 P.3d 671, 712 (Okla. Crim. App. 2006). On remand to a new judge and a new jury, Mr. Mitchell was sentenced to death a third time. The OCCA affirmed, *Mitchell v. State* (*Mitchell V*), 235 P.3d 640 (Okla. Crim. App. 2010), and this § 2254 habeas proceeding ensued.

[1] From 1994 through 2016, multiple courts have issued opinions in this case. The following chart provides the case citations and corresponding short citations used in this opinion.

Decision	Short Citation
Mitchell v. State, 884 P.2d 1186 (Okla. Crim. App. 1994)	*Mitchell I*
Mitchell v. Ward, 150 F. Supp. 2d 1194 (W.D. Okla. 1999)	*Mitchell II*
Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001)	*Mitchell III*
Mitchell v. State, 136 P.3d 671 (Okla. Crim. App. 2006)	*Mitchell IV*
Mitchell v. State, 235 P.3d 640 (Okla. Crim. App. 2010)	*Mitchell V*
Mitchell v. Duckworth, No. 11-429, 2016 WL 4033263 (W.D. Okla. July 27, 2016)	*Mitchell VI*

The district court denied relief on all of Mr. Mitchell's claims and denied his request for a certificate of appealability ("COA"). *Mitchell v. Duckworth* (*Mitchell VI*), No. 11-429, 2016 WL 4033263 (W.D. Okla. July 27, 2016); *see* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court"). This court granted COAs as to whether:

> (1) "Oklahoma's capital-sentencing statute is unconstitutional because it does not require a unanimous jury to find that the aggravating factors outweigh the mitigating factors by proof beyond a reasonable doubt." Order Granting COA, Doc. 10551958 at 2.
>
> (2) "Oklahoma's 'heinous, atrocious, or cruel' (HAC) aggravating circumstance is unconstitutional." *Id.* at 3.
>
> (3) "Mr. Mitchell had a state-created liberty interest in being convicted and sentenced by the same jury under Okla. Stat. tit. 21, § 701.10, and that, under *Hicks v. Oklahoma*, 447 U.S. 343 (1980), his due process rights were unconstitutionally impaired when, on remand from this court, he was resentenced by a new jury in 2002." Order Granting Third COA, Doc. 10579703 at 1-2.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we affirm.

I. **BACKGROUND**

We begin with the relevant factual history as presented by the OCCA.[2] We then provide an overview of the procedural history leading to this appeal. We present additional background below as relevant to our discussion of Mr. Mitchell's claims.

[2] *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting

A. ***Factual Background***

In *Mitchell V*, the OCCA summarized the facts as follows:

> Briefly stated, on January 7, 1991, Alfred Brian Mitchell found Elaine Scott alone at the Pilot Recreation Center in Oklahoma City. The evidence presented at the resentencing established that [Mr.] Mitchell first attacked [Ms.] Scott near the Center's library, where a spot of blood, one of [Ms.] Scott's earrings, and a sign that she had been hanging were later found on the floor. [Ms.] Scott apparently ran for the innermost room of the Center's staff offices—as she had told her mother she would if she ever found herself in a dangerous situation at the Center—where there was a phone and a door that she could lock behind her. She almost made it. Although the exact sequence of events is unclear, the State established that [Ms.] Scott's clothing was taken off and that a violent struggle ensued, in which [Mr.] Mitchell beat and battered [Ms.] Scott, using his fists, a compass, a golf club (which ended up in pieces), and a wooden coat rack. The forensic evidence—including the condition of [Ms.] Scott's nude, bruised, and bloodied body—established that she was moving throughout the attack, until the final crushing blows with the coat rack, which pierced her skull and ended her life.

235 P.3d at 646 (quotations omitted). Because Mr. Mitchell does not dispute these facts, we presume they are correct. *See* 28 U.S.C. § 2254(e)(1) ("In a [habeas corpus] proceeding instituted . . . by a person in custody pursuant to the judgment of a State court, a determination of factual issue made by a State court shall be presumed to be correct.").

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the presumption of correctness by clear and convincing evidence."); *see also Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) ("The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." (quotations omitted)).

B. ***Procedural Background***

In 1992, in the District Court of Oklahoma County, a jury convicted Mr. Mitchell of first-degree malice aforethought murder, in violation of Okla. Stat. tit. 21, § 701.7; robbery with a dangerous weapon, in violation of Okla. Stat. tit. 21, § 801; larceny of an automobile, in violation of Okla. Stat. tit. 21, § 1720; first-degree rape, in violation of Okla. Stat. tit. 21, §§ 1111, 1114; and forcible anal sodomy, in violation of Okla. Stat. tit. 21, § 888. *See Mitchell I*, 884 P.2d at 1191. The same jury recommended a death sentence for the murder. *Id.* The trial court sentenced Mr. Mitchell to death for the murder and to 170 years in prison for the other felonies. *Id.*

1. **First Sentencing**

Mr. Mitchell's jury based its death sentence recommendation on three aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel ("HAC"); (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) Mr. Mitchell posed a continuing threat to society. *Mitchell I*, 884 P.2d at 1191; *see* Okla. Stat. tit. 21, § 701.11 (requiring Oklahoma juries to find at least one aggravating circumstance beyond a reasonable doubt before imposing the death penalty). The OCCA affirmed the convictions and sentence. *Mitchell I*, 884 P.2d at 1209.

In 1997, Mr. Mitchell filed his first federal habeas application under 28 U.S.C. § 2254 after seeking post-conviction relief in state court. Among other things, he asserted that his convictions for rape and sodomy were constitutionally infirm because

(1) the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*; (2) testimony from the state's forensic chemist (Joyce Gilchrist) was false and misleading; and (3) the prosecution engaged in egregious misconduct by capitalizing on her testimony to mislead the jury. Mr. Mitchell further argued that any constitutional error on the rape and sodomy charges should result in habeas relief from his death sentence. Following an evidentiary hearing, the district court granted the writ on the rape and sodomy convictions. It explained:

> [T]he State's blatant withholding of unquestionably exculpatory evidence is absolutely indefensible. [Ms.] Gilchrist's trial testimony that the DNA analysis performed by the FBI was "inconclusive" "as to [Petitioner]" was, without question, untrue. Over a year before Petitioner was tried and convicted of rape and anal sodomy, Agent Vick's DNA testing revealed that *Petitioner's DNA was not present on the samples tested*.
>
> Petitioner's trial counsel did not receive copies of the autoradiographs developed by Agent Vick. Petitioner's trial counsel did not receive copies of [Ms.] Gilchrist's notes, which demonstrate that she, too, was confident that only Ms. Scott's DNA was present on the vaginal swab and that only Ms. Scott and [Ms. Scott's boyfriend, Phil Taylor's,] DNA was present on the panties. Instead, the prosecution turned over only the formal FBI report discussed above which, *at best*, is unclear and ambiguous.
>
> Just as troubling to this Court is the fact that the State labored extensively at trial to obscure the true DNA test results and to highlight [Ms.] Gilchrist's test results, which admittedly have a much lower degree of certainty than the DNA testing. [Ms.] Gilchrist testified at trial that the results of her blood tests were consistent with both [Mr.] Taylor and [Mr.] Mitchell. While the only foreign DNA found was consistent only with [Mr.] Taylor, the prosecution emphasized [Ms.] Gilchrist's test results and told the jury

> the DNA testing was "inconclusive." At the same time, the prosecution withheld the true facts from the defense, thereby preventing effective cross-examination. . . .
>
> In closing argument, the prosecution capitalized on the FBI report and placed its own twist on the report. The prosecution told the jury there were no DNA results because the testing was "inconclusive" because of "low molecular weight and degraded sample of DNA." It is clear that this statement is entirely unsupported by evidence and is misleading—the prosecution had DNA results which excluded [Mr.] Mitchell as the donor of the samples tested.

Mitchell v. Ward (*Mitchell II*), 150 F. Supp. 2d 1194, 1226-27 (W.D. Okla. 1999) (citations omitted). The court, however, declined to vacate Mr. Mitchell's death sentence, explaining that "[t]he jury had sufficient evidence to justify its conclusion that the three aggravating circumstances it found were present, even without the rape and sodomy convictions." *Id*. at 1230.

Mr. Mitchell appealed the district court's decision to this court, arguing the invalid rape and sodomy convictions required vacatur of his death sentence. We agreed and explained that "[s]exual assault charges are by their nature highly inflammatory and prejudicial." *Mitchell III*, 262 F.3d at 1065. We added that if those charges had not been before the jury, "[b]oth the guilt and sentencing stages would necessarily have had a different focus and character." *Id.* We explained:

> [W]e simply cannot be confident that the jury would have returned the same sentence had no rape and sodomy evidence been presented to it [because that] evidence impacted all three of the aggravating circumstances found by the jury: that the murder was heinous, atrocious, and cruel; that it was committed to avoid arrest for the rape and

> sodomy; and that Mr. Mitchell posed a continuing threat to society.

Id. We reversed Mr. Mitchell's death sentence and granted a conditional writ of habeas corpus requiring that he be resentenced. *Id.* at 1066.

2. **Second Sentencing**

After our decision, a newly constituted state court jury again recommended that Mr. Mitchell be sentenced to death. The Oklahoma state district court reimposed the death penalty, and Mr. Mitchell appealed to the OCCA. *Mitchell IV*, 136 P.3d at 676. The OCCA "found serious error in numerous aspects of [his] resentencing." *Id.* at 712.[3] It vacated Mr. Mitchell's sentence and ordered a new re-sentencing before a different judge and jury "because of the substantial evidence of trial court bias contained in the record." *Id*. at 713.

3. **Third Sentencing**

On remand, yet another jury recommended that Mr. Mitchell be sentenced to death. This time, the jury found only the HAC aggravator—that the murder was "especially heinous, atrocious, or cruel." *Mitchell V*, 235 P.3d at 645. The trial court

[3] The OCCA found that the trial court abused its discretion by (1) allowing the state to make certain arguments about the "avoid arrest" aggravating circumstance, (2) denying defense counsel the opportunity to question certain prospective jurors, and (3) allowing the State to present graphic photographic and video evidence. *Mitchell IV*, 136 P.3d at 712. The OCCA also found the trial court erroneously excluded Mr. Mitchell's mitigating character evidence, allowed testimony from certain witnesses, and failed "to prevent or ameliorate" "serious prosecutorial misconduct" by the resentencing prosecutor. *Id.*

sentenced Mr. Mitchell in accordance with the jury's recommendation, and Mr. Mitchell appealed to the OCCA, raising 18 claims of error. *Id.* at 645-46. The OCCA found no reversible error and affirmed Mr. Mitchell's death sentence. *Id.* at 666. Mr. Mitchell filed for post-conviction relief, which the OCCA denied. The Supreme Court also denied his petition for a writ of certiorari. *Mitchell v. Oklahoma*, 562 U.S. 1293 (2011).

4. **Section 2254 Application and COAs**

Mr. Mitchell filed the underlying § 2254 habeas application, asserting 21 grounds for relief. *See Mitchell VI*, 2016 WL 4033263, at *2. The district court denied relief, *id.*, and denied a COA on all claims, ROA at 387-88.

Mr. Mitchell then requested COAs from this court. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring habeas petitioners to obtain a COA); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (same). We granted COAs on three issues: (1) whether Oklahoma's sentencing statute is unconstitutional under the Sixth Amendment because it allows imposition of the death penalty without a jury finding that the HAC aggravator outweighed any mitigating circumstances beyond a reasonable doubt (the "*Hurst* claim"), (2) whether the Oklahoma HAC aggravator is unconstitutional under the Eighth Amendment (the "HAC claim"), and (3) whether Mr. Mitchell was deprived of due

process because the same jury did not determine his guilt and punishment (the "*Hicks* claim"). [4]

We address each issue below.

II. DISCUSSION

A. *Standard of Review*

The three issues in this appeal are "governed by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), which requires federal courts to give significant deference to state court decisions." *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013). Under AEDPA, when a state court has decided a claim on the merits, we must defer to the court's adjudication unless it:

> (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.

28 U.S.C. § 2254(d).

[4] In his initial request for a COA, Mr. Mitchell presented four claims: (1) a *Brady* claim, (2) the *Hurst* claim, (3) the HAC claim, and (4) an Eighth Amendment claim under *Roper v. Simmons*, 543 U.S. 551, 578 (2005). *See* Aplt. Stmt. of Issues, Doc. 10486954. He acknowledged the court could not grant a COA on the fourth claim but nonetheless presented it to preserve it for Supreme Court review. *Id.* at 83. After this court denied a COA on all claims, Mr. Mitchell submitted a renewed motion, which raised only the *Hurst* claim, the HAC claim, and the *Hicks* claim. *See* Renewed Request for COA, Doc. 10507440 at 2.

"Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014) (alterations and quotations omitted). It "consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*." *House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008) (discussing *Carey v. Musladin*, 549 U.S. 70 (2006)). "An OCCA decision is 'contrary to' a clearly established law if it applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts." *Lockett*, 711 F.3d at 1231 (alterations and quotations omitted); *see also Bell v. Cone*, 543 U.S. 447, 452-54 (2005). "An OCCA decision is an 'unreasonable application' of clearly established federal law if it identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of petitioner's case." *Lockett*, 711 F.3d at 1231 (quotations omitted).

B. ***Analysis of the Three Issues on Appeal***

We address the three issues for which we have granted a COA: (1) the Sixth Amendment *Hurst* claim, (2) the Eighth Amendment HAC claim, and (3) the due process *Hicks* claim. As to all three, we conclude the OCCA's adjudication was not contrary to or an unreasonable application of clearly established Supreme Court law.[5] We therefore affirm the district court's denial of habeas relief on all claims.

[5] Mr. Mitchell does not argue that the OCCA's decisions involved unreasonable factual determinations. *See* 28 U.S.C. § 2254(d)(2) (allowing for habeas relief where a

1. **Sixth Amendment *Hurst* Claim**

Before the OCCA and in his § 2254 application, Mr. Mitchell claimed his death sentence was unconstitutional under the Sixth Amendment because the jury was not instructed to find beyond a reasonable doubt that the HAC aggravator outweighed the mitigating evidence. He argued that *Hurst v. Florida*, 136 S. Ct. 616 (2016), "requires the weighing decision to rest on proof beyond a reasonable doubt." Pet'r. Corr. First Supp. Br., Doc. 10558627 at 20. Mr. Mitchell first raised this claim in his direct appeal from his third sentencing. *See Mitchell V*, 235 P.3d at 665. The OCCA rejected it on the merits, *see id.*, and the district court denied habeas relief, *see Mitchell VI*, 2016 WL 4033263, at *37.

Below, we provide additional legal background on the *Hurst* claim. We then examine the OCCA's merits decision under § 2554(d)(1). We affirm the district court because the OCCA's decision was not contrary to or an unreasonable application of Supreme Court law. Mr. Mitchell concedes that circuit precedent compels this result.

a. *Additional legal background*

The Fourteenth Amendment right to due process and the Sixth Amendment right to a jury trial entitle a criminal defendant to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (alterations and quotations omitted).

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state court's decision "resulted in a decision that was based on an unreasonable determination of the facts"). We therefore review his claims under only § 2254(d)(1).

In *Apprendi*, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490; *see also Hurst*, 136 S. Ct. at 624 (invalidating Florida's capital sentencing scheme, "which required the judge alone to find the existence of an aggravating circumstance").

Under Oklahoma's capital sentencing scheme, the death penalty may not be imposed "[u]nless at least one of the statutory aggravating circumstances . . . is [found by a unanimous jury beyond a reasonable doubt] or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances." Okla. Stat. tit. 21, § 701.11. In *Matthews v. Workman*, 577 F.3d 1175 (10th Cir. 2009), a habeas petitioner brought an *Apprendi* challenge to this scheme, arguing the jury should "have been instructed that it had to find *beyond a reasonable doubt* that aggravating factors outweighed the mitigating." *Id.* at 1195. We denied relief, holding that the weighing of aggravating and mitigating circumstances is not subject to the *Apprendi* rule because it "is not a finding of fact . . . but a highly subjective, largely moral judgment regarding the punishment that a particular person deserves." *Id.* (quotations omitted).

We likewise rejected an *Apprendi* challenge to Oklahoma's capital sentencing scheme in *Underwood v. Royal*, 894 F.3d 1154 (10th Cir. 2018). In that case, as in *Matthews*, the petitioner argued the jury should have been instructed to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. *Underwood*, 894 F.3d at 1185. We held that "*Matthews* foreclose[d] us

from concluding . . . that the OCCA contradicted or unreasonably applied *Apprendi* in [denying the petitioner's] claim." *Id.* at 1185-86. We also concluded "*Hurst* [did] not supply a superseding contrary Supreme Court decision that would allow us to overrule *Matthews*." *Id.* at 1186. We therefore denied the petitioner's request for habeas relief.

b. *Analysis*

Reviewing under § 2254(d)(1), we conclude the OCCA's denial of Mr. Mitchell's *Hurst* claim was not contrary to or an unreasonable application of clearly established Supreme Court law. We therefore affirm the district court's denial of habeas relief.

As discussed above, *Matthews* held that Oklahoma's capital sentencing scheme does not violate *Apprendi* even though it does not require the jury to find the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *See Matthews*, 577 F.3d at 1195. "We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (emphasis and quotations omitted). We therefore cannot hold that the OCCA decision was contrary to or an unreasonable application of *Apprendi*.

In his early briefing, Mr. Mitchell urged us to reconsider our holding in *Matthews* in light of "*Hurst*, which condemned Florida for removing the weighing decision from the jury [and] undercuts the Tenth Circuit's approach." Pet'r. Corr. First Supp. Br., Doc. 10558627 at 27. *Underwood* forecloses this argument. It held that "*Hurst* does not supply a superseding contrary Supreme Court decision that would allow us to overrule

Matthews." *Underwood*, 894 F.3d at 1186. Mr. Mitchell now concedes as much. In response to this court's request for supplemental briefing on the impact of *Underwood* on this appeal, he said, "[Mr.] Mitchell is forced to concede that [*Underwood*] precludes this panel from granting relief on [this claim]. Relief must come from a higher court." Pet'r. Second Supp. Br., Doc. 10574880 at 1.

Because *Matthews* held that Oklahoma's capital sentencing scheme does not violate *Apprendi*, and because we rejected an identical challenge in *Underwood*, we cannot conclude that the OCCA's decision was contrary to or an unreasonable application of clearly established Supreme Court law. We therefore affirm the district court's denial of habeas relief on Mr. Mitchell's *Hurst* claim.

2. **Eighth Amendment HAC Aggravator Claim**

Mr. Mitchell argues Oklahoma's HAC aggravator is unconstitutional under the Eighth Amendment. *See* Pet'r. Corr. First Supp. Br., Doc. 10558627 at 1-8, 11.[6] The OCCA rejected this argument when Mr. Mitchell raised it in his direct appeal from his second and third sentencings. *See Mitchell IV*, 136 P.3d at 711; *Mitchell V*, 235 P.3d at

[6] In *Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (en banc), we recognized that a petitioner may bring two types of HAC aggravator claims: (1) a *Jackson* claim, "which relies on the Due Process Clause of the Fourteenth Amendment" to allege there was insufficient evidence to establish the aggravator, or (2) an Eighth Amendment claim challenging the constitutionality of the aggravator. *Id.* at 924 n.6; *see Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). In the OCCA and in federal district court, Mr. Mitchell made both a sufficiency-of-the evidence and an Eighth Amendment vagueness challenge to the HAC aggravator. But he did not seek—nor have we granted—a COA on his separate sufficiency-of-the-evidence claim. We thus address only his Eighth Amendment challenge.

662. The district court likewise rejected the claim when it denied relief in the underlying habeas proceeding. *See Mitchell VI*, 2016 WL 4033263, at *34.

We (a) provide additional legal background on Mr. Mitchell's HAC aggravator claim and (b) examine the OCCA's merits decision under § 2254(d). We conclude the decision was not contrary to or an unreasonable application of Supreme Court law. We therefore affirm the district court's denial of habeas relief on Mr. Mitchell's HAC claim.

a. *Additional legal background*

Oklahoma's HAC aggravator permits the imposition of the death sentence if a jury unanimously finds beyond a reasonable doubt that "[t]he murder was especially heinous, atrocious, or cruel." Okla. Stat. tit. 21, § 701.12(4); *see id.* at § 701.11. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Supreme Court held that Oklahoma's HAC aggravator was unconstitutionally vague. *Id.* at 363-64. In a previous case, *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court stated that even if an aggravator is unconstitutionally vague on its face, it may be constitutional if the state "tailor[s] and appl[ies] [the aggravator] in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.* at 428. Consistent with this precedent, the *Maynard* Court said that a "limiting construction" requiring "torture or serious physical abuse . . . would [make Oklahoma's HAC aggravator] constitutionally acceptable." 486 U.S. at 365.

After *Maynard*, the OCCA adopted such a limiting construction. *See Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987) ("[W]e now . . . restrict [the HAC aggravator's] application to those murders in which torture or serious physical abuse is

present."); *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995) ("Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met." (quotations omitted)). This court has repeatedly held that under this limiting construction, Oklahoma's HAC aggravator is not unconstitutionally vague. *See, e.g.*, *Medlock v. Ward*, 200 F.3d 1314, 1319 (10th Cir. 2000) ("Our Circuit has . . . upheld the facial constitutionality of [the HAC aggravator] as 'narrowed' by the State of Oklahoma, and we are bound by that body of precedent."); *Hatch v. State*, 58 F.3d 1447, 1468-69 (10th Cir. 1995) ("In response to [*Maynard*], the [OCCA] adopted a limiting construction . . . . That narrowing interpretation of the [HAC] aggravator has been cited with approval by the Supreme Court."), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001) (en banc).

b. *Analysis*

Reviewing under § 2254(d)(1),[7] we conclude the OCCA's application of the HAC aggravator was not contrary to or an unreasonable application of clearly established

[7] Mr. Mitchell presented his HAC aggravator argument on direct appeal from his second and third sentencings. On direct appeal from the second sentencing, the OCCA rejected the argument, explaining "[it had] repeatedly rejected the claim that [the HAC] aggravator, as narrowed by this court, is unconstitutionally vague." *Mitchell IV*, 136 P.3d at 711. On appeal from the third sentencing, the OCCA rejected the claim because "[Mr. Mitchell's] argument [was] *res judicata* as he ha[d] previously challenged the constitutionality of the aggravator." *Mitchell V*, 235 P.3d at 662.

A state court's reliance on res judicata "provides strong evidence that the claim has already been given full consideration by the state courts." *Cone v. Bell*, 556 U.S. 449, 467 (2009). Further, Mr. Mitchell "accepts that 28 U.S.C. § 2254(d) governs review

Supreme Court law. We therefore affirm the district court's denial of relief as to Mr. Mitchell's HAC aggravator claim.[8]

Mr. Mitchell argues Oklahoma's HAC aggravator is unconstitutionally vague. Pet'r. Corr. First. Supp. Br., Doc. 10558627 at 17.[9] He concedes that after *Maynard*, Oklahoma courts adopted a constitutionally permissible construction of the HAC aggravator. Oral Arg. at 0:34-1:15. But he claims "Oklahoma has veered off course, returning to its prior, unlawful position." Pet'r. Corr. First Supp. Br., Doc. 10558627 at 1. This argument fails for two reasons.

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of" his HAC claim. Pet'r. Second Supp. Br., Doc. 10574880 at 2. We therefore review the issue under the AEDPA standard.

[8] The State failed to argue procedural default either in district court or on appeal. Because of this, any affirmative defense based on the OCCA's res judicata ground for denying relief is waived. *See Hooks v. Ward*, 184 F.3d 1206, 1216 (10th Cir. 1999) ("There is no doubt that 'state-court procedural default . . . is an affirmative defense,' and that the state is 'obligated to raise procedural default as a defense or lose the right to assert the defense thereafter.'" (quoting *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996)).

[9] Mr. Mitchell and the OCCA have, at various points throughout this case, treated the HAC claim as both an as-applied and a facial challenge. Mr. Mitchell has recently resisted this distinction, arguing "[f]acial and as-applied challenges are not categorically different . . . ." Pet'r. Corr. First Supp. Br., Doc. 10558627 at 9. But on the eve of oral argument, he filed a letter under Federal Rule of Appellate Procedure 28(j), "acknowledge[ing] he poses a facial challenge" to Oklahoma's HAC aggravator. Pet'r. 28(j) Letter, Doc. 10693978 at 2; *see also* Fed. R. App. P. 28(j) (allowing parties to provide a letter containing supplemental authority if, after briefing, "pertinent and significant authorities come to [the] party's attention"). He conceded the same at oral argument. *See* Oral Arg. at 0:27-0:31.

First, the OCCA applied the previously approved narrowing construction to Mr. Mitchell's appeal from his third sentencing. *See Mitchell V*, 235 P.3d at 664. The narrowing construction Oklahoma adopted after *Maynard* restricts the HAC aggravator "to those murders in which torture or serious physical abuse is present." *Stouffer*, 742 P.2d at 563; *see also Cheney*, 909 P.2d at 80 ("In accordance with the concerns raised in *Maynard*, [the OCCA] has limited [the HAC aggravator] to cases in which the State proves beyond a reasonable doubt that the murder . . . was preceded by torture or serious physical abuse . . . ."). This circuit has approved that narrowing construction, *see Medlock*, 200 F.3d at 1319, and Mr. Mitchell concedes it is constitutional, *see* Oral Arg. at 0:34-1:15 (statement from Mr. Mitchell's counsel that "from the decision by the Supreme Court in [*Maynard*] [un]til about the end of the '90s . . . the Oklahoma courts were appropriately limiting [HAC]"). On appeal from Mr. Mitchell's third sentence, the OCCA applied this very construction, stating, "To prove the 'especially heinous, atrocious or cruel' aggravator, the State must show that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty." *Mitchell V*, 235 P.3d at 664. Mr. Mitchell therefore cannot argue that the OCCA applied an unconstitutional aggravator at his sentencing.

Second, even if there were room for debate as to whether the OCCA applied the constitutional construction, under *Bell v. Cone*, we must presume the state court applied the appropriately narrowed construction unless Mr. Mitchell makes an affirmative

showing to the contrary. *Bell*, 543 U.S. at 456. In *Bell*, the Sixth Circuit determined that the Tennessee Supreme Court failed to apply a constitutional narrowing construction of the state's HAC aggravator. *Id.* at 451-52, 455. The Supreme Court reversed, noting that "[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates." *Id.* at 455. The Court further explained, "[T]he [Tennessee] Supreme Court . . . construed the aggravating circumstance narrowly and . . . followed that precedent numerous times; absent an affirmative indication to the contrary, we must presume that it did the same thing here." *Id.* at 456.

Mr. Mitchell cannot overcome this presumption. Like the state courts in *Bell*, the OCCA adopted a constitutionally permissible narrowing of the HAC aggravator and "followed that precedent numerous times." *Id.* We therefore presume the OCCA continued to apply its constitutional narrowing construction unless Mr. Mitchell can provide an "affirmative indication to the contrary." *Id.* He offers no such "affirmative indication." *Id.*

Mr. Mitchell cites *DeRosa v. State*, 89 P.3d 1124 (Okla. Crim. App. 2004), claiming it represents an "express[] reject[ion]" of the OCCA's post-*Maynard* narrowing construction. Oral. Arg. at 2:20-2:55. But he acknowledges that *DeRosa* did not explicitly abandon the OCCA's constitutional narrowing. *Id.* at 3:51-4:02. Further, the Supreme Court has explained that "a federal court may consider state court *formulations* of a limiting construction to ensure that they are consistent" but may not "review . . . state court cases to determine whether a limiting construction has been *applied* consistently."

Arave v. Creech, 507 U.S. 463, 477 (1993). Thus, even if Mr. Mitchell were correct that the *DeRosa* court applied an impermissible construction, that would not demonstrate that the OCCA has abandoned its constitutionally permissible narrowing.

Mr. Mitchell also relies on this court's panel opinion in *Pavatt v. Royal* (*Amended Pavatt Panel Op.*), 894 F.3d 1115 (10th Cir. 2017).[10] The panel held that the OCCA acted contrary to clearly established law because it "did not apply the narrowing construction [of the HAC aggravator] that [the Tenth Circuit] previously approved." *Id.* at 1132. The Tenth Circuit en banc court later vacated the panel's opinion and decided the HAC claim was procedurally barred. *See Pavatt v. Carpenter*, 928 F.3d 906, 911 (10th Cir. 2019) (en banc). Mr. Mitchell acknowledges the panel's decision no longer has precedential value. *See* Pet'r. Fourth Supp. Br., Doc. 10677634 at 2. But because "[t]he en banc court never considered the merits of the Eighth Amendment/vagueness claims," *id.* at 1 (emphasis omitted), he urges us to adopt the *Pavatt* panel's conclusion that the OCCA has "veered" away from its constitutional narrowing and "no longer limit[s] this clearly vague aggravating circumstance," *id.* at 4 (quotations omitted).

Like Mr. Mitchell's arguments about *DeRosa*, this argument is unpersuasive. The panel opinion Mr. Mitchell urges us to accept reasoned that the OCCA had drifted from the previously approved narrowing construction and had "not appl[ied] a constitutionally acceptable interpretation of [the] HAC aggravator." *Amended Pavatt Panel Op.* at 1132.

[10] This panel opinion amended and superseded a previous panel opinion, *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017).

But because the Supreme Court's "decisions do not authorize review of state court cases to determine whether a limiting construction has been applied consistently," *Arave*, 507 U.S. at 477 (emphasis omitted), a misapplication of the HAC aggravator in the OCCA decisions leading to and including *Pavatt* would not establish that the OCCA used an unconstitutional construction in Mr. Mitchell's case. Thus, even if we agreed with the *Pavatt* panel's view that the OCCA has applied an unconstitutional construction in some cases, that would not provide the "affirmative indication" required for Mr. Mitchell to overcome *Bell*. 543 U.S. at 456.

Because Mr. Mitchell offers no "affirmative indication," *id.*, to suggest the OCCA has "not compl[ied] with constitutional dictates," *id.* at 455, "we must presume" the OCCA construed the HAC aggravator narrowly, *id.* at 456. The OCCA's application of the HAC aggravator was therefore not "contrary to" or "an unreasonable application of[] clearly established Federal law." 28 U.S.C. § 2254(d). We thus affirm the district court's denial of habeas relief on Mr. Mitchell's HAC aggravator claim.

3. **Due Process *Hicks* Claim**

Mr. Mitchell argues his resentencing violated Oklahoma Statutes §§ 701.10 and 701.10a, which provide that in a death penalty case, guilt and sentencing proceedings must be conducted before the same trial jury. He contends this state law violation qualifies as a due process violation under *Hicks*. The OCCA rejected this claim as "barred by the doctrine of *res judicata*." *Mitchell V*, 235 P.3d at 653. We (a) provide

an overview of the relevant law and (b) examine the merits of Mr. Mitchell's *Hicks* claim under § 2254(d)(1). We affirm the district court's denial of habeas relief.

a. *Legal background*

The following (i) quotes the relevant Oklahoma statutes, (ii) summarizes the Supreme Court's *Hicks* decision, and (iii) provides additional legal background on the AEDPA standard.

i. Oklahoma statutes

Title 21 Oklahoma Statute § 701.10 states:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, wherein the state is seeking the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death . . . . The proceeding shall be conducted by the trial judge before the *same trial jury* . . . .

Okla. Stat. tit. 21, § 701.10 (emphasis added). Section 701.10a further provides:

> Notwithstanding [the above], which requires that *the same jury sit in the sentencing phase of a capital murder trial,* the following shall apply:
>
> Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error *in the sentencing proceeding only,* may set aside the sentence of death and remand the case to the trial court . . . . No error in the sentencing proceeding shall result in the reversal of the conviction for a capital felony. When a capital case is remanded after vacation of a death sentence, the prosecutor may[] . . . move the trial court to impanel a *new sentencing jury* who shall determine the sentence of the defendant[] . . . [and] the trial court shall impanel a new jury for the purpose of conducting new sentencing proceedings[.]

Okla. Stat. tit. 21, § 701.10a (emphasis added).

ii. *Hicks v. Oklahoma*

In *Hicks v. Oklahoma*, an Oklahoma jury convicted Mr. Hicks of distributing heroin. 447 U.S. at 344-45. After receiving an instruction to apply Oklahoma's then-existing habitual offender statute, the jury sentenced Mr. Hicks to 40 years in prison, the statute's mandatory sentence. *Id.* at 345-46. Shortly after, the OCCA held in *Thigpen v. State*, 571 P.2d 467, 471 (Okla. Crim. App. 1977), that the habitual offender statute was unconstitutional. *See Hicks*, 447 U.S. at 345. Without the unconstitutional habitual offender statute, a 10-year minimum—rather than a 40-year minimum—would have applied to Mr. Hicks's sentencing. *See id.* at 346. Mr. Hicks thus appealed, seeking to have his sentence vacated. *Id.* at 345. The OCCA "acknowledged that the [habitual offender] provision was unconstitutional, but nonetheless affirmed the . . . conviction and sentence, reasoning that [Mr. Hicks] was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event." *Id.*

The United States Supreme Court reversed. It noted that Mr. Hicks had a "statutory right [under Oklahoma law] to have a jury fix his punishment in the first instance" and that this right "substantially affects the punishment imposed." *Id.* at 347. It also noted that without the unconstitutional 40-year minimum, "[t]he possibility that the jury would have returned a sentence of less than 40 years [was] . . . substantial." *Id.* at 346. The Court rejected the OCCA's conclusion that Mr. Hicks had not been prejudiced by the application of the invalid habitual offender statute and stated, "It is . . .

wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence." *Id.* The Court therefore held that "the State deprived [Mr. Hicks] of his liberty without due process of law," *id.* at 347, and reversed and remanded for resentencing.

iii. Additional AEDPA background

AEDPA permits reversal of a state court's judgment only if the court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). "It is the petitioner's burden to make this showing and it is a burden intentionally designed to be 'difficult to meet.'" *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)).

"[T]he threshold question" in an AEDPA analysis is "[w]hether the law is clearly established." *House*, 527 F.3d at 1015 (emphasis omitted); *see also Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004) ("We begin by determining the relevant clearly established law."). "The absence of clearly established federal law is dispositive under § 2254(d)(1)," *House*, 527 F.3d at 1018, and "without clearly established federal law, a federal habeas court need not assess whether a state court's decision was contrary to or involved an unreasonable application of such law," *id.* at 1017 (quotations omitted).

"[C]learly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*." *Id.* at 1016. Such

holdings "must be construed narrowly and consist only of something akin to on-point holdings." *Id.* at 1015.[11]

b. *Analysis*

Because it is not clear whether § 701.10 and § 701.10a apply to proceedings like Mr. Mitchell's, we do not decide whether Mr. Mitchell suffered a state-law violation.[12] Instead, we assume he did and proceed to our AEDPA analysis. Below, we (i) explain why AEDPA review applies and (ii) analyze the merits of the claim under the AEDPA standard. We affirm the district court's denial of habeas relief because (1) Mr. Mitchell has not advanced any argument as to why the OCCA's sentencing decision was contrary to or an unreasonable application of clearly established Supreme Court law, and (2) *Hicks* does not supply the clearly established law necessary for Mr. Mitchell to overcome AEDPA deference.

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[11] Although "clearly established federal law" must be factually comparable to the case at issue, "factual identity between existing Supreme Court cases and the case *sub judice*" is neither necessary nor sufficient. *House*, 527 F.3d at 1016 n.5. As this court explained in *House*, "[I]t is not enough for courts to mechanistically seek to determine whether there are Supreme Court holdings that involve facts that are indistinguishable from the case at issue." *Id.* Instead, courts "must exercise a refined judgment and determine the actual materiality of the lines (or points) of distinction between existing Supreme Court cases and the particular case at issue . . . ." *Id.*

[12] We are not convinced that Mr. Mitchell's resentencing violated the same-jury requirement set forth in § 701.10 and § 701.10a. These provisions state a same-jury rule for the guilt and sentencing stages of a capital trial, but they do not address what must happen if a federal habeas court vacates a death sentence. Mr. Mitchell acknowledges this uncertainty. At oral argument, his counsel recommended certifying the *Hicks* question to the Oklahoma courts, *see* Oral Arg. at 22:17-34, and stated, "I'm forced to concede . . . that there's some ambiguity in the Oklahoma law," *id.* at 22:54-23:00.

i. AEDPA standard applies

The AEDPA standard governs Mr. Mitchell's *Hicks* claim because the OCCA addressed the issue on the merits. *See Stouffer v. Duckworth*, 825 F.3d 1167, 1179 (10th Cir. 2016) ("[I]f the state court did not decide the claim on the merits, the stringent principles of deference under . . . § 2254 are inapplicable." (quotations omitted)). Mr. Mitchell argues "there was no adjudication on the merits by the state court" and that we should therefore review his claim de novo. Renewed Request for COA, Doc. 10507440 at 31. But where, as here, "a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Johnson v. Williams*, 568 U.S. 289, 298 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 99 (2011)). Mr. Mitchell has not overcome this presumption because he has not identified any "state-law procedural principles" or other "indication" showing the state court did not resolve his claim. *Id.* He also has waived any argument that AEDPA review does not apply because he did not argue in district court that the OCCA did not decide his *Hicks* claim on the merits. *See* Brian R. Means, Fed. Habeas Manual § 3:7 (2019) ("[A] prisoner may waive the argument that a state court decision

does not constitute a merits adjudication for purposes of AEDPA . . . if not raised in the district court . . . .").[13] We therefore review the claim under § 2254(d)(1).[14]

ii. AEDPA analysis

1) Failure to argue AEDPA

Mr. Mitchell advances no arguments as to whether or how his *Hicks* claim should prevail under the AEDPA framework. At oral argument, his counsel effectively conceded the *Hicks* claim cannot withstand AEDPA review. *See* Oral Arg. at 23:00-04 (Mr. Mitchell's counsel accepting the panel's suggestion that the *Hicks* claim "could not prevail under AEDPA deference"). Mr. Mitchell has therefore failed to demonstrate that the OCCA's decision was contrary to or an unreasonable application of clearly established federal law. *See Owens*, 792 F.3d at 1242 ("It is the petitioner's burden to make this showing . . . ."). We could reject the *Hicks* claim on the sole basis that Mr. Mitchell has not advanced any arguments relating to the AEDPA standard.

[13] Mr. Mitchell's counsel confirmed this at oral argument. When the panel asked, "You don't disagree with me that there were no arguments in district court that the standard of review is not AEDPA deference?," Oral Arg. at 21:12-23, counsel responded, "Correct. There was not an explicit argument . . . . I accept that," *id.* at 21:23-31; *see also id.* at 16:10-21:35 (discussing whether AEDPA review applies to Mr. Mitchell's *Hicks* claim).

[14] As explained above in footnote 8, the state waived any defense based on the OCCA's res judicata ground for denying relief by failing to argue procedural default either in district court or on appeal. *See Hooks*, 184 F.3d at 1216.

2) No clearly established law

Even if we proceed to the merits, the *Hicks* claim fails because Mr. Mitchell cannot show that *Hicks* supplies clearly established Supreme Court law. *See House*, 527 F.3d at 1018 ("The absence of clearly established federal law is dispositive . . . ."). *Hicks* is not "closely-related or similar to the case *sub judice*." *Id.* at 1016. In *Hicks*, an Oklahoma trial court instructed the jury to sentence the defendant under Oklahoma's habitual offender statute, which was later held unconstitutional. *See* 447 U.S. at 344-45. The Supreme Court found this prejudiced the defendant and violated his due process rights. *Id.* at 346. *Hicks* thus decided that when a state law provides for a jury to impose a sentence, a defendant has a due process right for the jury to be instructed under a constitutional standard. Mr. Mitchell, by contrast, alleges a due process right to have the same jury decide both guilt and punishment in a capital case. He does not contend his resentencing jury was instructed to apply an unconstitutional sentencing statute.

Hicks thus does not provide "something akin to [an] on-point holding[]." *House*, 527 F.3d at 1015. Although the claims in *Hicks* and this case both involved due process challenges to jury sentencing proceedings, they are materially different. *Hicks* addressed the defendant's right to be sentenced by a properly instructed jury. Mr. Mitchell alleges a right to be convicted and sentenced by the same jury. Applying *Hicks* to this case would "require us inappropriately to extend [*Hicks*] to a novel context." *Littlejohn v. Trammell*, 704 F.3d 817, 850 (10th Cir. 2013). *Hicks* therefore cannot serve as clearly established federal law to resolve Mr. Mitchell's claim. *See id.* at 849-50 (determining Fifth

Amendment's prohibition on unlawful extraction of confessions did not provide clearly established law for defendant's claim that his voluntary confessions violated his due process rights).

Mr. Mitchell argues that "*Hicks* unquestionably gave [Mr.] Mitchell a constitutional right to the 'same jury' following . . . a remand from a federal court." Pet'r. Third Supp. Br., Doc. 10593597 at 7-8. But *Hicks* stands for the general due process principle that "[w]here . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, . . . [t]he defendant . . . has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." 447 U.S. at 346. General principles, however, do not provide clearly established law under AEDPA. As the Supreme Court said in *Nevada v. Jackson*, 569 U.S. 505 (2013), "framing [Supreme Court] precedents at . . . a high level of generality" would "defeat the substantial deference that AEDPA requires" by allowing "a lower federal court [to] transform even the most imaginative extension of existing case law into clearly established Federal law, as determined by the Supreme Court." *Id.* at 512 (quotations omitted). And in *House*, we said "federal courts may [not] extract clearly established law from the general legal principles developed in factually distinct contexts." 527 F.3d at 1016 n.5.

"Because there is no clearly established federal law" to resolve Mr. Mitchell's *Hicks* claim, "[his] challenge fails at the threshold inquiry," and "[u]nder § 2254(d)(1) our analysis ends." *Id.* at 1022; *see also id.* at 1021 ("Absent controlling Supreme Court

precedent, it follows ineluctably that the [state court's] decision . . . cannot be either contrary to, or an unreasonable application of, clearly established Federal law." (alterations and quotations omitted)). We therefore affirm the district court's denial of relief as to Mr. Mitchell's *Hicks* claim.

III. **CONCLUSION**

For the foregoing reasons, we affirm the decision of the district court.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

Appendix B

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

ALFRED BRIAN MITCHELL, Petitioner, vs. KEVIN DUCKWORTH,[1] Interim Warden, Oklahoma State Penitentiary, Respondent.	)	Case No. CIV-11-429-F

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. 21). This is Petitioner's second habeas challenge to the convictions and sentences he received in Oklahoma County District Court Case No. CF-91-206.

In 1992, Petitioner was tried by jury and found guilty of the crimes of first degree murder, robbery with a dangerous weapon, larceny of an automobile, first degree rape, and forcible anal sodomy. Finding three aggravating circumstances (especially heinous, atrocious, or cruel; committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society), the jury sentenced Petitioner to death for the murder. On the

[1] Pursuant to Fed. R. Civ. P. 25(d), Kevin Duckworth, who currently serves as interim warden of the Oklahoma State Penitentiary, is hereby substituted as the proper party respondent in this case.

remaining counts, Petitioner received an aggregate imprisonment sentence of 170 years. In 1997, after an unsuccessful pursuit for relief in the state courts,[2] Petitioner initiated his first habeas corpus action. In 1999, the Court granted Petitioner partial relief. Finding that Petitioner's rape and sodomy convictions violated his right to due process, the Court conditionally granted the writ, giving the State the option to retry Petitioner on these charges. The Court denied all other requested relief. Mitchell v. Ward, 150 F. Supp. 2d 1194 (W.D. Okla. 1999). On appeal, Petitioner asserted, among other claims, that the unconstitutional rape and sodomy convictions required a new capital sentencing proceeding as well. The Tenth Circuit agreed. Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001).

Since the Tenth Circuit's decision in 2001, Petitioner has had two state court resentencing proceedings.[3] In both of these subsequent proceedings, Petitioner was sentenced to death.[4] The resentencing ordered as a result of Petitioner's first habeas action was held in 2002; however, in Mitchell v. State, 136 P.3d 671 (Okla. Crim. App. 2006), the OCCA found multiple errors and ordered a second resentencing. The second resentencing was held in 2007, and the OCCA found no errors in this proceeding which warranted relief. Mitchell v. State, 235 P.3d 640 (Okla. Crim. App. 2010). In Mitchell v. State, No. PCD-2008-356 (Okla. Crim. App. July 7, 2010) (unpublished), the OCCA also denied Petitioner post-conviction relief.

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[2] Mitchell v. State, 934 P.2d 346 (Okla. Crim. App. 1997) (first post-conviction application); Mitchell v. State, 884 P.2d 1186 (Okla. Crim. App. 1994) (first direct appeal).

[3] The State did not retry Petitioner on the rape and sodomy charges.

[4] In both of the resentencing proceedings, the jury rejected the continuing threat aggravator, and in the second resentencing, the jury also rejected the avoid arrest aggravator. Thus, the only aggravating circumstance supporting Petitioner's death sentence is the jury's finding in the second resentencing that the murder was especially heinous, atrocious, or cruel (O.R. VII, 1375).

In his petition, Petitioner has presented twenty-one grounds for relief. Doc. 21. Respondent has responded to the petition and Petitioner has replied. Docs. 30 and 38. In addition to his petition, Petitioner has filed motions for discovery and an evidentiary hearing. Docs. 22, 23, 39, and 40. After a thorough review of the state court record (which Respondent has provided), the pleadings filed herein, and the applicable law, the Court finds that, for the reasons set forth below, Petitioner is not entitled to his requested relief.

I. Facts.

In adjudicating Petitioner's appeal of his second resentencing, the OCCA incorporated the facts from its 1994 opinion and reproduced its summary of the facts from its 2006 opinion. In so doing, the OCCA noted that "[t]he evidence presented at the second re-sentencing trial was sufficiently the same as that presented at the first re-sentencing so that we may rely on the brief summary of facts set forth in our earlier opinion[.]" Mitchell, 235 P.3d at 646. Since Petitioner does not dispute these facts, they are presumed correct in accordance with 28 U.S.C. § 2254(e)(1) and reproduced here:

> Briefly stated, on January 7, 1991, [Petitioner] found Elaine Scott alone at the Pilot Recreation Center in Oklahoma City. The evidence presented at the resentencing established that [Petitioner] first attacked Scott near the Center's library, where a spot of blood, one of Scott's earrings, and a sign that she had been hanging were later found on the floor. Scott apparently ran for the innermost room of the Center's staff offices—as she had told her mother she would if she ever found herself in a dangerous situation at the Center—where there was a phone and a door that she could lock behind her. She almost made it. Although the exact sequence of events is unclear, the State established that Scott's clothing was taken off and that a violent struggle ensued, in which [Petitioner] beat and battered Scott, using his fists, a compass, a golf club (which ended up in pieces), and a wooden coat rack. The forensic evidence—including the condition of Scott's nude, bruised, and bloodied body—established that she was moving throughout the attack, until the

> final crushing blows with the coat rack, which pierced her skull and ended her life.

Id. (quoting Mitchell, 136 P.3d at 676–77).

II. 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 his ability to obtain 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.

III. Analysis.

A. Ground I: Reassertion of Previously Raised Brady[5] Claim.

In his first ground for relief, Petitioner reasserts the Brady claim he raised in his first habeas petition. Although Petitioner was granted relief on this claim in the form of a conditional writ by which the State was required to retry him on the rape and sodomy charges (or dismiss them) and provide him a resentencing proceeding for his murder conviction, Petitioner argues that he should have been given even greater relief, namely, a whole new trial (guilt and sentencing) on his murder conviction. Under the plain language of 28 U.S.C. § 2244(b)(1), Petitioner cannot proceed on this claim. Section 2244(b)(1) states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application *shall be dismissed.*" (Emphasis added). Petitioner raised this very claim before and therefore he cannot raise it again. Requesting different relief does not change the substance of the claim.

The Supreme Court's decision in Magwood v. Patterson, 561 U.S. 320 (2010), does not alter the Court's ruling. Although the Magwood Court determined that a second habeas petition following a capital resentencing proceeding was not a second and successive application, it not only left open the question of whether a returning state court prisoner could challenge anew his underlying conviction in that subsequent

[5] Brady v. Maryland, 373 U.S. 83 (1963).

application, id. at 342, but it also did not address the situation presented in this case where the claim now presented was in fact raised and adjudicated in the prior proceeding. However, even if Magwood were construed to allow Petitioner to re-raise this claim, the Court would nevertheless find that Petitioner is not entitled to the additional relief he requests.

A Brady violation occurs when the prosecution suppresses material evidence. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). "In a case involving convictions for multiple counts, analysis of whether confidence in the verdict remains 'must be assessed count by count.'" United States v. Bagcho, ___ F. Supp. 3d ___, 2015 WL 9216604, at *10 (D.D.C. Dec. 17, 2015) (quoting United States v. Johnson, 592 F.3d 164, 171 (D.C. Cir. 2010)). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-10 (1976).

In Petitioner's case, the Brady violation was based on "the prosecution's failure to provide the DNA evidence linking [Ms. Scott's boyfriend] to the semen on Ms. Scott's panties, and revealing that Petitioner's DNA was not found in any of the samples tested . . . ." Mitchell, 150 F. Supp. 2d at 1228. Adding insult to this constitutional injury was the testimony given at trial by Joyce Gilchrist, a forensic chemist for the Oklahoma City Police Department.[6]

[6] "Nicknamed 'Black Magic' for her seeming ability to get lab results no other chemist could," Ms. Gilchrist "was fired in 2001 for doing sloppy work and giving false or misleading testimony." Mark Hansen, *Crimes in the Lab*, 99-SEP A.B.A. J. 44, 47 (Sept. 2013).

> Gilchrist's testimony that the DNA tests on the semen were "inconclusive," or "inconclusive as to" Petitioner, was, at least, misleading. When she testified at trial, Gilchrist knew the semen on Ms. Scott's panties was not consistent with both Petitioner and [Ms. Scott's boyfriend]. She knew the semen was at least a preliminary match for [Ms. Scott's boyfriend] *and* that Petitioner's DNA had *not* been found on the panties. Thus, the DNA test results were far from inconclusive.

Id. at 1229. There is no question that this evidence[7] undermined the jury's verdict on the rape and sodomy charges. As stated by the Tenth Circuit, "the jury convicted [Petitioner] of rape and forcible anal sodomy despite evidence it did not hear indicating that no such assault had taken place." Mitchell, 262 F.3d at 1064. The Tenth Circuit surmised that had the defense been given this information, "there [was] at least a reasonable probability that . . . it would have succeeded in getting those charges dismissed prior to the trial." Id. at 1065. As for sentencing, the Tenth Circuit found that this same evidence undermined its confidence in Petitioner's death sentence.

> [W]e simply cannot be confident that the jury would have returned the same sentence had no rape and sodomy evidence been presented to it. First and foremost, the rape and sodomy evidence impacted all three of the aggravating circumstances found by the jury: that the murder was heinous, atrocious and cruel; that it was committed to avoid arrest for the rape and sodomy; and that [Petitioner] posed a continuing threat to society. Moreover, the defense presented considerable mitigating evidence for the jury to weigh against the aggravating circumstances it found. That evidence included [Petitioner's] youth (18); his loving relationships with his extended family and friends, which showed a totally different side of his character; and his intelligence (he had been in a program for the gifted and talented children in his elementary

[7] This, however, was not the only DNA evidence in the case. As discussed herein, additional DNA evidence confirmed Petitioner's own admission that although he did not rape or sodomize Ms. Scott, he did masturbate on her, leaving his sperm (and his DNA) on one of Ms. Scott's pubic hairs.

> school). In addition, Dr. Wanda Draper, a psychologist with a PhD in human development, testified at the sentencing hearing about [Petitioner's] developmental history, concluding that he would do well in a structured environment such as the one he experienced in the juvenile facility where he was a leader among his peers. This evidence enabled defense counsel to argue that [Petitioner's] life was worth saving and that he would do well in a prison environment if the jury sentenced him to life without parole. Under these circumstances, we are persuaded [Petitioner] has met the Kyles standard by showing that absent the Brady violation, there is a reasonable probability the result of the sentencing proceeding would have been different. See Kyles, 514 U.S. at 435, 115 S.Ct. 1555.

Mitchell, 262 F.3d at 1065-66.

To obtain Brady relief for his murder conviction, Petitioner must show that the suppressed forensic evidence affected the jury's determination of his guilt. "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." Agurs, 427 U.S. at 112-13. In support of his request for relief, Petitioner makes three assertions: (1) that he was forced to testify in his first trial in order to deny the rape and sodomy charges; (2) that the rape and sodomy charges "were inherently intertwined" with the murder charge; and (3) that "[t]aking away the rape and sodomy charges diminishes greatly the evidence supporting a finding of malice aforethought." Petition, pp. 17, 19. However, none of these assertions demonstrates a reasonable probability that, had the evidence in question been disclosed, the jury would have entertained a reasonable doubt as to Petitioner's guilt for the murder.

First, Petitioner has not shown how his testifying in his first trial correlates to the jury's finding of guilt on the murder charge. While he states that he was forced

to testify in order to counteract Ms. Gilchrist's testimony,[8] he does not assert how his testimony factored into the jury's verdict. In fact, Petitioner even acknowledges that the jury already knew of his admissions "to being present and masturbating to ejaculation." Petition, p. 17. In addition, Petitioner was connected to the murder scene by eyewitness testimony and by "unchallenged evidence of sperm attributable to Petitioner being found on Ms. Scott's clothing and in the public [sic] combings . . . ." Mitchell, 150 F. Supp. 2d at 1199-1200, 1229 n.53.[9]

Second, Petitioner's assertion that the rape, sodomy, and murder "were inherently intertwined" does not address how the jury's murder verdict would have been affected had the suppressed evidence been disclosed. Although Petitioner was tried for these charges together, along with the additional charges of robbery (for taking Ms. Scott's personal property) and larceny (for stealing her car), the jury was instructed on the elements of each crime, and so although they were related in time and place, the elements were distinct (O.R. I, 44-54). The fact that Petitioner did not rape or sodomize Ms. Scott does not lessen his culpability for the murder, especially when he admitted to being present and masturbating on her.

Third, while Petitioner contends that the evidence supporting malice aforethought "diminishes greatly" when the rape and sodomy charges are separated from the murder charge, the Court strongly disagrees. The jury was instructed that malice aforethought is "a deliberate intention to take away the life of a human being"

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[8] In addressing another one of Petitioner's claims (Ground V herein), the OCCA found this assertion untenable: "the reason [Petitioner] took the witness stand in his first trial was to explain why he had given so many different stories to the police, both before and after he was arrested, and to exculpate himself and inculpate "C. Ray." Mitchell, 235 P.3d at 654.

[9] At his second resentencing, forensic expert Brian Wraxall testified that semen found on a pubic hair of Ms. Scott matched Petitioner's DNA at nine loci. Mr. Wraxall testified that the probability of finding the same match elsewhere in the population was one in nine trillion (Tr. IV, 866-76).

(O.R. I, 45), and the evidence which supports this finding stands on its own, independent and untainted by the suppressed forensic evidence. Petitioner violently attacked Ms. Scott with his fists and items he found within his reach, including a compass, a golf club, and a wooden coat rack, and he did not stop until he had killed her. Ms. Scott was found nude and bruised in a pool of blood, with a fractured skull and exposed brain matter. Even more than the absence of a reasonable probability, the Court harbors no doubt that the jury's finding of malice aforethought murder was not affected by the suppressed forensic evidence (and Ms. Gilchrist's related testimony).

For the foregoing reasons, the Court concludes that Petitioner's Ground I should be dismissed, or in the alternative, denied for lack of merit.

B. Grounds II, XIII, and XIX: Cruel and Unusual Punishment.

In Grounds II, XIII, and XIX, Petitioner sets forth three reasons why his death sentence constitutes cruel and unusual punishment under the Eighth Amendment. All three of these claims were presented to the OCCA and denied on the merits. Mitchell, 235 P.3d at 658-60, 665.

In Ground II, Petitioner asserts that because he has yet to be executed for the murder he committed in 1991, his death sentence is unconstitutional. Petitioner argues that "[t]o subject anyone to the death penalty after two such egregiously flawed proceedings, permitting a third bite at the apple following such blatant contempt for constitutional jurisprudence, is cruel and unusual, and contrary to the basic tenets of Due Process." Petition, pp. 26-27. Petitioner additionally asserts that "[t]here is no penological justification for carrying out a death sentence after so many years against a barely 18 year old offender who has 20 years hence behaved so impeccably . . . ." Id. at 27. Petitioner presents this claim even though he acknowledges that the

Supreme Court has not addressed this issue. Id. The OCCA denied Petitioner relief for this very reason. Mitchell, 235 P.3d at 665.

The Supreme Court has been given multiple opportunities to address the issue Petitioner raises in his Ground II, but yet it has repeatedly declined to take the issue up. See Boyer v. Davis, No. 15-8119, 2016 WL 1723586 (May 2, 2016) (denying certiorari where petitioner had been "under threat of execution" for thirty-two years); Muhammad v. Florida, ___ U.S. ___, 134 S. Ct. 894 (2014) (denying certiorari and a stay of execution on a similar claim); Valle v. Florida, ___ U.S. ___, 132 S. Ct. 1 (2011) (denying certiorari and a stay of execution where petitioner had been on death row for thirty-three years); Johnson v. Bredesen, 558 U.S. 1067 (2009) (denying certiorari and a stay of execution where petitioner had been on death row for twenty-nine years); Allen v. Ornoski, 546 U.S. 1136 (2006) (denying certiorari and a stay of execution where petitioner was a wheelchair-confined, seventy-six-year-old blind diabetic who had been on death row for twenty-three years); Knight v. Florida, 528 U.S. 990 (1999) (denying certiorari where petitioners had been on death row for twenty years or more); Elledge v. Florida, 525 U.S. 944 (1998) (denying certiorari where petitioner had been on death row for twenty-three years); Lackey v. Texas, 514 U.S. 1045 (1995) (denying certiorari where petitioner had been on death row for seventeen years).

In addition to the absence of Supreme Court authority, the Tenth Circuit has found that Petitioner's claim lacks merit. In Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995), the petitioner claimed that an Eighth Amendment violation resulted from his fifteen years on death row, "during which time he faced at least seven execution dates." In denying relief, the Tenth Circuit noted the absence of authoritative case law:

> To our knowledge, there is no reported federal case that has adopted the position advocated by Appellant. Although two Supreme Court justices have expressed the view that lower federal courts should grapple with this issue, those views do not constitute an endorsement of the legal theory, which has never commanded an affirmative statement by any justice, let alone a majority of the Court.

Id. See also Jones v. Gibson, 206 F.3d 946, 959 n.6 (10th Cir. 2000) (citing Stafford and denying Eighth Amendment relief where the petitioner had been on death row for twenty years).

Other circuits have found a lack of merit to the claim as well. In Chambers v. Bowersox, 157 F.3d 560, 568 (8th Cir. 1998), the petitioner had been on death row for fifteen years. In denying Eighth Amendment relief, the Eighth Circuit held as follows:

> We believe that delay in capital cases is too long. But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life. Chambers's strongest argument is that the State has had to try him three times before getting it right. That is true, but there is no evidence, not even a claim, that the State has deliberately sought to convict Chambers invalidly in order to prolong the time before it could secure a valid conviction and execute him. We believe the State has been attempting in good faith to enforce its laws. Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully. If it is not cruel and unusual punishment to execute someone after the electric chair malfunctioned the first time, see Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), we do not see how the present situation even begins to approach a constitutional violation.

Id. (footnote omitted). See also Thompson v. Sec'y for Dep't of Corr., 517 F.3d 1279, 1283-84 (11th Cir. 2008) (finding no merit to prolonged confinement claim).

In light of all of this authority, it is clear that Petitioner has not shown that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law, and therefore, Ground II is denied.

In Ground XIII, Petitioner argues that his death sentence is unconstitutional in light of the Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005). In Roper, 543 U.S. at 578, the Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Although by its express terms Roper does not apply to Petitioner, Petitioner argues that its rationale does and that he should be relieved of his death sentence because of his youthfulness. Petition, pp. 65-68. He also contends that Roper should be construed to prevent the State from relying on juvenile adjudications to support the continuing threat aggravator as was done in his case. Id. at 68-69.

Petitioner presented his Ground XIII to the OCCA on direct appeal. As issues of first impression, the OCCA discussed them at length. Mitchell, 235 P.3d at 658-60. With respect to his first issue, the OCCA denied relief based on Roper's bright line rule.

> The U.S. Supreme Court has drawn a bright line at eighteen (18) years of age for death eligibility and we therefore reject [Petitioner's] argument that being two weeks beyond his eighteenth birthday at the time of the murder exempts him from capital punishment. Under the plain language of Roper, the prohibition against capital punishment is limited to the execution of an offender for any crime committed before his 18th birthday.

Mitchell, 235 P.3d at 659. The OCCA's application of Roper is not only reasonable, but absolutely correct. In arriving at its holding, the Supreme Court stated as follows:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that

> distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574. Because Petitioner was eighteen years old when he committed his crime, Roper clearly does not apply to him, and Petitioner's argument for an extension of Roper is not a basis for habeas relief. See Pinholster, 563 U.S. at 182 ("State-court decisions are measured against [the Supreme] Court's precedents as of 'the time the state court renders its decision.'") (quoting Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003)).

As to the second issue, the OCCA held as follows:

> This Court has consistently held that evidence of unadjudicated bad acts, non-violent bad acts and juvenile offenses are admissible in a capital case to prove a defendant constitutes a continuing threat to society. Douglas v. State, 1997 OK CR 79, ¶¶ 85–87, 951 P.2d 651, 675–76 and cases cited therein. Nothing in the language of Roper suggests that the State is prohibited from relying on prior juvenile adjudications to support an aggravating circumstance.
>
> . . . .
>
> We find nothing in Roper to support [Petitioner's] claim of exclusion from the death penalty and no abuse of discretion in the trial court's admission of [Petitioner's] prior juvenile adjudication to support the "continuing threat" aggravator. Further, [Petitioner] has failed to show any resulting prejudice by the admission of his juvenile adjudication as the jury rejected both the "continuing threat" and the "avoid arrest" aggravators that relied on the evidence.

Mitchell, 235 P.3d at 659-60. Here again, the OCCA cannot be faulted for its proper interpretation of Roper. Because Roper does address the use of juvenile adjudications

in capital proceedings, the OCCA's denial of relief is neither contrary to or an unreasonable application of it. For these reasons, Petitioner's Ground XIII is also denied.

In Ground XIX, Petitioner challenges Oklahoma's method of execution. Because Petitioner does not challenge the constitutional validity of his death sentence but only how the State intends to carry it out, the Court finds that his Ground XIX is not cognizable in this habeas action. Glossip v. Gross, 576 U.S. ___, 135 S. Ct. 2726, 2738 (2015) (acknowledging the holding of Hill v. McDonough, 547 U.S. 573 (2006), "that a method-of-execution claim must be brought under [42 U.S.C.] § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence"); Hill, 547 U.S. at 579-80 (discussing the differences between habeas and § 1983 actions and finding that a challenge to a lethal injection protocol was properly filed as a § 1983 case). Petitioner's claim must be brought under § 1983, and in fact, Petitioner has already done so. See Glossip v. Gross, Case No. CIV-14-665-F (W.D. Okla. filed June 25, 2014).

For the reasons set forth above, relief is unwarranted on Petitioner's Grounds II, XIII, and XIX, and they are hereby denied.

C. Ground III: Ineffective Assistance of Trial and Appellate Counsel.

In Ground III, Petitioner asserts that his trial counsel was ineffective for failing to investigate and obtain evidence to impeach the State's blood spatter and crime reconstruction expert, Tom Bevel. Petitioner argues that if his trial counsel had undertaken the proposed investigation, there would have been insufficient evidence to prove the especially heinous, atrocious, or cruel aggravator beyond a reasonable doubt. Petitioner additionally faults his appellate counsel for failing to raise this claim on direct appeal. Petitioner raised this claim on post-conviction. The OCCA addressed the merits and denied relief. Mitchell, No. PCD-2008-356, slip op. at 3-5,

6-10. Respondent asserts that Petitioner's Ground III must be denied because Petitioner has failed to show that the OCCA's decision is contrary to or an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984).[10]

"[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance . . . ." Burt v. Titlow, 571 U.S.___, 134 S. Ct. 10, 18 (2013). Whether counsel has provided constitutional assistance is a question to be reviewed under the familiar standard set forth in Strickland. To obtain relief, a petitioner is required to show not only that his counsel performed deficiently, but that he was prejudiced by it. Strickland, 466 U.S. at 687. The assessment of counsel's conduct is "highly deferential," and a petitioner must overcome the strong presumption that counsel's actions constituted sound trial strategy. Id. at 689. A showing of prejudice under Strickland "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

In Richter, the Supreme Court addressed not only the limitations of the AEDPA, but how those limitations specifically apply to a claim of ineffective assistance of counsel that a state court has denied on the merits. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision."

[10] Respondent additionally asserts that to the extent Petitioner raises an Eighth Amendment violation, such claim is unexhausted. Response, p. 28. Petitioner's sole reference to the Eighth Amendment is in his proposition heading. Petition, p. 29. The Court finds that this, without more, is insufficient to raise the claim, and in any event, because Petitioner did not assert an Eighth Amendment violation when he raised his ineffectiveness claim on post-conviction, it is unexhausted and subject to an anticipatory procedural bar. See Lott v. Trammell, 705 F.3d 1167, 1179 (10th Cir. 2013) (citing Anderson v. Sirmons, 476 F.3d 1131, 1139-40 n.7 (10th Cir. 2007), and applying an anticipatory procedural bar to an unexhausted claim).

Richter, 562 U.S. at 101 (internal quotation marks and citation omitted). The Supreme Court bluntly acknowledged that "[i]f this standard is difficult to meet, that is because it was meant to be." Id. at 102.

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

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

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

> actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

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

After reviewing all aspects of the murder, including the physical evidence, crime photographs/diagrams, prior testimony, police reports, autopsy report, and Petitioner's statements to police, Mr. Bevel testified as to how he believed the murder occurred. Relevant to the especially heinous, atrocious, or cruel aggravator, Mr. Bevel described a struggle that began in one part of the building and ended where Ms. Scott's body was found. In his opinion, Ms. Scott was not walking to a safer location in the building, but "fleeing" there. After an unsuccessful attempt to lock herself inside an inner office, Ms. Scott's clothes were pulled off. Once her clothes were off, Petitioner masturbated on her, stabbed her in the neck five times with a compass, and struck her at least six times with a golf club and a wooden coat rack. Although Mr. Bevel did not give any opinion as to how long the attack lasted or how long Ms. Scott maintained consciousness, he did testify that the bruising on her wrists and pelvic area were indications that she struggled with Petitioner as he exercised control over her and masturbated on her; that the stab wounds to her neck had a "vital reaction" which meant she was still alive when they were inflicted; and that the blood pattern around her body and the multi-directional blood spatter in the room showed significant movement as she was receiving these injuries (Tr. V, 953-56, 958-65, 968-75, 977-82, 984-88, 1002-03, 1006-12, 1021; Court's Exhibit 7).

Petitioner claims that Mr. Bevel's testimony could have been impeached with evidence that challenged his time line of events (Court's Exhibit 7). The evidence concerns Jesse Richards, a city worker who testified at Petitioner's first trial. Mr. Richards testified that he and another city employee were at the Pilot Center from about 2:20-2:50 p.m. on the day of the murder, that the parking lot was empty, and

that no one was in the building. Mitchell, 884 P.2d at 1192. Contrary to his testimony, Petitioner claims that Mr. Richards has since stated that they actually arrived at the Center around 12:45 p.m. and left between 1:45 and 2:00 p.m.[11] Petitioner asserts that this evidence may have been used to show that the murder actually "happened *after* [Petitioner] met Mr. Biggs at the door, *not* before," as referenced on Mr. Bevel's "Most Probable Sequence of Major Events." Court's Exhibit 7; Petition, pp. 32, 34.[12]

In denying Petitioner relief on this claim, the OCCA discussed Petitioner's supporting evidence at length, but ultimately concluded that Petitioner had not demonstrated prejudice because the evidence would not have impeached Mr. Bevel's testimony. Mitchell, No. PCD-2008-356, slip op. at 6-10. The OCCA questioned Mr. Richards' new time frame, given some nineteen years after the murder, noting it

> is inconsistent with all of the other evidence. Petitioner is the only person to have ever said that there was anyone else in the Pilot Center at the time of the murder except for himself and [Ms. Scott]. And his

[11] Petition, p. 30 (referencing Exhibit E to the Appendix filed in support of his application for post-conviction relief). Petitioner also states that the alarm at the Center may have been turned off and on at 2:34 p.m. Despite a statement by an alarm company employee to that effect, the computer print-out of activity did not show that the alarm had been turned on and off at that time. Petition, p. 31 (referencing Exhibit D to the Appendix filed in support of his application for post-conviction relief).

[12] Alan Biggs, another city worker, testified at the second resentencing that he stopped by the Center around 1:45 p.m. When he arrived, there was a red car (Ms. Scott's car) running in the parking lot. Petitioner met him at the door and told him that the Center was closed because they were cleaning the restrooms. Mr. Biggs described his encounter with Petitioner as unusual, and he left without entering the building and with a feeling that something was not right (Tr. III, 709-20). See Mitchell, 884 P.2d at 1191-92 (discussing Mr. Biggs' similar testimony at Petitioner's original trial).

claims of a third party perpetrator/perpetrators have consistently been found at odds with the forensic evidence.

Id. at 9. The OCCA also found that Mr. Bevel's "testimony was not the only testimony regarding [Ms. Scott's] conscious physical suffering" and that "[t]here was sufficient other evidence admitted in support of the 'especially heinous, atrocious, or cruel' aggravator from which the jury could find [Ms. Scott] consciously suffered prior to her death." Id. at 9-10.

As Respondent asserts, Petitioner has not shown the OCCA's determination to be contrary to or an unreasonable application of Strickland. Related to the OCCA's finding that Mr. Richards' new time frame is inconsistent with the presented evidence, Petitioner even acknowledges that it "is inconsistent with [Mr. Richards] not seeing Ms. Scott's car in the parking lot." Petition, p. 30. If Mr. Richards had in fact arrived at the Center at 12:45 p.m., or at anytime between 12:45 and 1:35-1:45 p.m., both Ms. Scott and her boss, Carolyn Ross, would have been there. Ms. Ross testified that when she left the Center between 1:35 and 1:45 p.m., Petitioner and Ms. Scott were the only ones in the Center. Although Ms. Ross had put in a call for city workers to come to the Center to fix a leaking roof, she was still expecting them when she left and both her truck and Ms. Scott's car were in the parking lot at that time (Tr. III, 653-54, 669-75). When Mr. Biggs arrived, Ms. Ross had already left as the only car he saw in the parking lot was Ms. Scott's and it was running (Tr. III, 713, 720).

In addition to its inconsistency, Petitioner's evidence regarding Mr. Richards also lacks credibility. It is hearsay evidence,[13] which is inherently unreliable, and it offers no detail regarding the circumstances under which it was obtained. The investigator's affidavit does not reflect that Mr. Richards was even asked about his prior testimony or given an opportunity to explain the time inconsistency. It is axiomatic that memories fade and that the most reliable evidence would be the sworn

[13] Mr. Richards' statements are presented in an affidavit executed by the investigator. No reason is given as to why Mr. Richards did not execute his own affidavit.

testimony Mr. Richards gave at trial in the year following the murder. Mitchell, 235 P.3d at 645 (noting that Petitioner's first trial was held in June 1992). Yet Petitioner's evidence offers no explanation for why Mr. Richards' statements given nineteen years after the murder should be accepted as more credible.

Finally, and most importantly, even if trial counsel had used this evidence to impeach Mr. Bevel, it would not have called into question the jury's finding of the especially heinous, atrocious, or cruel aggravator. This aggravating circumstance requires "the State to show that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty." Mitchell, 235 P.3d at 664. Once this showing is made, "the attitude of the killer and the pitiless nature of the crime can also be considered." Id. Irrespective of the time line of events, Petitioner's evidence does not call into question Mr. Bevel's testimony about the nature and extent of Ms. Scott's injuries and the blood evidence which shows that Ms. Scott struggled with Petitioner, was moving throughout the attack, and was therefore alive and conscious as she fought for her life. Moreover, as the OCCA noted, there was additional evidence supporting the aggravator. In addition to the medical examiner's testimony regarding Ms. Scott's injuries–that many of them were antemortem and would not have caused unconsciousness (Tr. V, 1121-22; Court's Exhibit 4, pp. 83-85, 96-97, 100-01, 108-11), both Petitioner's statements to police and his own testimony support a finding that Ms. Scott suffered serious physical abuse and that her murder was especially heinous, atrocious, or cruel. Although Petitioner has continually downplayed his involvement and placed the blame for Ms. Scott's death on others, his multiple versions of "the truth" have provided detail as to how Ms. Scott was attacked, the physical abuse she took, and the pain she suffered. According to own his testimony (given in 1992 and introduced in his second resentencing), Ms. Scott's screams were

such that they still haunt him (Tr. V, 1071-81, 1085-86; Tr. VI, 1154; Court's Exhibit 9, pp. 1256-68, 1287). In light of all of these circumstances and the established evidence, Petitioner has not shown the OCCA reached a decision contrary to or an unreasonable application of Strickland when it denied him relief on this claim. Ground III is therefore denied.

D. Ground IV: Jackson v. Denno[14] Hearing.

In Ground IV, Petitioner asserts that he should have been given a second Jackson v. Denno hearing prior to the admission of his statements to police in his second resentencing proceeding.[15] Although Petitioner acknowledges that the voluntariness of his statements had already been determined in prior state proceedings and in his first federal habeas corpus action, he nevertheless contends that a second hearing was required due to a change in the testimony of Oklahoma City Police Detective John Maddox and the OCCA's decision in McCarty v. State, 977 P.2d 1116, 1131 (Okla. Crim. App. 1998), *vacated*, 114 P.3d 1089 (Okla. Crim. App. 2005) (granting the defendant's application for post-conviction relief on other grounds, vacating his death sentence, and remanding the case to the district court for a new trial). Petitioner raised this claim on direct appeal, but the OCCA denied relief. Mitchell, 235 P.3d at 653-54. Because Petitioner has not shown that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law, relief must be denied.

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[14] 378 U.S. 368 (1964). In Jackson, 378 U.S. at 377, the Supreme Court held that a defendant who objects to the admission of a confession is entitled to "a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession."

[15] In his proposition heading and in his closing sentence, Petitioner makes reference to the trial court's failure to give the jury an instruction regarding the voluntariness of his statements. Petition, pp. 35, 38. However, Petitioner makes no argument in support of this additional claim, and therefore, the Court declines to address it.

In denying Petitioner relief on this claim, the OCCA held as follows:

> In Proposition II, [Petitioner] contends he should have been accorded a Jackson v. Denno hearing at his resentencing trial. [Petitioner's] custodial statements have repeatedly been found voluntary. See Mitchell I, 1994 OK CR 70, ¶¶ 12–14, 884 P.2d at 1194–1195; Mitchell v. Ward, 150 F.Supp.2d at 1213; Mitchell v. Gibson, 262 F.3d at 1060. [Petitioner] did not seek a petition for rehearing or rehearing *en banc* before the Tenth Circuit nor a petition for a writ of certiorari in the United States Supreme Court to challenge the denial of his involuntary statement claim.
>
> The admissibility of [Petitioner's] previously determined voluntary statements is specifically permitted under 21 O.S.2001, § 701.10a(4) ("[a]ll exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding").
>
> The only new argument raised by [Petitioner] is that at the second resentencing trial, Detective Maddox testified that [Petitioner] was a suspect when the interviews with police began on September 8, 1991, while in 1992 Detective Maddox testified that [Petitioner] was not a suspect when the interviews began and did not become a suspect until later that day. Contrary to [Petitioner's] claim, this change in testimony does not cast the entire police interview in a different light. Detective Maddox testified in 1992 and in 2007 that [Petitioner] was Mirandized prior to the beginning of the police interview on September 8, 1991. Mitchell I, 1994 OK CR 70, ¶ 5, 884 P.2d at 1192. Maddox's 2007 testimony at most shows a witness with a faulty memory. The trial court's failure to hold a second Jackson v. Denno hearing is not grounds for relief. This proposition is denied.

Mitchell, 235 P.3d at 653-54 (footnotes omitted).

Jackson requires a trial court to hold a hearing outside the presence of the jury to determine the voluntariness of a defendant's statement when he objects to its admission. Jackson, 378 U.S. at 376-77. In compliance with Jackson, Petitioner was given a hearing at the time of his original trial. Mitchell, 884 P.2d at

1192 (referencing the hearing). Petitioner has cited no Supreme Court authority which requires more, and the Court finds no merit to Petitioner's argument that a second hearing was needed due to Detective Maddox's testimony at his second resentencing. Petitioner has not shown that the detective's most recent testimony is anything more than a misrecollection, nor has he shown what difference it would have made in assessing the voluntariness of his statements. The record is clear that Petitioner was advised of his rights in accordance with Miranda v. Arizona, 384 U.S. 436 (1966), and that he waived those rights before any questioning began (Tr. V, 1051-52; State's Exhibit 124). Mitchell, 884 P.2d at 1192 ("Although he was given, and waived, his Miranda rights at the outset . . . .").

The Court also rejects Petitioner's argument that the OCCA's decision in McCarty required that a second hearing be held. In McCarty, the OCCA found that a Jackson v. Denno hearing should have been held in McCarty's resentencing proceeding; however, the facts are markedly different from Petitioner's case. In McCarty, the statements in question related to another murder McCarty had committed, one which the prosecution relied on to prove that he was a continuing threat. Given some unusual circumstances, McCarty never went to trial for that murder, and so when the state sought to use these statements against him, the voluntariness of the statements had never been explored. Although McCarty had requested a Jackson v. Denno hearing, the trial court refused, "finding [McCarty] was not 'in custody' at the time the statements were made." The OCCA found no support for the trial court's ruling:

> [A]lthough many of the Jackson v. Denno cases involve what amounts to a "custodial" confession, we find no binding, authoritative support for the position that a person is required to be in custody before the

> voluntariness of his or her confessions or statements can be challenged. The focus of a Jackson v. Denno hearing is coercion, not custody.

McCarty, 977 P.2d at 1126-31. As the facts demonstrate, McCarty does not stand for the proposition that a Jackson v. Denno hearing is required in Oklahoma resentencing proceedings as a matter of course, and it clearly does not hold that a defendant is entitled to more than one Jackson v. Denno hearing.

Because Petitioner was afforded a Jackson v. Denno hearing, he simply has no viable argument that the OCCA's decision is contrary to or an unreasonable application of Jackson (or any other Supreme Court authority, for that matter). Accordingly, Ground IV is denied.

E. Ground V: Admission of Petitioner's Prior Testimony.

In Ground V, Petitioner, relying on the Supreme Court's ruling in Harrison v. United States, 392 U.S. 219 (1968), asserts that his testimony from his original trial should not have been admitted in his second resentencing proceeding because he was impelled to testify due to a Brady violation and the misleading testimony of Ms. Gilchrist. See Ground I, supra. Petitioner raised this claim on direct appeal. The OCCA addressed the merits of the claim and denied relief. Mitchell, 235 P.3d at 654-55.

In Harrison, a defendant complained about the admission of his prior testimony. In his first trial, Harrison only testified in order to counter three confessions introduced against him. On appeal, it was determined that the confessions were illegally obtained and therefore erroneously admitted. On retrial, the confessions were not introduced, but Harrison's prior testimony was. The question before the Supreme Court was "whether [Harrison's] trial testimony was the inadmissible fruit of the illegally procured confessions." Harrison, 392 U.S. at 220-21. The Court found that it was. "[T]he same principle that prohibits the use of confessions [wrongfully

obtained] also prohibits the use of any testimony impelled thereby–the fruit of the poisonous tree . . . ." Id. at 222. "The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." Id. at 223.

With reference to Littlejohn v. State, 85 P.3d 287, 298-99 (Okla. Crim. App. 2004), in which the OCCA assumed that Harrison applied outside of the Fifth Amendment context, the OCCA determined that no Harrison violation occurred in Petitioner's case because his testimony was not induced by the Brady/Gilchrist error. The OCCA found as follows:

> The record shows that the reason [Petitioner] took the witness stand in his first trial was to explain why he had given so many different stories to the police, both before and after he was arrested, and to exculpate himself and inculpate "C. Ray." In light of testimony from witnesses at the scene placing [Petitioner] there both before and after the murder, and evidence of his shoe print found in the deceased's blood, [Petitioner's] claim that but for the Gilchrist testimony he would not have testified is untenable.

Mitchell, 235 P.3d at 654. The OCCA also held that even if Petitioner's testimony should have been excluded, any error was harmless beyond a reasonable doubt. Id. at 654-55.

In order for Petitioner to prevail on his Ground V, he must show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law, namely, Harrison, which he cites in support of his request for relief. However, the Tenth Circuit has made clear that Harrison does not apply outside of the Fifth Amendment context. In Littlejohn v. Trammell, 704 F.3d 817, 849 (10th Cir. 2012), the Tenth Circuit noted that "Harrison was concerned with the Fifth Amendment's

prohibition on law enforcement's unlawful extraction of confessions from defendants[,]" and that "[b]y its terms, Harrison is applicable only where a defendant's testimony is impelled by the improper use of *his own* unconstitutionally obtained confessions *in violation of the Fifth Amendment*." In Littlejohn, the petitioner was seeking to extend Harrison beyond its express holding, an idea the Tenth Circuit unequivocally rejected.

> It is apparent that the rule Mr. Littlejohn advocates for involves the application of Harrison's remedial measure (i.e., suppression) where a defendant's prior testimony is impelled by an alleged *due process violation*. To adopt such a rule would require us inappropriately to extend Harrison to a novel context. See Premo v. Moore, [562] U.S. [115, 127] (2011) ("[N]ovelty . . . [that] renders [a] relevant rule less than 'clearly established' . . . provides a reason to reject it under AEDPA.").
>
> Whether Harrison ever may be extended beyond its Fifth Amendment confession context is not the question before us. Rather, giving due deference to state court adjudications as AEDPA commands, our threshold concern must be whether Harrison's holding furnished the OCCA with clearly established federal law to resolve Mr. Littlejohn's argument. We answer that question in the negative. For that reason, we reject Mr. Littlejohn's impelled-testimony argument.

Littlejohn, 704 F.3d at 850-51 (footnotes omitted). As in Littlejohn, because Harrison does not apply to Petitioner's circumstances, Petitioner has not established his right to relief and Ground V is therefore denied.

F. Grounds VI, VII and VIII: Jury Selection.

In Grounds VI, VII, and VIII, Petitioner challenges several aspects of the jury selection process, claiming he was denied his constitutional rights to an impartial jury and due process. Petitioner raised these claims on direct appeal. With thorough and detailed analysis, the OCCA addressed the merits of the claims and denied relief.

Mitchell, 235 P.3d at 646-52. Petitioner has not shown that the OCCA's decision is an unreasonable one.

There is no question that "[c]apital defendants have the right to be sentenced by an impartial jury." Uttecht v. Brown, 551 U.S. 1, 22 (2007). "[D]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." Morgan v. Illinois, 504 U.S. 719, 727 (1992). An impartial juror in the capital setting is one who, despite his or her views on capital punishment, can follow the trial court's instructions. Thus, "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (internal quotations marks omitted).

"[B]ecause determinations of juror bias cannot be reduced to question-and-answer sessions[,]" the printed record cannot fully capture the qualification assessment. Id. at 424-26, 434-35. Reviewing courts must therefore defer to the trial court's determination of whether a particular juror is qualified to serve. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." Uttecht, 551 U.S. at 9.

Adding to this deference is even more deference–the deference embodied in the AEDPA standard for relief. In Eizember v. Trammell, 803 F.3d 1129, 1135-36 (10th Cir. 2015), the Tenth Circuit recently discussed the interplay of these deferential standards:

> How do these established standards play out when we're called on to review not a federal trial court on direct appeal but the reasonableness of a state's application of federal law on collateral review? In [Uttecht] the Court explained that a federal court owes what we might fairly describe as double deference: one layer of deference because only the trial court is in a position to assess a prospective juror's demeanor, and an "additional" layer of deference because of AEDPA's "independent, high standard" for habeas review. See id. at 9–10, 127 S.Ct. 2218. Indeed, the Court stressed that where, as here, the record reveals a "lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion" on the issue of exclusion. Id. at 20, 127 S.Ct. 2218.

See also White v. Wheeler, 577 U.S. ___, 136 S. Ct. 456, 460, 462 (2015) (discussing the "doubly deferential" standard: "simple disagreement does not overcome the two layers of deference owed by a federal habeas court in this context") (internal quotation marks omitted).

In Ground VI, Petitioner asserts that "the jury selection process . . . did not comport with due process" because the trial court denied his requests to utilize jury questionnaires and to conduct individual questioning. Petition, p. 43. Characterizing the jury selection process as expedited and short, Petitioner argues that his requests were not only reasonable but necessary to gather "enough information to intelligently exercise his peremptory challenges." Id.

In denying Petitioner relief on this claim, the OCCA made the following findings regarding the jury selection process employed in Petitioner's case:

> The record reflects a very thorough *voir dire* was conducted spanning two and half days. Prior to the start of questioning, prospective jurors were informed of their purpose—to decide punishment—and given the three possible punishments. The trial judge explained the Bill of Particulars, the role of aggravating circumstances and mitigating evidence, the State's burden of proof, the process involved in finding the existence of an aggravating circumstance, the weighing of that evidence against the mitigating evidence and the determining of the appropriate

> sentence. The judge indicated the jury would receive all of this information in written instructions at the close of the evidence. The judge further informed the prospective jurors that a juror needed to be fair and impartial, able to listen to all of the evidence, and consider all three possible punishments.
>
> The record in this case shows that the trial court did not rush through *voir dire*. There is no indication in the record that defense counsel was prevented from asking any questions pertinent to exercising peremptory challenges. [Petitioner] used all nine peremptory challenges. However, nowhere in the record or appellate brief does he request additionally challenges or specify which sitting jurors he would excuse if given additional challenges.

Mitchell, 235 P.3d at 647. Despite these findings of fact, which are afforded a presumption of correctness in this proceeding, 28 U.S.C. § 2254(e)(1), Petitioner asserts, as he did on direct appeal, that the questioning of three prospective jurors shows why jury questionnaires and individual questioning should have be employed in his case. The OCCA addressed this assertion as follows:

> In support of his claim, [Petitioner] directs us to responses by three potential jurors during the court's initial questioning. Prospective Jurors R.M. and A.K. stated they remembered reading about [Petitioner's] case in the newspapers. Prospective Juror R.L. stated his wife had been murdered, her murderer was on death row, and the process had been unpleasant for him. [Petitioner] argues that if questionnaires or individual *voir dire* had been allowed the jury pool would not have been exposed to the highly inflammatory responses of the three potential jurors.
>
> . . . .
>
> Prospective Jurors R.M. and A.K. stated they remembered reading about [Petitioner's] case in the newspapers approximately 16 or 17 years earlier. No details of what they remembered reading were given. Both stated they could set aside what they remembered reading and decide the case on the evidence presented at trial.

> Because of the obvious difficulty in reviewing juror candidness, we must rely and place great weight upon the trial court's opinion of the jurors. See Eizember, 2007 OK CR 29, ¶ 41, 164 P.3d at 221 ("[d]eference must be paid to the trial judge who sees and hears the jurors", quoting Wainwright v. Witt, 469 U.S. 412, 425, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)). Here, the trial court, who saw the prospective jurors and heard their responses firsthand, found no need to conduct individual *voir dire*. We find the record supports that conclusion as there is nothing in their responses that indicate the prospective jurors were anything less than candid.
>
> Prospective Juror R.L., after giving the previously cited testimony regarding the murder of his wife, and at the request of defense counsel, was sequestered from the remainder of the jury pool and individual *voir dire* was conducted. At the end of which, he was excused for cause. [Petitioner] has failed to show how this prospective juror's statements about his personal experiences, bereft of any personal opinions, impacted the remainder of the jury pool.

Mitchell, 235 P.3d at 646, 647.

Despite Petitioner's contention that the voir dire conducted in his case should have been something more, it is clear that Petitioner has no constitutional right to demand the method by which a jury is selected. See Skilling v. United States, 561 U.S. 358, 386 (2010) ("No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*."); United States v. Wood, 299 U.S. 123, 145-46 (1936) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests . . . ."). Part and parcel of Petitioner's right to an impartial jury, however, is "an adequate *voir dire* to identify unqualified jurors." Morgan, 504 U.S. at 729. The OCCA found that the voir dire conducted in Petitioner's case was in fact adequate, and because Petitioner has failed to show that this determination is an unreasonable one, his Ground VI must be denied.

In Ground VII, Petitioner objects to the trial court's removal of nine prospective jurors for cause.[16] Labeling the trial court's questioning of these jurors as "cursory" and "truncated," Petitioner contends that the questions posed to them were inadequate to determine "whether they could set aside generalized opposition to capital punishment sufficiently to follow the law . . . ." Petition, pp. 44, 46.

In denying Petitioner relief on this claim, the OCCA reviewed the questioning of each of the nine jurors. It ultimately concluded that two of the prospective jurors, Jurors F.F. and J.P., were not removed due to their views on capital punishment, but "were properly excused due to the influence of outside matters affecting their ability to sit as fair and impartial jurors." Mitchell, 235 P.3d at 650. With respect to Juror F.F., the OCCA found as follows:

> Prospective Juror F.F. initially told the court "it was kind of hard to say" whether he could give meaningful consideration to all three punishments. (Tr. Vol. I, pg. 66). Upon further questioning by the court, it became clear the potential juror's knowledge of facts in an unrelated upcoming criminal trial would affect his ability to listen to the case against [Petitioner] and make a decision. Despite the court's decision to excuse the juror, defense counsel was granted additional *in-camera* questioning. As a result, the prospective juror said that because of his knowledge of the other case, he could not be fair to either side in [Petitioner's] case. Over defense counsel's objection, the court excused the juror, stating "he's got something external affecting him . . . it's something that affects him from something else that would affect his ability to give both sides a fair trial." (Tr. Vol. I, pg. 70).

Mitchell, 235 P.3d at 648. And with respect to Juror J.P., the OCCA found:

> Prospective Juror J.P. initially said he could not consider the death penalty because of religious scruples. Upon further questioning by the

[16] Petitioner notes that three of these jurors were African American; however, his scant reference to Batson v. Kentucky, 476 U.S. 79 (1986), and lack of argument, are insufficient to raise the claim. Petition, pp. 44, 47.

> court, the prosecutor and defense counsel, the court found the juror had been equivocal in his answers regarding consideration of the death penalty. During an individual, sequestered *voir dire*, where he was questioned extensively by the court, the prosecutor and defense counsel, J.P. clarified his views and stated he could not consider all three punishments. In excluding J.P. for cause, the court noted that from observing him closely in chambers, J.P. was allowing matters outside the law and evidence, to influence his ability to consider to all three punishments.

Id. at 649.

Regarding Juror F.F., it is clear that his relationship with another capital defendant hampered his ability to consider all three punishments (Tr. I, 65-70), and although Juror J.P. struggled with whether or not he could consider all three, after extensive questioning by the trial court, the prosecutor, and defense counsel, it was clear that his life experience of losing his wife to cancer and his relationship with his fellow parishioners prevented him from doing so (Tr. III, 471-97). Because the record clearly belies Petitioner's contention that these jurors were improperly removed, Petitioner has not shown that the OCCA unreasonably denied him relief with respect to these two jurors. See Uttecht, 551 U.S. at 20 ("But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion.").

Of the seven remaining jurors, the OCCA found that six of them "were unequivocal in their responses that they could not consider all three punishments." Mitchell, 235 P.3d at 649. "Because these prospective jurors could not consider all of the punishments provided by law, they could not discharge their duties as jurors." Id. Once again, the OCCA's decision is supported by the record:

- Juror P.M. stated that for personal and religious reasons she could not consider the death penalty, that her position was unequivocal, that nothing at all could change her mind, and after further defense

questioning, that she "would never vote for anyone's life to be taken" (Tr. I, 72-75).

- Juror N.B. stated without hesitation that should could not consider all three punishments. She specifically stated that she could not consider the death penalty, that she had felt that way for a "very long time," and that she could think of no circumstances under which she could ever impose a death sentence (Tr. I, 83-84).

- Juror J.W. stated that he could not consider two of the three sentencing options–life without parole and death–because people change. He told the trial court that had felt this way for awhile and that nothing could change his mind (Tr. I, 85-87).

- Juror K.D. told the trial court that "for as long as [she could] remember" she had been against the death penalty. She emphatically stated that she could not give the death penalty under any circumstances, even if the law told her she had to consider all three (Tr. I, 90-91).

- Juror K.B. stated she could not consider the death penalty, that it was eliminated as an option for her consideration, and that she was not going to change her mind under any circumstances and irrespective of instructions which told her she had to consider all three (Tr. I, 91-92).

- Juror M.W. stated that he would exclude the death penalty as an option and that his position was unequivocal (Tr. III, 468-69).

Consequently, Petitioner has not shown that the OCCA unreasonably denied him relief with respect to these six additional jurors.

The final juror challenged by Petitioner is Juror S.A., whom the OCCA acknowledged was not as clear in her responses as the other eight. Although she first stated that she had a "serious" issue with the death penalty, she also seemed to affirm that she could set aside her issue with the death penalty and decide the case. After exchanging apologies for the apparent confusion, the trial court asked in more explicit

and direct terms, "Can you set aside your opinion . . . and not consider it any more and decide the issues in this case or are you period, no death penalty, no matter what[?]" To this question, Juror S.A. answered, "No matter what" (Tr. I, 81-82). In denying relief with respect to Juror S.A., the OCCA found as follows:

> Any ambiguity in S.A.'s responses was cleared up by additional questioning from the trial court. In the potential juror's last recorded answer, she was unequivocal in her decision that she could not consider all three punishments. Therefore, we find no abuse of the trial court's discretion in excusing her for cause.

Mitchell, 235 P.3d at 649. Although the OCCA found that the trial court cleared up Juror S.A.'s ambiguous answers, even if some ambiguity remained, the trial court cannot be faulted. See Witt, 469 U.S. at 434 ("[W]hatever ambiguity [may be found] in this record, we think that the trial court, aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve it in favor of the State."). See also Uttecht, 551 U.S. at 7 (quoting Witt). For all of the foregoing reasons, Petitioner's Ground VII does not entitle him to relief.[17]

Petitioner's Ground VIII is in essence an extension of his Ground VI in that he complains about how the trial court conducted voir dire. Here, Petitioner contends that he should have been allowed to show the prospective jurors some of the crime scene photographs, tell them what specific aggravators the State was alleging, define mitigating evidence, and ask them certain questions about the death penalty. As previously discussed, Petitioner has no constitutional right to dictate the parameters of voir dire, and so long as the jury selection process adequately identifies who is qualified to serve and who is not, the trial court has discretion in the particulars. In

[17] In denying Petitioner relief, the OCCA also found that the trial court did not err in rejecting Petitioner's request to ask additional questions to these jurors, and it did not cause confusion when it at times used the terms "meaningful consideration" and "equivocal." Mitchell, 235 P.3d at 649-50.

denying Petitioner relief on these claims, the OCCA found that the trial court acted within its discretion and that Petitioner was not denied his right to an impartial jury.

> A review of the record shows the trial court did not abuse its discretion in the manner in which *voir dire* was conducted. The record clearly shows defense counsel was allowed sufficient *voir dire* to determine if there were grounds to challenge a particular juror for cause and to intelligently exercise peremptory challenges. In many instances, defense counsel's request for individual *voir dire* was granted.
>
> Now on appeal, [Petitioner] has not stated how he would have used his peremptory challenges differently given additional information nor has he cited to any sitting juror with any prejudices against him. Our review of the record shows a jury free of outside influence, bias and personal interest was selected to hear [Petitioner's] case. Therefore, given the traditionally broad discretion accorded to the trial judge in conducting *voir dire*, and our inability to discern any possible prejudice from not allowing further general questioning, we find [Petitioner's] constitutional rights were not violated by *voir dire*.

Mitchell, 235 P.3d at 651-52. Because Petitioner has not shown that this determination by the OCCA is unreasonable, the Court finds that relief must be denied on his Ground VIII as well.

Where, as here, the trial court is invested with broad discretion to conduct voir dire and the OCCA has addressed all of Petitioner's juror related claims in full and with abundant analysis and sound reasoning supported by the trial record, Supreme Court authority and AEDPA deference mandates that Petitioner's Grounds VI, VII, and VIII all be denied.

G. Grounds IX, X, and XI: General Evidentiary Issues.

In Grounds IX, X, and XI, Petitioner raises evidentiary challenges to the admission of photographs, Mr. Bevel's crime reconstruction testimony, and DNA evidence. All of these claims were raised by Petitioner on direct appeal and denied by the OCCA on the merits. Mitchell, 235 P.3d at 655-58. Addressing each claim in

turn, the Court concludes that Petitioner has not shown that the OCCA's adjudication of these claims is contrary to or an unreasonable application of Supreme Court law.

It is well-established that "[f]ederal habeas review is not available to correct state law evidentiary errors . . . ." Smallwood v. Gibson, 191 F.3d 1257, 1275 (10th Cir. 1999). See also Thornburg v. Mullin, 422 F.3d 1113, 1128-29 (10th Cir. 2005) (quoting Smallwood); Spears v. Mullin, 343 F.3d 1215, 1225-26 (10th Cir. 2003) (same). Thus, when a habeas petitioner complains about the admission of evidence, inquiry is limited to the constitutional issue of whether a due process violation has occurred. The question is whether the admitted evidence rendered the petitioner's trial fundamentally unfair. Id. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (finding that the exclusion of critical evidence denied a defendant "a trial in accord with traditional and fundamental standards of due process"). Undefined by specific legal elements, this standard obliges the Court to "tread gingerly" and "exercise considerable self-restraint." Duckett v. Mullin, 306 F.3d 982, 999 (10th Cir. 2002) (internal quotation marks omitted) (quoting United States v. Rivera, 900 F.2d 1462, 1477 (10th Cir. 1990)). No alleged evidentiary error shall be viewed in isolation, but instead considered in light of the entire proceeding. Harris v. Poppell, 411 F.3d 1189, 1197 (10th Cir. 2005) (discussing the application of a fundamental fairness review and quoting Duckett and Le v. Mullin, 311 F.3d 1002, 1013 (10th Cir. 2002)).

In his Ground IX, Petitioner complains about the volume of photographs of Ms. Scott which were admitted. Although Petitioner acknowledges that "the State is entitled to offer some photographic evidence of the crime scene and the victim," he contends that fourteen photographs of her body at the crime scene and eleven autopsy photographs (which were in addition to thirty general crime scene photographs) were excessive and gruesome, and therefore, inflammatory and prejudicial. Petition, p. 52.

In denying Petitioner relief, the OCCA addressed every aspect of Petitioner's claim in significant detail.

> The admissibility of photographs is a matter within the trial court's discretion and absent an abuse of that discretion, this Court will not reverse the trial court's ruling. Warner, 2006 OK CR 40, ¶ 167, 144 P.3d at 887. Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect. Id. The probative value of photographs of murder victims can be manifested in numerous ways, including showing the nature, extent and location of wounds, establishing the *corpus delicti*, depicting the crime scene, and corroborating the medical examiner's testimony. Id.
>
> Many of the photographs in this case were introduced during the testimony of Tom Bevel and illustrated his theory of blood spatter and blood transfer evidence. Bevel testified that the deceased had been stabbed in the neck with the school compass that was found underneath her. He also testified the blood smear and blood transfer evidence showed that the deceased was moving during the attack and that the attack was particularly violent and brutal. Photographs illustrating this testimony aided the jury in understanding the nature of the attack on the deceased and helped explain the final location of her body.
>
> Autopsy photographs supported the testimony of the medical examiner and aided the jury in understanding the nature of the wounds suffered by the deceased. The photographs were relevant to support the State's allegation of the existence of the "heinous, atrocious or cruel" aggravator as they showed the deceased suffered serious physical abuse prior to her death.
>
> [Petitioner's] argument that the photographs were unduly prejudicial because the manner of death was not disputed has been previously rejected by this Court. See Patton, 1998 OK CR 66, ¶ 59, 973 P.2d at 290. Likewise, [Petitioner's] argument that the photographs were unduly prejudicial because his guilt was not contested fails. Title 21 O.S.2001, § 701.10a specifically provides that "[a]ll exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing

proceeding[.]" See Fitzgerald v. State, 2002 OK CR 31, ¶ 11, 61 P.3d 901, 905.

Further, [Petitioner's] argument that the photographs were unduly prejudicial because they were gruesome does not warrant relief. In Patton, we said:

> The fact that the photographs may be gruesome does not of itself cause the photographs to be inadmissible. "Gruesome crimes result in gruesome pictures." McCormick v. State, 845 P.2d 896, 898 (Okl.Cr.1993). There is no requirement that the visual effects of a particular crime be down played by the State. Id. "The only consideration to be made is whether the pictures are unnecessarily hideous, such that the impact on the jury can be said to be unfair". Id.

1998 OK CR 66, ¶ 60, 973 P.2d at 290.

As neither the manner of death nor [Petitioner's] guilt is disputed, "[w]e are unable to sympathize with [Petitioner] when he complains that the photos are graphic and are somewhat confused that he would expect them to be otherwise." Smallwood v. State, 1995 OK CR 60, ¶ 35, 907 P.2d 217, 228.

[Petitioner's] complaint about the volume of photographs also does not warrant relief. In Mitchell III, this Court was troubled by the admission of photographs of the crime scene as well as a videotape of the crime scene showing the deceased's body. 2006 OK CR 20, ¶ 53, 136 P.3d at 695. This Court found much of the evidence was admissible, but the trial court had abused its discretion by failing to properly constrain the State in its presentation of the evidence, much of which was cumulative. Id. The record of this second resentencing reflects that the trial court was well aware of this Court's rulings in Mitchell III, and worked hard not to commit the same errors. The crime scene videotape was not admitted into evidence in the second resentencing and the number of photographs admitted was reduced. While there was some duplication in the images reflected in the photographs, [Petitioner] has failed to meet his burden of showing the repetition was needless or inflammatory. Warner, 2006 OK CR 40, ¶ 168, 144 P.3d at 887.

Finally, [Petitioner] finds error in the prosecution's publication of some of the photographs during closing argument, instead of when they were introduced during a witnesses' testimony. Defense counsel argued at trial that withholding the photographs throughout trial until closing argument was so inflammatory as to violate due process and fundamental fairness. Denying [Petitioner's] objection, the trial court found the photographs had been admitted into evidence therefore they could be published to the jury and the jury could take them to deliberations. The judge noted that many of the photographs had been cropped and cut down and that the total number of admissible photographs had been reduced.

[Petitioner] does not cite any authority requiring that all exhibits admitted into evidence be published prior to closing argument. Further, he has failed to show any prejudice resulting from the timing of the admission of the photographs.

Having found the photographs relevant, they may still be excluded from evidence if the probative value of the photographs is outweighed by their prejudicial impact on the jury. 12 O.S.2001, § 2403. "In reviewing the prejudicial impact of photographs this Court has said that '[w]here the probative value of photographs . . . is outweighed by their prejudicial impact on the jury that is, the evidence tends to elicit an emotional rather than rational judgment by the jury then they should not be admitted into evidence.'" Short v. State, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094. Applying that standard to this case, we find the photographs introduced were probative and that probative value was not outweighed by any prejudicial impact. The evidence overwhelmingly supported the "heinous, atrocious or cruel" aggravator and there is no indication the jury's verdict was an emotional response rather than a rational judgment based on the evidence.

Based upon our review of the photographic evidence introduced in this case, we find the errors committed in the first resentencing concerning admission of this evidence were not repeated in this case. The trial court properly "constrained" the State's presentation of this evidence and did not abuse its discretion in the admission of the photographs. This proposition of error is denied.

Mitchell, 235 P.3d at 655-56 (footnote omitted).

In order to prevail on his Ground IX, Petitioner must show that *all* fairminded jurists would disagree with the OCCA's assessment. Frost v. Pryor, 749 F.3d 1212, 1225-26 (10th Cir. 2014) ("Under the test, if *all* fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, *some* fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied.") (emphasis added); Stouffer v. Trammell, 738 F.3d 1205, 1221 (10th Cir. 2013) (citing Richter, 562 U.S. at 101, for the proposition that relief is warranted "*only if all* 'fairminded jurists' would agree that the state court got it wrong") (emphasis added). Given the OCCA's well-reasoned analysis, the due process standard of review which applies to his claim, and the AEDPA deference afforded the OCCA's decision, Petitioner has not made this showing.[18] Accordingly, relief on Ground IX is denied.

Petitioner's Ground X challenges the admission of Mr. Bevel's testimony. As discussed in Ground III, supra, Mr. Bevel, an expert in blood spatter and crime reconstruction, testified as to how he believed the murder occurred based on the physical evidence, crime photographs/diagrams, prior testimony, police reports, autopsy report, and Petitioner's statements to police. Petitioner contends that Mr. Bevel should not have been allowed to testify because his testimony was cumulative,

[18] As Respondent asserts, Petitioner's reference to the Tenth Circuit's decision in Spears is unavailing. Response, pp. 65-66. As in Wilson v. Sirmons, 536 F.3d 1064, 1115 (10th Cir. 2008), and Thornburg, 422 F.3d at 1129, and unlike Spears, the photographs in the present case had a "logical connection" to the State's burden of proof.

irrelevant, and unreliable.[19] Petitioner suggests that the trial court's failure to conduct a Daubert/Kumho[20] hearing contributed to the alleged error.

In denying Petitioner relief on this claim, the OCCA set forth the following analysis:

> In his eighth proposition of error, [Petitioner] argues that the crime scene reconstruction testimony of Tom Bevel was unnecessary and usurped the fact finding function of the jury. As in the 2002 resentencing trial, Bevel's crime scene reconstruction testimony was used to help establish the various events involved in [Petitioner's] attack upon the deceased and the most likely sequence of those events. In Mitchell III, this Court summarized Bevel's testimony at [Petitioner's] 2002 resentencing trial:
>
> > Bevel testified extensively about what the physical evidence at the crime scene—including the bloodstain patterns, the position of Scott's body, the location of various objects, *etc*.—suggested about the "weapons" [Petitioner] used to attack Scott (including his hands, a golf club, a compass, and a coat rack) and the order in which they were used. Bevel also testified about the likelihood of some type of sexual attack upon Scott prior to her death. He noted hip bruises consistent with someone exerting pressure in this area, and also that the lack of significant blood on her clothing was inconsistent with a scenario in which the clothing was removed after her death.
>
> 2006 OK CR 20, ¶ 68, 136 P.3d at 700–01, n. 150.

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[19] Respondent asserts that to the extent Petitioner relies upon the Sixth Amendment for relief on this claim, this portion of his claim is unexhausted. Response, pp. 68-70. However, the Court need not address Respondent's assertion because it concludes that Petitioner has not adequately presented such a claim. Petitioner's sole reference to the Sixth Amendment, namely the insertion of "VI" into a list of constitutional amendments in his closing paragraph, does not a claim make. Petition, p. 56.

[20] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). Oklahoma applies the standards set forth in Daubert and Kumho to determine the admissibility of novel expert testimony. Harris v. State, 84 P.3d 731, 745 (Okla. Crim. App. 2004).

Bevel's testimony in the 2007 resentencing was substantially the same. In Mitchell III, this Court found Bevel's testimony establishing the various events involved in [Petitioner's] attack upon the deceased and the most likely sequence of those events relevant to the jury's determination regarding the "heinous, atrocious, or cruel" aggravating circumstance. Id. 2006 OK CR 20, ¶ 68, 136 P.3d at 701. We do so again.

[Petitioner] also argues Bevel's testimony was unreliable as he could not say how long the entire event lasted from start to finish, and his theory that it all happened in at most five minutes was simply impossible. The starting point for the sequence of events which included the deceased's murder was the departure of Carolyn Ross from the Pilot Center and ended with the arrival of Allen Briggs [sic] at the Center. Both Ms. Ross and Mr. Briggs [sic] gave approximate times for their departure and arrival. Bevel testified that due to these approximate times, he did not have sufficient information to say exactly how long the assault inside the Pilot Center lasted. The weight and credit to be given Bevel's testimony was within the province of the jury. See Bland v. State, 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714.

Relying on 12 O.S.2001, § 2403, [Petitioner] also argues Bevel's testimony was needlessly cumulative to that of Carolyn Ross and Captain Vance Allen. Section 2403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise. When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. Mayes v. State, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310.

Ms. Ross and Captain Allen testified to events occurring immediately before and after [Petitioner's] assault on the deceased. Bevel's expert testimony was based in part on evidence provided by Ross and Allen. His testimony exceeded that given by Ross and Allen and his references to their testimony showed how the various accounts of that day were interconnected. Contrary to [Petitioner's] argument, the order in which the events of January 7, 1991, occurred was relevant in

> the resentencing proceeding as it showed that the deceased suffered serious physical abuse prior to her death thus establishing the aggravator of "especially heinous, atrocious or cruel." [Petitioner] was not denied a fair sentencing by the admission of the crime scene reconstruction testimony.

Mitchell, 235 P.3d at 656-57. Contrary to Petitioner's contentions, the Court does not agree that the admission of Mr. Bevel's testimony denied him a fundamentally fair sentencing proceeding.

After twenty-seven years as a police officer, Mr. Bevel started his own consulting company, a significant portion of which is devoted to training others in blood stain pattern analysis and crime scene analysis and reconstruction. In the area of blood stain pattern analysis, Mr. Bevel testified that his training and education dates back to 1979. Mr. Bevel also detailed for the jury his training and education in crime reconstruction. At the time of trial, Mr. Bevel was an Associate Professor in the Master of Forensic Science program at the University of Central Oklahoma, had co-authored three editions of a textbook on blood stain pattern analysis, and had given instruction on blood stain pattern analysis to groups across the United States and abroad. Mr. Bevel had previously been recognized as an expert in state and federal courts and in foreign jurisdictions. Prior to giving his analysis of the crime scene in the present case, he explained the intricacies of his disciplines to the jury (Tr. V, 942-53).

A review of Mr. Bevel's education, experience, and overall testimony supports a finding that he was a qualified expert, and that as previously discussed in Ground III, supra, his testimony was highly relevant to the especially heinous, atrocious, or cruel aggravator. While other witnesses, like Ms. Ross and Mr. Riggs, contributed to the time line of events by testifying about their contact with Petitioner at the Center, and the medical examiner testified about the nature and extent of Ms. Scott's injuries,

Mr. Bevel's testimony covered the crime itself, i.e., the likely order of Ms. Scott's injuries (and the items used to inflict them) and the struggle Ms. Scott engaged in with Petitioner as she fought for her life. Therefore, contrary to Petitioner's assertions, Mr. Bevel's testimony was not cumulative, irrelevant, or unreliable, but germane and helpful to the jury's sentencing determination. Accordingly, the Court cannot conclude that the OCCA mishandled Petitioner's claim. Because the OCCA's denial of relief was reasonable, and because it is clear that Petitioner was not denied a fundamentally fair trial by Mr. Bevel's testimony, relief on Ground X is denied.

In Ground XI, Petitioner complains about the chain of custody relating to DNA evidence admitted in his second resentencing proceeding. The record reflects that in 1992 Mr. Wraxall, the executive director and chief forensic serologist of an independent lab in California, received evidence from Ms. Gilchrist on behalf of the Oklahoma City Police Department (Tr. IV, 866-67, 869-70, 876-77). The evidence in question is a "stain allegedly taken from the pubic hair of Ms. Scott" (Tr. IV, 877). Mr. Wraxall found semen in the stain and he extracted DNA from it. In 2002, Mr. Wraxall used updated technology to compare the extracted DNA with a known sample from Petitioner, both of which had been in his possession since 1992. Petitioner's DNA matched the extracted DNA at nine loci. Mr. Wraxall testified that the probability of finding the same match elsewhere in the population was one in nine trillion (Tr. IV, 872-76). Given the issues related to Ms. Gilchrist, see Ground I, supra, Petitioner contends that this DNA evidence should not have been admitted without additional chain of custody evidence showing how Ms. Gilchrist obtained the sample she sent to Mr. Wraxall.[21]

[21] Respondent argues for the application of a procedural bar to the federal aspect of Petitioner's Ground XI. Response, pp. 75-78. However, having construed Petitioner's claim as a state law evidentiary claim, its merit is properly assessed under a fundamental fairness review and the procedural bar doctrine does not apply.

In denying Petitioner relief on this claim, the OCCA acknowledged the chain of custody rule:

> The purpose of the chain of custody rule is to guard against substitution of or tampering with the evidence between the time it is found and the time it is analyzed. Alverson v. State, 1999 OK CR 21, ¶ 22, 983 P.2d 498, 509. Although the State has the burden of showing the evidence is in substantially the same condition at the time of offering as when the crime was committed, it is not necessary that all possibility of alteration be negated. Id. If there is only speculation that tampering or alteration occurred, it is proper to admit the evidence and allow any doubt to go to its weight rather than its admissibility. Id.

Mitchell, 235 P.3d at 657-58. It then found no error in the admission of the DNA evidence:

> Evidence at the resentencing established that [Petitioner] admitted to masturbating on or near the deceased's body and that the semen found on the deceased's body could have only come from ejaculate onto the deceased's body or the sheet in which her body was carried from the crime scene. [Petitioner] offers only speculation that some sort of tampering or substitution of evidence occurred prior to the time Gilchrist sent the evidence to Wraxall. Therefore, any doubts about the credibility of the evidence went to its weight not its admissibility.

Id. at 658.

The standard of review which the Court applies to this claim is one of fundamental fairness. The question, viewed through the lens of AEDPA deference, is whether the OCCA's application of its own evidentiary chain of custody rule denied Petitioner a fundamentally fair trial. It did not. On cross-examination, defense counsel questioned Mr. Wraxall about the origin of the pubic hair stain, emphasizing that it came from Ms. Gilchrist. Defense counsel also brought out issues relating to Ms. Gilchrist's reliability, and the simple fact that when Mr. Wraxall receives evidence, he does not know its integrity, i.e., how it was collected, handled, and

preserved (Tr. IV, 876-83, 887). The jury was therefore made aware of Petitioner's concerns about the evidence and could consider the same in determining what weight to give it. But even beyond this, there is Petitioner's own admission that he masturbated on Ms. Scott's body, evidence which clearly validates Mr. Wraxall's findings and supports the admission of the evidence (Tr. VI, 1154; Court's Exhibit 9, p. 1264). See Petition, pp. 12, 71 n.13 (Petitioner's acknowledgment that the DNA evidence corroborated his testimony). Given these circumstances, the admission of DNA evidence did not deny Petitioner a fundamentally fair trial and the OCCA did not act unreasonably when it found no error in the admission of the evidence. Ground XI is denied.

For the reasons set forth above, the Court finds that Petitioner is not entitled to relief on any of the general evidentiary challenges alleged in his Grounds IX, X, and XI. All of these grounds are therefore denied.

H. Ground XII: Double Jeopardy.

In Ground XII, Petitioner contends that a double jeopardy violation occurred when the State was allowed to pursue the continuing threat aggravator in his second resentencing proceeding. Because the jury rejected the continuing threat aggravator in his first resentencing, Petitioner argues that jeopardy attached and the State was prevented from seeking this aggravator a second time.[22]

Petitioner raised this claim on direct appeal. Relying on its decisions in Hogan v. State, 139 P.3d 907 (Okla. Crim. App. 2006), and Harris v. State, 164 P.3d 1103 (Okla. Crim. App. 2007), the OCCA denied relief. As additional support for its denial, the OCCA also found that Petitioner's claim lacked merit because the jury

[22] For the same reasons stated with respect to Ground X, it is unnecessary to address Respondent's procedural bar assertion here as well. See n.19, supra.

rejected the continuing threat aggravator in his second resentencing. Mitchell, 235 P.3d at 662.

In Hogan, the defendant's first trial resulted in a death sentence supported by the jury's finding that the murder was especially heinous, atrocious, or cruel. Although alleged, this first jury did not find the continuing threat aggravator. When Hogan was retried, the State alleged not only the especially heinous, atrocious, or cruel aggravator but also the continuing threat aggravator. Like the first jury, the second jury rejected the continuing threat aggravator but returned a death sentence because the murder was especially heinous, atrocious, or cruel. Like Petitioner, Hogan "argue[d] that the failure of his first jury to unanimously find he presented a continuing threat was an effective acquittal of that aggravator which terminated jeopardy, invoked the protection of the double jeopardy clause, and prohibited the State from charging it again at his second trial." Hogan, 139 P.3d at 926. Applying Supreme Court authority, the Hogan Court denied relief as follows:

> In Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) the Supreme Court considered "whether the Double Jeopardy Clause bars a further capital sentencing proceeding when, on appeal from a sentence of death, the reviewing court finds the evidence insufficient to support the only aggravating factor on which the sentencing judge relied, but does not find the evidence insufficient to support the death penalty." Poland, 476 U.S. at 148, 106 S.Ct. at 1751. The Poland court affirmed the "usual" rule that a capital defendant who obtains reversal of his conviction on appeal has had his original conviction nullified and the slate wiped clean. Id. at 152, 106 S.Ct. at 1753. If convicted again, he may be subjected to the full range of punishment provided by law. Id. The clean slate rule does not apply, however, if the defendant has been acquitted because the prosecution did not prove its case for the death penalty. Id. A defendant is acquitted of the death penalty whenever a jury agrees or an appellate court decides that the prosecution has failed to prove its case for the death penalty. See Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)(defendant sentenced to life by a capital sentencing jury has been acquitted of the death penalty and

the Double Jeopardy Clause forbids the state from seeking the death penalty on retrial in the event the defendant obtains reversal of his conviction); Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)(sentencer's finding, albeit erroneous, that no aggravating circumstance is present resulting in the imposition of a life sentence is an acquittal barring a second capital sentencing proceeding).

The court held in Poland that neither the sentencer nor the reviewing court had decided that the prosecution had not proved its case for the death penalty and thus acquitted the petitioners because both had found evidence of an aggravating circumstance. Poland, 476 U.S. at 154–55, 106 S.Ct. at 1754–55. The Poland court rejected the argument that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution constitutes an "acquittal" of that circumstance for double jeopardy purposes. Poland, 476 U.S. at 155–56, 106 S.Ct. at 1755. The court refused to "view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance" because aggravating circumstances are not separate penalties or offenses; rather they are the standards that guide the sentencer's choice between the alternative verdicts of death and life imprisonment. Id. at 156, 106 S.Ct. at 1755. Poland followed the usual rule, holding the State is not barred from seeking the death penalty on retrial of a defendant who has not been acquitted of the death penalty and the State may present evidence of any aggravating circumstance supported by the record.

Nothing in Sattazahn [v. Pennsylvania, 537 U.S. 101 (2003),] abrogates Poland's holding and nothing supports Hogan's argument here. Sattazahn argued that his judge-imposed life sentence in lieu of a non-finding of death by his jury was a jeopardy-terminating event. The Sattazahn majority disagreed and found that a jury's inability to reach a decision in the penalty phase of a capital trial resulting in the imposition of a statutorily mandated life sentence did not constitute an "acquittal" of the offense the Supreme Court now terms "murder plus aggravating circumstances" sufficient to bar the prosecution from seeking the death penalty again on retrial. Sattazahn, 537 U.S. at 112, 123 S.Ct. at 740. The mere imposition of a life sentence is not an acquittal of the death penalty for double jeopardy purposes. To bar the State from seeking the death penalty on retrial, there must be an affirmative decision by the

defendant's first jury not to impose a death sentence, *i.e.* an acquittal of the death penalty on the merits. Id. at 106–07, 123 S.Ct. at 737. Because Sattazahn's first jury had deadlocked without reaching a decision regarding aggravating circumstances and the trial court thereafter imposed a life sentence, Sattazahn could not establish that the jury had "acquitted" him during his first capital-sentencing proceeding. Consequently, jeopardy had not terminated; Sattazahn's successful appeal wiped the slate clean and the state was permitted to seek the death penalty upon retrial. Sattazahn, 537 U.S. at 112–13, 123 S.Ct. at 740.

Unlike Sattazahn who appealed a life sentence imposed by a judge by operation of law, Hogan appeals a death sentence imposed by a jury on a verdict of guilty on murder plus aggravating circumstances. By sentencing Hogan to death at his first trial on a finding the murder was especially heinous, atrocious, or cruel, Hogan's jury clearly did not acquit him of murder plus aggravating circumstances. Therefore, he cannot make a claim of entitlement to a life sentence on the basis of either acquittal or operation of law. In the absence of a jeopardy-terminating event entitling him to a life sentence (i.e., acquittal by jury on aggravating circumstances and imposition of life sentence or finding of insufficient evidence by appellate court of all aggravators), retrial for murder plus aggravating circumstances is not barred on double jeopardy grounds.

Contrary to his claim, Part III of the Sattazahn opinion (joined by three justices) does not support his position that his first jury effectively acquitted him of the continuing threat aggravator. Part III of that opinion discusses the application of Apprendi v. New Jersey[, 530 U.S. 466 (2000),] and Ring v. Arizona[, 536 U.S. 584 (2002),] in the context of capital sentencing double jeopardy claims. Because aggravating circumstances operate as the functional equivalent of an element of a greater offense, murder is a distinct lesser included offense of murder plus one or more aggravating circumstances. Murder exposes a defendant to a maximum sentence of life imprisonment; murder plus one or more aggravators increases the maximum sentence to death. The Sixth Amendment requires that a jury, not a judge, find the existence of any aggravating circumstances beyond a reasonable doubt. In Part III of Sattazahn, a plurality of the court agreed:

> In the post-Ring world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)." Thus, [Arizona v.] Rumsey [467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)] was correct to focus on whether a factfinder had made findings that constituted an "acquittal" of the aggravating circumstances; but the reason that issue was central is not that a capital-sentencing proceeding is "comparable to a trial," . . . but rather that "murder plus one or more aggravating circumstances" is a separate offense from "murder" *simpliciter*.

Sattazahn, 537 U.S. at 112, 123 S.Ct. at 740.

Hogan's first jury found that the murder was especially heinous, atrocious, or cruel and convicted him of murder plus aggravating circumstance(s). Even were we to treat each aggravator as a separate offense as Hogan desires rather than distinguishing as separate offenses murder simpliciter and murder plus aggravating circumstance(s), the only thing we know about Hogan's first jury is that it did not unanimously find that the continuing threat aggravator existed beyond a reasonable doubt. This is not the same as a unanimous finding that the aggravator does not exist at all; some jurors may have found it while others did not. Jeopardy does not attach and bar retrial in that situation. See Sattazahn, 537 U.S. at 109, 123 S.Ct. at 738 (stating a retrial following a hung jury normally does not violate the Double Jeopardy Clause).

For that reason, this case does not implicate the concerns of protecting the finality of acquittals present in Bullington and Rumsey. There is no reason to shield a defendant in Hogan's position from further litigation; further litigation is the only hope he has. Poland, 476 U.S. at 156, 106 S.Ct. at 1756. Neither does Hogan's case present the Hobson's choice discussed by the Sattazahn dissent. Sattazahn, 537 U.S. at 126, 123 S.Ct at 748 (Ginsburg, J., dissenting)(noting that a defendant in Sattazahn's position must relinquish either his right to file a potentially

> meritorious appeal, or his state-granted entitlement to avoid the death penalty). When Hogan appealed and succeeded in overturning his murder conviction and vacating his death sentence, the slate was wiped clean. The State was not barred from retrying Hogan on murder plus aggravating circumstances and presenting evidence to support the continuing threat aggravator.

Hogan, 139 P.3d at 926-30 (footnotes omitted).

As repeatedly stated herein, in order for Petitioner to obtain relief for any of his claims he must show that the OCCA rendered a decision that is contrary to or an unreasonable application of Supreme Court law. In rejecting Petitioner's double jeopardy claim, the OCCA relied on Hogan wherein it recited and applied relevant Supreme Court authority to deny a claim which is identical to Petitioner's, and the Court finds no fault with the OCCA's reasoned analysis. See Hanson v. Sherrod, No. 10-CV-0113-CVE-TLW, 2013 WL 3307111, at *22-24 (N.D. Okla. July 1, 2013) (concluding that the OCCA did not unreasonably apply Poland based on the reasoning employed in Hogan). Accordingly, no relief is warranted on Petitioner's Ground XII.

I. Ground XIV: Jury Question.

In Ground XIV, Petitioner asserts that he is entitled to a new trial because the jury did not have all of the information it needed to make a reliable sentencing determination. Petitioner's claim is based on a question the jury sent out during deliberations. The actual jury note is not contained in the record, and although the trial transcript does not reflect the exact question asked, it is clear from the in camera discussion that the jury was inquiring about the nature of Petitioner's murder conviction, i.e., whether it was premeditated. *At the urging of Petitioner's counsel*, the trial court did not answer the jury's question. The jurors were told that they had all of the law and evidence it needed to return a verdict (Tr. IX, 1652-54). Petitioner now contends that because the jury questioned his mental state and because "[t]he jury

was not given an instruction allowing them to take that concern into consideration while weighing aggravating and mitigating circumstances," at least one member of the jury questioned his underlying guilt and therefore both his conviction and sentence must be vacated. Petition, pp. 70-71.

In denying Petitioner relief on this claim, the OCCA held as follows:

> In Proposition XII, [Petitioner] contends the trial court erred in failing to instruct the jury to give consideration to any questions it might have concerning [his] guilt of first degree murder. His claim is based on a note received from the jury during deliberations asking whether [he] had been convicted of premeditated murder. [Petitioner] asserts the note indicates that at least one juror harbored some doubt regarding the murder conviction. We review only for plain error as this objection is being raised for the first time on appeal. Bernay v. State, 1999 OK CR 37, ¶ 49, 989 P.2d 998, 1012.
>
> Resentencing proceedings should not be viewed as a second chance at revisiting the issue of guilt. Rojem v. State, 2006 OK CR 7, ¶ 56, 130 P.3d 287, 299. Evidence relating to residual doubt is "not relevant to the defendant's character, record, or any circumstance of the offense." Id. quoting Bernay, 1999 OK CR 37, ¶ 50, 989 P.2d at 1012. To tell the jury as defense counsel did in opening statement that [Petitioner] had been convicted of first degree murder, yet later tell them to consider residual doubt as mitigation evidence would be inconsistent and confusing. Rojem, 2006 OK CR 7, ¶ 55, 130 P.3d at 298. We find no plain error in the trial court's failure to instruct the jury on residual doubt.

Mitchell, 235 P.3d at 660. Petitioner has not met his burden of showing that this decision is contrary to or unreasonable application of Supreme Court law.

Petitioner's guilt was determined by a jury in 1992, and his resentencing proceedings did not open an avenue for its reconsideration. Throughout the second resentencing, the jury was continually advised and reminded that Petitioner had already been convicted of first degree murder and that its only job was to determine

his sentence (O.R. VII, 1346; Tr. I, 56-57, 59; Tr. II, 174, 358-59, 361-62; Tr. III, 529, 641; Tr. IX, 1570-71). During voir dire particularly, the jury was told in no uncertain terms that Petitioner had committed an intentional act and that he had absolutely no defense to it. Among other admissions, defense counsel told the jury that "there was no legal justification"; "it wasn't an accident"; 'it wasn't self-defense"; "[Petitioner] wasn't insane"; and "he wasn't drunk" (Tr. II, 395; Tr. III, 518, 521). Given these circumstances, which demonstrate a clear explanation of Petitioner's crime and the jury's sole task of determining punishment, the reason for the jury's question is unclear.[23] However, in response to Petitioner's claim that the question was an indication that at least one juror "harbored some doubt regarding some aspect of [his] murder conviction," the Court cannot fault the OCCA for denying Petitioner relief because residual doubt was not relevant to the jury's sentencing determination. See Brief of Appellant, Case No. D-2008-57, p. 61.

The Supreme Court has "never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing." Abdul-Kabir v. Quarterman, 550 U.S. 233, 250-51 (2007) (citing Oregon v. Guzek, 546 U.S. 517, 523-27 (2006)). In the Guzek opinion, the Supreme Court discussed its Eighth Amendment case law, giving particular attention to its holding in Lockett v. Ohio, 438 U.S. 586 (1978). Guzek, 546 U.S. at 523-24. In Lockett, the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 F.3d at 604 (footnotes omitted). However, despite this broad statement in Lockett

[23] The trial court even questioned "the idiot . . . who wrote the question" (Tr. IX, 1654).

governing the admission of mitigating evidence, the Supreme Court in Guzek found that it had never construed the Eighth Amendment as encompassing the right to present evidence of residual doubt. Guzek, 546 U.S. at 523, 525. Because the OCCA's decision is in line with both Abdul-Kabir and Guzek, Petitioner cannot rely upon them for relief.

Petitioner's reliance on the Supreme Court's decisions in Kennedy v. Louisiana, 554 U.S. 407 (2008), Spaziano v. Florida, 468 U.S. 447 (1984), *overruled on other grounds by* Hurst v. Florida, 577 U.S.___, 136 S. Ct. 616 (2016), and Woodson v. North Carolina, 428 U.S. 280 (1976), are not helpful to him either because he has not shown that the OCCA's decision is in conflict with these holdings. In Kennedy, 554 U.S. at 413, the Supreme Court found that it was constitutionally impermissible to sentence a defendant to death for raping a child "where the crime did not result, and was not intended to result, in death of the victim." Kennedy is clearly inapplicable to the present case because Ms. Scott was murdered, and Petitioner's first jury found beyond a reasonable doubt that her murder was intended. As for Spaziano, Petitioner cites it for the proposition that a capital sentencing determination requires the jury to be informed "on the facts and circumstances of the individual and his crime." Spaziano, 468 U.S. at 460 n.7. However, in his second resentencing proceeding, the State presented evidence which informed the jury of the circumstances of Petitioner's crime and why Petitioner was deserving of the death penalty, and likewise Petitioner was given the opportunity to challenge this evidence through cross-examination and to present his case for mitigation. And finally, Woodson, 428 U.S. at 305, stands for the general principal that capital punishment proceedings require heightened reliability, but because this general principal is inherently subsumed in the Supreme Court's decision in Guzek, the Supreme Court case which directly addresses the

specific issue raised by Petitioner, the Court finds that Woodson offers Petitioner no greater protection.

In summary, for the reasons set forth above, the Court finds that Petitioner's Ground XIV is without merit. Because Petitioner has not shown that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law, relief is denied.

J. Ground XV: Victim Impact Testimony.

In Ground XV, Petitioner raises three errors with respect to the victim impact testimony presented at his second resentencing proceeding. All three of these claims were presented to the OCCA and denied on the merits. Mitchell, 235 P.3d at 660-61; Mitchell, 136 P.3d at 703-04. Therefore, in order to prevail on any of them, Petitioner must show that the OCCA's decision is contrary to or an unreasonable application of Supreme Court law. Because Petitioner has not made this showing, the Court finds that relief must be denied.

In his first claim, Petitioner asserts that the victim impact evidence presented through Ms. Scott's parents and her brother violated Payne v. Tennessee, 501 U.S. 808 (1991). He argues that Payne permits only a quick glimpse of the victim's life and that testimony which focuses "solely on the emotional impact of the family's loss" is improper. Petition, p. 73.

In Payne, the Supreme Court held that the Eighth Amendment does not erect a per se bar to the admission of victim impact evidence. "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Payne, 501 U.S. at 827. While this evidence does not violate the Eighth Amendment, the Court in Payne acknowledged that a Fourteenth Amendment

violation may be found where the evidence introduced "is so unduly prejudicial that it renders the trial fundamentally unfair." Id. at 825.

In denying Petitioner relief on this claim, the OCCA held as follows:

> Three victim impact witnesses testified at the re-sentencing—the deceased's father, mother, and brother. This testimony comprised only eleven pages out of the 1,664 pages of transcript. The victim impact statements appear to be substantially the same as those given in the first re-sentencing trial. Cognizant of our review of the evidence presented in the first re-sentencing proceeding, the trial court reviewed the statements *in camera* and significantly pared them down. Having thoroughly reviewed the victim impact statements given in this case, we find they did not focus too much on the emotional aspects of the decedent's death or her family's life prior to her death. Therefore, the evidence did not violate due process or deprive [Petitioner] of a fair sentencing proceeding.

Mitchell, 235 P.3d at 660. Because the OCCA's analysis is reasonable, and because it stands a far distance from the extreme malfunctions the AEDPA is meant to correct, no relief is warranted for this claim. Richter, 562 U.S. at 102.

Petitioner's next claim is that "[v]ictim impact evidence acts as a 'super-aggravator' which negates or impermissibly diminishes the narrowing function that aggravating circumstances are constitutionally required to provide under the Eighth and Fourteenth Amendments." Petition, p. 73 (citing Lockett). The OCCA rejected this argument, and given the Supreme Court's decision in Payne, Petitioner cannot show that its determination is unreasonable. Mitchell, 235 P.3d at 660; Mitchell, 136 P.3d at 703 & n.168 (citing Cargle v. State, 909 P.2d 806, 828 n.15 (Okla. Crim. App. 1995)). It is clear that Petitioner's argument here is for a blanket exclusion. By employing the term "super-aggravator," Petitioner argues that victim impact evidence should never be allowed because it functions outside of the jury's assessment and weighing of the aggravating and mitigating circumstances, "tipping the scales in favor

of death." Petition, p. 74. Without a doubt, Payne forecloses Petitioner's argument. As long as victim impact evidence operates within the parameters of the Due Process Clause and does not unduly infringe upon a defendant's right to a fundamentally fair trial, the State is allowed to introduce the evidence and the jury is allowed to consider it as it determines an appropriate sentence. Payne, 501 U.S. at 824-25, 827.

Petitioner's final challenge is to the instruction given to the jury regarding its consideration of the victim impact evidence that was presented. Petitioner takes issue with the following language: "It [victim impact evidence] is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victims are individuals whose death may represent a unique loss to society and the family" (O.R. VII, 1367). Petitioner's problem with this language is its reference to society's loss. Although Petitioner acknowledges that it reflects the verbiage used in Payne, Petitioner contends that it exceeds what is permitted by Oklahoma statute. Petition, pp. 74-75.

By acknowledging that the instruction comports with Payne, Petitioner has undercut his request for relief. At most, Petitioner has presented a claim of state law error; however, this Court is not empowered to order relief for violations of state law. Hancock v. Trammell, 798 F.3d 1002, 1034 (10th Cir. 2015) (citing Estelle v. McGuire, 502 U.S. 62, 67 (1991), for the proposition that "[f]ederal courts cannot grant habeas relief based on a state court's erroneous application of state law"). In addition, the Court is equally mindful that it is bound by the OCCA's interpretation of its own law. House v. Hatch, 527 F.3d 1010, 1028 (10th Cir. 2008). In denying Petitioner relief, the OCCA specifically found that the society language contained in the victim impact instruction was not only consistent with Payne, but permissible under Oklahoma law.

> Oklahoma law does strictly limit *who* can present victim impact evidence, *i.e.*, the victim *or* members of the victim's immediate family *or* a representative of the victim or the family. Oklahoma law also constrains the content of such testimony, through our statutes and our caselaw interpreting these statutes and relevant U.S. Supreme Court decisions. Yet nothing within this governing authority prohibits evidence about how the victim's death represents a loss to society, so long as this evidence is otherwise appropriate. We recognize, as did the Payne Court, that a capital sentencing should not be focused upon the comparative "worth" to society of the victim whose life was taken. Nevertheless, we also recognize that providing even a brief "glimpse" of the life that the defendant extinguished will often involve evidence about what kind of person the victim was–including evidence suggesting the victim's unique role in and contributions to society. Similarly, a family member's testimony about the impact of a victim's death on that individual may also tend to suggest the victim's special role in society generally.
>
> While such evidence must be carefully evaluated under our existing standards, victim impact evidence suggesting that a particular victim was a uniquely valuable member of his or her community and our society is not *per se* inadmissible in a capital sentencing proceeding. Furthermore, we conclude that the single reference to the "loss to society" within our uniform jury instruction is constitutional and is also appropriate under Oklahoma law.

Mitchell, 136 P.3d at 703-04 (footnotes omitted). Accordingly, this claim is denied as well.

For the reasons set forth above, the Court denies relief on Petitioner's Ground XV. Because Petitioner has failed to show that the OCCA rendered a decision which is contrary to or an unreasonable application of Supreme Court law, relief under the AEDPA is foreclosed.

K. Ground XVI: Prosecutorial Misconduct.

In Ground XVI, Petitioner alleges three instances of prosecutorial misconduct. Because the OCCA reviewed this claim on the merits, Petitioner's ability to obtain

relief is contingent upon his showing that the OCCA's decision is contrary to or an unreasonable application of the due process standard of review employed by the Supreme Court to such claims. The Court concludes that he has not met his burden of proof.

"Prosecutors are prohibited from violating fundamental principles of fairness, which are basic requirements of Due Process." Hanson v. Sherrod, 797 F.3d 810, 843 (10th Cir. 2015). Therefore, when a petitioner alleges prosecutorial misconduct, the question is whether the prosecutor's actions or remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Evaluating the alleged misconduct in light of the entire proceeding, the reviewing court must determine "whether the jury was able to fairly judge the evidence in light of the prosecutors' conduct." Bland v. Sirmons, 459 F.3d 999, 1024 (10th Cir. 2006). In denying Petitioner relief, the OCCA applied this due process standard. Mitchell, 235 P.3d at 661.

Petitioner's first complaint concerns the prosecutor's continual references to justice. Petitioner argues that the prosecutor's comments equated justice with a death sentence and expressed "her personal opinion that death was the only just verdict." Petition, p. 76. The majority of Petitioner's complaint focuses on voir dire and the prosecutor's questions to the prospective jurors about whether they believed that the purpose of the trial was to search for the truth and whether the end result should be justice. Petitioner makes additional reference to a line of argument in the prosecutor's second closing argument wherein the prosecutor reminded the jurors of their answers to these questions, followed by her submission that based on the crime committed, death was the appropriate sentence. Petition, pp. 76-77.

Because there was no defense objection to any of these comments, the OCCA reviewed this claim for plain error. It then denied relief as follows:

> A review of the comments made in *voir dire* does not support [Petitioner's] argument. None of the comments equate justice with the death penalty or express the prosecutor's personal opinion on the death penalty. At most, the prosecutor got the prospective jurors to agree that the trial should be a search for the truth and that the result should be justice. Other comments suggested that justice might be a sentence other than death. We find no plain error in the prosecutor's *voir dire* comments.
>
> As for closing arguments, the prosecutor's arguments were based on the evidence and focused on the jurors' duty to apply the law and the evidence and return the appropriate verdict. The comments did not convey the message that the jury had to vote for the death penalty or that they were to decide the case based on emotional reaction. We find no plain error.

Mitchell, 235 P.3d at 661 (citation omitted). Having thoroughly reviewed the comments as well, the Court concludes that the OCCA's assessment of the claim is both reasonable and accurate. In none of the comments did the prosecutor cross the equity line and infringe on Petitioner's ability to receive a fair trial.

Next, Petitioner complains about references to Ms. Scott being raped. As a result of the appeal of his first resentencing proceeding, the State was only permitted to use attempted rape (not rape) as the predicate crime for the avoid arrest aggravator in his second resentencing. Mitchell, 136 P.3d at 677-88. Accordingly, Petitioner argues that error occurred (1) when his prior testimony was admitted (because it included his denial that he did not rape or sodomize Ms. Scott) and (2) when the prosecutor misspoke twice in closing argument and used the term rape instead of attempted rape.

In denying Petitioner relief on this claim, the OCCA found that Petitioner was not entitled to relief because he had not shown prejudice. The OCCA reasoned that because the jury did not find the avoid arrest aggravator and because the references

did not impact the jury's finding of the especially heinous, atrocious, or cruel aggravator, Petitioner was not denied a fair trial. Mitchell, 235 P.3d at 662. Here again, the Court finds that the OCCA's conclusion is reasonable. The fact that the jury did not find the avoid arrest aggravator is tantamount to the lack of prejudice, and Petitioner offers no argument challenging this finding.

Finally, Petitioner imputes misconduct to the prosecution based on the amount of evidence it introduced and how it was presented to the jury. The OCCA denied relief on this claim with reference to its rejection of Petitioner's other claims challenging the admission of evidence, concluding that "the presentation of the evidence and arguments to the jury were not indicative of prosecutorial misconduct." Mitchell, 235 P.3d at 662. Petitioner has not shown how this finding is unreasonable. In this regard, one must not forget that a prosecutor is still an advocate who is permitted to "prosecute with earnestness and vigor" and to argue the case from the State's point of view. Berger v. United States, 295 U.S. 78, 88 (1935). The prosecution did so in the present case, and because the OCCA found no error in the admission of evidence, a claim of prosecutorial misconduct cannot stand.

In conclusion, the Court finds that Petitioner is not entitled to relief on his Ground XVI because he has not shown that the OCCA unreasonably denied his allegations of prosecutorial misconduct. Ground XVI is denied.

L. Ground XVII: Especially Heinous, Atrocious, or Cruel Aggravator.

Petitioner's Ground XVII is a challenge to the especially heinous, atrocious, or cruel aggravator. Petitioner's first contention is that the aggravator is unconstitutional. He also argues that once improperly admitted evidence is removed from consideration, there is insufficient evidence to support it. Petitioner presented these claims to the OCCA on direct appeal. The OCCA rejected Petitioner's

challenges to the constitutionality of the aggravator and the supporting evidence and found sufficient evidence to support it. Mitchell, 235 P.3d at 662-64. Because these determinations are reasonable, Petitioner's Ground XVII must be denied.

Regarding Petitioner's challenge to the constitutionality of the aggravator, Petitioner has not shown that the OCCA unreasonably denied this claim. Mitchell, 235 P.3d at 662. The Tenth Circuit has repeatedly rejected similar challenges. Wilson, 536 F.3d at 1108 ("The Tenth Circuit has routinely upheld the constitutionality of the heinous, atrocious, or cruel aggravator so long as it includes the 'torture or serious physical abuse' limitation."); Miller v. Mullin, 354 F.3d 1288, 1300 (10th Cir. 2004) (listing several cases in which the Tenth Circuit has upheld Oklahoma's heinous, atrocious, or cruel aggravator since it was found unconstitutionally vague in Maynard v. Cartwright, 486 U.S. 356 (1988)); Workman v. Mullin, 342 F.3d 1100, 1115-16 (10th Cir. 2003) ("We have specifically found Oklahoma's new formulation to be constitutional since this limiting language was enacted."); Medlock v. Ward, 200 F.3d 1314, 1321 (10th Cir. 2000) ("We have held that the 'heinous, atrocious, or cruel' aggravating circumstance as narrowed by the Oklahoma courts after Maynard to require torture or serious physical abuse characterized by conscious suffering can provide a principled narrowing of the class of those eligible for death.").

As for the allegedly improper evidence supporting the aggravator, Petitioner refers to the evidentiary claims he presents in his Grounds IX and X, supra. However, the OCCA found no error in the admission of this evidence and this Court has likewise denied relief.

What remains then is Petitioner's attack on the sufficiency of the evidence supporting the aggravator. When reviewing the sufficiency of the evidence supporting an aggravating circumstance, the OCCA applies the standard of review set forth in

Jackson v. Virginia, 443 U.S. 307, 319 (1979). Thus, the OCCA "reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt." Mitchell, 235 P.3d at 663-64. Jackson applies on habeas review as well. Lewis v. Jeffers, 497 U.S. 764, 781 (1990). "Like findings of fact, state court findings of aggravating circumstances often require a sentencer to 'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" Id. at 782 (quoting Jackson, 443 U.S. at 319). Thus, the Court "'must accept the jury's determination as long as it is within the bounds of reason.'" Lockett v. Trammel [sic], 711 F.3d 1218, 1243 (10th Cir. 2013) (quoting Boltz v. Mullin, 415 F.3d 1215, 1232 (10th Cir. 2005)). In addition to the deference afforded a jury's verdict, the AEDPA adds another layer of deference to the Court's review of a sufficiency claim. See Hooks v. Workman, 689 F.3d 1148, 1166 (10th Cir. 2012) ("We call this standard of review 'deference squared.'") (citation omitted). When reviewing the evidentiary sufficiency of an aggravating circumstance under Jackson, the Court looks to Oklahoma substantive law to determine its defined application. Hamilton v. Mullin, 436 F.3d 1181, 1194 (10th Cir. 2006).

In determining Petitioner's claim, the OCCA set forth the following standard for the aggravator:

> To prove the "especially heinous, atrocious or cruel" aggravator, the State must show that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty. After making the above determination, the attitude of the killer and the pitiless nature of the crime can also be considered.

Mitchell, 235 P.3d at 664 (citation omitted). It then found the aggravator satisfied by the following evidence:

> The decedent was first assaulted by [Petitioner] in the Center's library and in a desperate attempt to get away from him, ran for the innermost room of the Center's staff office where she could lock the door behind her and phone for help. However, before she could secure herself behind the locked door, [Petitioner] forced his way into the office and a violent struggle ensued. The decedent's clothing was removed and she was beaten by [Petitioner] using his fist, a school compass, a golf club and a wooden coat rack. The decedent moved and attempted to defend herself throughout the attack until [Petitioner] inflicted the final blow to her head with the coat rack. This evidence clearly shows the decedent's conscious physical suffering as a result of [Petitioner's] repeated physical assaults to her body. Further, her great mental anguish is evident as she surely realized her options for getting past [Petitioner] and out of the office to safety were dwindling.
>
> Considering the unprovoked manner of the killing in this case, the conscious suffering of the decedent, both physically and mentally, and the attitude of the killer as evidenced by [Petitioner's] attacks upon a victim whom he clearly overpowered and who did not have the means to adequately defend herself, the jury's finding of the "heinous, atrocious or cruel" aggravator was supported by sufficient evidence.

Id. Petitioner simply has no argument that this finding is unreasonable. Even beyond a finding that the OCCA's determination is reasonable under the AEDPA's double deference standard, the evidence that Ms. Scott's murder was especially heinous, atrocious, or cruel is so clear and undisputed that this Court has no doubt that the jury's finding of this aggravating circumstance is supported by the constitutionally sufficient evidence. Ground XVII is denied.

M. Ground XVIII: Jury Instructions.

Petitioner's Ground XVIII presents three challenges to the jury instructions.[24] For the following reasons, none entitle Petitioner to habeas relief.

[24] In an effort to "preserve them all," Petitioner puts forth a laundry list of other issues at the close of this ground for relief. Petition, pp. 83-84. These claims are hereby denied without consideration of their merit, because they are not, in any sense, meaningfully articulated.

"A habeas petitioner who seeks to overturn his conviction based on a claim of error in the jury instructions faces a significant burden." Ellis v. Hargett, 302 F.3d 1182, 1186 (10th Cir. 2002). "Unless the constitution mandates a jury instruction be given, a habeas petitioner must show that, in the context of the entire trial, the error in the instruction was so fundamentally unfair as to deny the petitioner due process." Tiger v. Workman, 445 F.3d 1265, 1267 (10th Cir. 2006).

> It is well established that a criminal defendant has a due process right to a fair trial. E.g., Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Further, the Supreme Court has acknowledged that an instructional error can, under certain circumstances, result in a violation of a defendant's right to a fair trial. See Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977); Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). Importantly, however, the Court has stated that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Henderson, 431 U.S. at 154, 97 S.Ct. 1730. "The question in such a collateral proceeding," the Court has stated, "is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," and "not merely whether the instruction is undesirable, erroneous, or even universally condemned . . . ." Id. (internal quotation marks and citations omitted).

Cummings v. Sirmons, 506 F.3d 1211, 1240 (10th Cir. 2007).

Petitioner's first complaint is that although the jury was instructed that it had to consider the aggravating circumstances before it could impose the death penalty, the instructions did not impose the same mandatory consideration of the mitigating circumstances. Thus, Petitioner asserts that "[t]he permissive language of the uniform jury instructions improperly allowed the jury the option of ignoring mitigating circumstances altogether." Petition, p. 82.

In denying Petitioner relief, the OCCA found that the quoted language upon which Petitioner based this claim was not contained in the instructions given to the jury. Therefore, Petitioner's assertion that error occurred when the jury was instructed that mitigating evidence "'*may be* considered'"[25] was completely baseless. Mitchell, 235 P.3d at 664 (emphasis added). This holding is of course reasonable, which explains why Petitioner has corrected[26] the quoted language to reflect what the jury was actually told in his second resentencing proceeding. Petition, p. 82. However, with this correction, the very substance of the claim evaporates. Petitioner's reference is now to a general instruction defining what mitigating circumstances are. There is no language in this instruction that gives the jury the option of not considering his mitigation evidence. In fact, it even states that it is up to the jury to determine what circumstances are mitigating and that mitigating circumstances do not have to meet the reasonable doubt standard before being considered (O.R. VII, 1359). In other instructions, the jury was also advised (1) of the circumstances that Petitioner believed were mitigating, while being told that it was not confined to this list but could consider any other circumstances it deemed mitigating; and (2) that before returning a death sentence, it must first find that the aggravating circumstances outweigh the mitigating ones, but that even so, that it was not required to impose a sentence of death (O.R. VII, 1360-64). Reviewing the instructions as a whole, it is clear that they did not employ the permissive language Petitioner objects to and the instructions did not hinder the jury's consideration of Petitioner's mitigating evidence.

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[25] The record reflects that this language was a part of the instructions to the jury in Petitioner's first trial, but not in the second resentencing proceeding (O.R. I, 71).

[26] Respondent asserts that this correction equates to a new claim which is unexhausted and subject to a procedural bar; however, he also acknowledges that the new claim may be dismissed on the merits despite the lack of exhaustion. Response, p. 112. Because the claim is clearly without merit, the Court finds that dismissal on the merits is the easier course.

Petitioner's next complaint is with the uniform instruction OUJI-CR (2d) 4-76, which was given to his jury and provides in pertinent part:

> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole.

(O.R. VII, 1355). Petitioner asserts that this instruction is erroneous because it implies that the jury could only give a life sentence if it did not find any aggravating circumstances. Petition, p. 82. On direct appeal, the OCCA found no merit to the claim. Mitchell, 235 P.3d at 664 (citing Bryson v. State, 876 P.2d 240 (Okla. Crim. App. 1994). In light of Tenth Circuit authority rejecting this very claim, the Court finds that Petitioner has not shown that the OCCA's denial of relief is unreasonable. Fox v. Ward, 200 F.3d 1286, 1300-01 (10th Cir. 2000); Bryson v. Ward, 187 F.3d 1193, 1206-07 (10th Cir. 1999); Duvall v. Reynolds, 139 F.3d 768, 789-91 (10th Cir. 1998).

Petitioner's third challenge to the instructions is to another uniform instruction, OUJI-CR (2d) 4-80, which was given to his jury. This instruction states as follows:

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating circumstances outweigh the mitigating circumstances, you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

(O.R. VII, 1364). Petitioner contends that this instruction is erroneous because it conflicts with a state statute, Okla. Stat. tit. 21, § 701.11, and because it permits the imposition of a death sentence upon a simple weighing of the aggravating and mitigating circumstances. Petition, p. 83. The OCCA rejected this claim on the merits and Petitioner has failed to show that its rejection was unreasonable. Mitchell, 235 P.3d at 664.

In Kansas v. Marsh, 548 U.S. 163, 173-74 (2006), the Supreme Court found that in order for a state capital sentencing scheme to be deemed constitutional, it must meet only two qualifications. It "must 1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." Id. If these two qualifications are met, Supreme Court precedent makes it clear "that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." Id. at 174. The Supreme Court has "'never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'" Id. at 175 (quoting Franklin v. Lynaugh, 487 U.S. 164, 179 (1988)).

In accordance with Marsh, the Court finds that Petitioner has not shown that OUJI-CR (2d) 4-80 is constitutionally infirm. Oklahoma is acting within the discretion afforded it by the Supreme Court. In addition, the Court is unpersuaded by Petitioner's argument that the instruction is in conflict with Section 701.11. The OCCA has specifically rejected Petitioner's argument, and as a matter of state law, the Court is bound by its interpretation. House, 527 F.3d at 1028; Fields v. State, 923

P.2d 624, 638 (Okla. Crim. App. 1996); Allen v. State, 871 P.2d 79, 101 (Okla. Crim. App. 1994).[27]

For the foregoing reasons, the Court finds that Petitioner has failed to establish his entitlement to relief based on alleged faulty instructions. Accordingly, Petitioner's Ground XVIII is denied.

N. Ground XX: Aggravating Circumstances.

In Ground XX, Petitioner asserts that Jones v. United States, 526 U.S. 227 (1999), Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), require Oklahoma capital juries to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Petitioner raised this claim on direct appeal but was denied relief. Mitchell, 235 P.3d at 665. In light of the numerous circuit and district court opinions rejecting this very claim, the Court finds that Petitioner has not shown that the OCCA's rejection of this claim is contrary to or an unreasonable application of Supreme Court law. Lockett, 711 F.3d at 1252-55; Matthews v. Workman, 577 F.3d 1175, 1195 (10th Cir. 2009); Lay v. Trammell, No. 08-CV-617-TCK-PJC, 2015 WL 5838853, at *54-56 (N.D. Okla. Oct. 7, 2015); Rojem v. Trammell, No. CIV-10-172-M, 2014 WL 4925512, at *18 (W.D. Okla. Sept. 30, 2014); Smith v. Trammell, No. CIV-09-293-D, 2014 WL 4627225, at *50 (W.D. Okla. Sept. 16, 2014); Ryder ex rel. Ryder v. Trammell, No. CIV-05-0024-JHP-KEW, 2013 WL 5603851, at *35 (E.D. Okla. Oct. 11, 2013); Fitzgerald v. Trammell, No. 03-CV-531-GKF-TLW, 2013 WL 5537387, at *59 (N.D. Okla. Oct. 7, 2013); Jackson v. Workman, No. 08-CV-204-JHP-FHM, 2013 WL 4521143, at *27 (N.D. Okla. Aug. 26, 2013); Cole v. Workman, No. 08-CV-328-CVE-PJC, 2011 WL

[27] In denying Petitioner relief, the OCCA noted that Petitioner, who in his brief on appeal had acknowledged the holdings of Fields and Allen, was in effect asking the Court to reconsider the issue. Mitchell, 235 P.3d at 664. See Brief of Appellant, Case No. D-2008-57, p. 78 & n.43.

3862143, at *51-52 (N.D. Okla. Sept. 1, 2011); DeRosa v. Workman, No. CIV-05-213-JHP, 2010 WL 3894065, at *32-33 (E.D. Okla. Sept. 27, 2010); Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1277-78 (E.D. Okla. 2007). Relief is therefore denied.

O. Ground XXI: Cumulative Error.

In his final ground, Petitioner asserts that he is entitled to relief based on a cumulative error theory. Petitioner unsuccessfully raised a cumulative error claim on direct appeal, which the OCCA addressed as follows:

> We have reviewed each of [Petitioner's] claims for relief and the record in this case and conclude that although his resentencing trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require relief because they did not render his resentencing trial fundamentally unfair, taint the jury's verdict, or render his sentencing unreliable. Any errors were harmless beyond a reasonable doubt, individually and cumulatively. Therefore, no modification of sentence is warranted and this proposition of error is denied.

Mitchell, 235 P.3d at 665. Not only does Petitioner make no attempt to challenge this holding, but instead of presenting argument about particular claims which in the aggregate might equate to cumulative error, he raises a whole new claim regarding the introduction of guilt stage evidence into his second resentencing proceeding. Petition, p. 92. For this reason, Petitioner's cumulative error claim fails from the start. See Hoxsie v. Kerby, 108 F.3d 1239, 1245 (10th Cir. 1997) ("Cumulative-error analysis applies where there are two or more actual errors."); United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990) ("The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. The purpose of a cumulative-error analysis is to address that possibility."). But even beyond this fault, the Court additionally finds that even if Petitioner's Ground XXI were construed as reasserting the general cumulative error

claim he raised to the OCCA in his Proposition XVII, Petitioner has not shown that the OCCA's denial of the same is unreasonable. Ground XXI is denied.

IV. Motions for Discovery and Evidentiary Hearing.

Petitioner has filed motions for discovery (Docs. 22 and 40) as well as motions for an evidentiary hearing (Docs. 23 and 39). For the following reasons, the Court finds that neither discovery nor an evidentiary hearing is warranted in this case.

In order to conduct discovery, Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts requires Petitioner to show good cause. In Bracy v. Gramley, 520 U.S. 899, 908-09 (1997), the Supreme Court acknowledged that "good cause" requires a pleading of specific allegations showing a petitioner's entitlement to relief if the facts are fully developed. Because Petitioner has not made this showing, and because Petitioner's discovery requests concern collateral issues which do not affect the Court's determination of the grounds raised in the Petition, the Court finds that Petitioner has failed to show that discovery should be permitted.

As the Tenth Court has acknowledged, in order to obtain a hearing on a habeas petition, "the factual allegations must be 'specific and particularized, not general or conclusory.'" Anderson v. Attorney General of Kansas, 425 F.3d 853, 858-59 (10th Cir. 2005) (citing Hatch v. Oklahoma, 58 F.3d 1447, 1471 (10th Cir. 1995)). Moreover, "[t]he purpose of an evidentiary hearing is to resolve conflicting evidence." Anderson, 425 F.3d at 860. However, 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. For the most part, Petitioner's request for an evidentiary hearing is too general to establish the need for one, but to the extent Petitioner's request relates to his Ground I, the Court finds that a hearing to explore why his prior habeas counsel did not seek particular relief on his Brady claim in his first habeas action is irrelevant

and without consequence to the Court's adjudication of Petitioner's Ground I. Accordingly, Petitioner's request for an evidentiary hearing is also denied.

V. 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 his requested relief. Accordingly, Petitioner's petition (Doc. 21), motions for discovery (Docs. 22 and 40), and motions for an evidentiary hearing (Docs. 23 and 39) are hereby **DENIED**. A judgment will enter accordingly.

IT IS SO ORDERED this 27th day of July, 2016.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

11-0429p002.wpd

Appendix C

235 P.3d 640
Court of Criminal Appeals of Oklahoma.

Alfred Brian **MITCHELL**, Appellant
v.
STATE of Oklahoma, Appellee.

No. D–2008–57.
|
July 1, 2010.

Synopsis

Background: After defendant, who had been convicted of first-degree malice aforethought murder, robbery with a dangerous weapon, larceny with an automobile, first-degree rape, and forcible anal sodomy and sentenced to death, obtained federal habeas corpus relief, 150 F.Supp.2d 1194, he appealed, 262 F.3d 1036, and was granted a new capital sentencing hearing. The District Court of Oklahoma County, Virgil C. Black, J., sentenced defendant to death. Defendant appealed. The Court of Criminal Appeals, 2006 OK CR 20, 136 P.3d 671, reversed and remanded. On remand the District Court sentenced defendant to death. Defendant appealed.

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

[1] the trial court's removal of six prospective jurors for cause was not an abuse of discretion;

[2] the trial court's refusal to allow defense counsel to discuss the specific aggravators alleged in capital murder case during voir dire was not an abuse of discretion;

[3] trial court error, if any, in failing to exclude defendant's testimony from his first murder trial, in which he denied the rape and sodomy charges filed against him, was harmless;

[4] as a matter of first impression, defendant was not entitled to an extension of *Roper v. Simmons*;

[5] victim impact evidence presented by murder victim's mother, father, and brother did not violate due process; and

[6] the prosecutor's improper reference during closing argument to the initial rape charges against defendant did not amount to prosecutorial misconduct.

Affirmed.

West Headnotes (51)

[1] **Criminal Law** Selection and impaneling
Jury Discretion of court
The manner and extent of voir dire is within the discretion of the trial court whose rulings will not be disturbed on appeal absent a clear abuse of discretion.

Cases that cite this headnote

[2] **Jury** Discretion of court
No abuse of discretion will be found so long as the voir dire is conducted in a manner which affords the defendant a jury free of outside influence, bias or personal interest.

Cases that cite this headnote

[3] **Jury** Laying foundation for peremptory challenges
Jury Bias and prejudice
The purpose of voir dire examination is to ascertain whether there are grounds to challenge prospective jurors for either actual or implied bias and to facilitate the intelligent exercise of peremptory challenges.

1 Cases that cite this headnote

[4] **Jury** Discretion of court
Whether to conduct individual voir dire is within the trial court's discretion.

Cases that cite this headnote

[5] **Jury** Mode of examination

Although a defendant may request individual voir dire, he has no automatic right to such a request.

1 Cases that cite this headnote

[6] **Jury** Mode of examination

Individual voir dire is appropriate where the record shows jurors were not candid in their responses about the death penalty, or that responses were tailored to avoid jury service.

1 Cases that cite this headnote

[7] **Jury** Mode of examination

The trial court's failure to conduct individual voir dire of two prospective jurors, who indicated that they remembered reading about defendant's case 16 or 17 years earlier, was not an abuse of discretion, during resentencing hearing for capital murder; both jurors indicated that they could set aside what they read and decide the case based on the evidence presented at trial.

Cases that cite this headnote

[8] **Jury** Trial and determination

Statements by prospective juror, who stated that his wife had been murdered and her murderer was on death row, did not adversely impact the jury pool, as argued by defendant, during resentencing hearing for capital murder; juror was sequestered after he made the statements, the court conducted individual voir dire with the juror, and he was excused for cause.

Cases that cite this headnote

[9] **Jury** Punishment prescribed for offense

The trial court's removal of six prospective jurors for cause was not an abuse of discretion, during sentencing phase of capital murder prosecution; all of the jurors were unequivocal in their responses that they could not consider all three possible punishments.

Cases that cite this headnote

[10] **Jury** Discretion of court

The decision whether to disqualify a prospective juror for cause rests in the trial court's sound discretion.

Cases that cite this headnote

[11] **Criminal Law** Selection and impaneling

The trial court's decision to disqualify a prospective juror for cause will not be overturned unless an abuse of discretion is shown.

1 Cases that cite this headnote

[12] **Criminal Law** Summoning, impaneling, or selection of jury

The Court of Criminal Appeals will look to the entirety of the juror's voir dire examination to determine if the trial court properly excused the juror for cause.

Cases that cite this headnote

[13] **Jury** Punishment prescribed for offense

The trial court's removal of prospective juror for cause was not an abuse of discretion, even though juror stated that she had a "serious" problem considering all three punishments, during resentencing for capital murder; during additional questioning by the trial court juror was unequivocal in her responses that she could not consider all three possible punishments.

Cases that cite this headnote

[14] **Jury** Extent of examination

When the proper questions have been asked by the trial court to determine whether prospective jurors can sit in the case, it is not error to deny defense counsel an opportunity to rehabilitate the excused jurors.

Cases that cite this headnote

[15] **Jury** Bias and Prejudice

Trial court dismissal of two prospective jurors for cause was not an abuse of discretion, during resentencing for capital murder; jurors were excused due to the influence of outside matters affecting their ability to sit as fair and impartial jurors.

Cases that cite this headnote

[16] **Jury** Mode of examination

Defense counsel was not entitled to introduce the prosecution's crime scene photographs and publish them to the jury during voir dire; the crime scene photographs had not been admitted into evidence at the time defense counsel sought to show them to the jury.

Cases that cite this headnote

[17] **Jury** Mode of examination

The trial court's refusal to allow defense counsel to discuss the specific aggravators alleged in capital murder case during voir dire was not an abuse of discretion; the court informed potential jurors of the role of aggravating circumstances in a capital trial, the State's burden to prove those aggravators beyond a reasonable doubt, the role of mitigating evidence and the jury's duty to weigh the evidence in aggravation against that in mitigation.

Cases that cite this headnote

[18] **Jury** Laying foundation for peremptory challenges

The trial court's limitation of defense counsel's questioning of potential jurors concerning their views on the death penalty did not deprive the defense of information necessary to intelligently exercise peremptory challenges, as argued by defendant; defense counsel was allowed sufficient voir dire to determine if there were grounds to challenge a particular juror for cause and to intelligently raise peremptory challenges.

Cases that cite this headnote

[19] **Jury** Mode of examination

The trial court may properly restrict questions on voir dire that are repetitive, irrelevant or regard legal issues upon which the trial court will instruct the jury.

Cases that cite this headnote

[20] **Habeas Corpus** Operation and Effect of Determination;Res Judicata; Successive Proceedings

Federal habeas trial and appellate courts' denial of habeas relief as to defendant's murder conviction, and remand limited to resentencing, were res judicata bar to defendant's state court claim on remand that he was entitled to a new guilt/innocence murder trial irrespective of remand for resentencing only, notwithstanding federal habeas courts' finding of *Brady* violation, where defendant had never previously argued the violation affected the reliability of his murder conviction, habeas courts adjudicated the error in context of the overall trial and fully considered its possible effect on defendant's murder conviction, and whether defendant was entitled to a new guilt/innocence trial on the murder conviction was necessarily decided by the federal courts. 21 Okl.St.Ann. § 701.10a.

Cases that cite this headnote

[21] **Judgment** Nature and elements of bar or estoppel by former adjudication

Judgment Matters which might have been litigated

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

1 Cases that cite this headnote

[22] **Judgment** Essentials of Adjudication

Res judicata precludes the relitigation of any issue that was necessarily decided in a prior proceeding.

2 Cases that cite this headnote

[23] **Sentencing and Punishment** Admissibility

Defendant was not entitled to a *Jackson v. Denno* hearing as to the voluntariness of his statements at his resentencing trial; defendant's custodial statements were repeatedly found to be voluntary. 21 Okl.St.Ann. § 701.10a(4).

Cases that cite this headnote

[24] **Criminal Law** Sentencing and Punishment

Trial court error, if any, in failing to exclude defendant's testimony from his first murder trial, in which he denied the rape and sodomy charges filed against him, was harmless, during resentencing of capital murder trial; the evidence did not contribute to defendant's sentence as the jury rejected the "avoid arrest" aggravator, which was based on evidence of defendant's attempted rape of the victim, and the jury found the existence of the "heinous, atrocious or cruel" aggravator, which was separate from any evidence of any sexual assault of the victim.

1 Cases that cite this headnote

[25] **Sentencing and Punishment** Documentary evidence

Photographs of murder victim and crime scene photographs were admissible during resentencing for capital murder; the photographs were admissible to assist the jury in understanding the testimony of blood splatter expert, the autopsy photographs of the victim supported the testimony of the medical examiner and aided the jury in understanding the nature of the victim's injuries, and the photographs supported the State's allegation of the "heinous, atrocious or cruel" sentencing aggravator as they showed that the victim suffered serious physical abuse prior to her death.

2 Cases that cite this headnote

[26] **Criminal Law** Photographs and Other Pictures

Criminal Law Documentary evidence

The admissibility of photographs is a matter within the trial court's discretion and absent an abuse of that discretion, the Court of Criminal Appeals will not reverse the trial court's ruling.

1 Cases that cite this headnote

[27] **Criminal Law** Photographs and Other Pictures

Criminal Law Photographs arousing passion or prejudice;gruesomeness

Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect.

1 Cases that cite this headnote

[28] **Criminal Law** Purpose of admission

The probative value of photographs of murder victims can be manifested in numerous ways, including showing the nature, extent and location of wounds, establishing the corpus delicti, depicting the crime scene, and corroborating the medical examiner's testimony.

1 Cases that cite this headnote

[29] **Criminal Law** Introduction of documentary and demonstrative evidence

The prosecution's publication of some of the photographs of the victim and the crime scene during closing argument, instead of during a witnesses' testimony, did not prejudice defendant, during resentencing for capital murder; no authority required all exhibits admitted into evidence to be published prior to closing argument.

Cases that cite this headnote

[30] **Sentencing and Punishment** Expert evidence

Testimony from crime scene reconstruction expert was relevant and admissible as to the jury's determination regarding the "heinous, atrocious, or cruel" aggravating circumstance, during resentencing for capital murder.

Cases that cite this headnote

[31] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. 12 Okl.St.Ann. § 2403.

1 Cases that cite this headnote

[32] **Sentencing and Punishment** Demonstrative evidence

Defendant's speculation that semen evidence was tampered with was insufficient to warrant suppression of the evidence during resentencing for capital murder.

Cases that cite this headnote

[33] **Criminal Law** Condition;change;tampering

Although the State has the burden of showing the evidence is in substantially the same condition at the time of offering as when the crime was committed, it is not necessary that all possibility of alteration be negated.

1 Cases that cite this headnote

[34] **Criminal Law** Condition;change;tampering

If there is only speculation that tampering or alteration occurred, it is proper to admit the evidence and allow any doubt to go to its weight rather than its admissibility.

1 Cases that cite this headnote

[35] **Sentencing and Punishment** Juveniles

Defendant was not entitled to an extension of *Roper v. Simmons*, which prohibited capital punishment of juvenile murderers under 18-years-old, even though defendant was two weeks beyond his 18th birthday when he murdered the victim; the Supreme Court in *Roper* drew a bright line at 18 years of age for death eligibility.

2 Cases that cite this headnote

[36] **Sentencing and Punishment** Dangerousness

Sentencing and Punishment Other offenses, charges, or misconduct

Defendant's juvenile adjudications could be used to support aggravating circumstances, during resentencing for capital murder; defendant's juvenile adjudications were admissible to establish that he constituted a continuing threat to society.

3 Cases that cite this headnote

[37] **Criminal Law** Sentencing and Punishment

Sentencing and Punishment Death sentence

The trial court's failure to instruct the jury to give consideration to any questions it might have concerning defendant's guilt of first degree murder did not constitute plain error, during resentencing for capital murder; resentencing proceedings did not constitute a second chance to revisit the issue of guilt.

Cases that cite this headnote

[38] **Sentencing and Punishment** Grounds and Considerations

Resentencing proceedings should not be viewed as a second chance at revisiting the issue of guilt.

Cases that cite this headnote

[39] **Constitutional Law** Evidence and witnesses

Sentencing and Punishment Victim impact

Victim impact evidence presented by murder victim's mother, father, and brother in death penalty case did not violate due process or deprive defendant of a fair sentencing proceeding; the victim impact statements did not focus too much on the emotional aspects of the victim's death or her family's life prior to her death. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[40] **Sentencing and Punishment** Review of Proceedings to Impose Death Sentence

The doctrine of res judicata barred defendant's appellate argument that alleged the reference to a victim's "unique loss to society" in the uniform jury instruction on victim impact evidence was improper, during second resentencing for capital murder; in defendant's appeal to the first resentencing his raised the same objection, and the Court of Criminal Appeals found that victim impact evidence that suggested that a victim was a uniquely valuable member to his or her community or society was not per se inadmissible during a capital sentencing proceeding.

Cases that cite this headnote

[41] **Criminal Law** Arguments and conduct of counsel

In reviewing a claim of prosecutorial misconduct, the Court of Criminal Appeals evaluates the alleged misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel.

1 Cases that cite this headnote

[42] **Criminal Law** Statements as to Facts, Comments, and Arguments

Criminal Law Scope of and Effect of Summing Up

Criminal Law Inferences from and Effect of Evidence

When evaluating a claim of prosecutorial misconduct the Court of Criminal Appeals is mindful that parties have great latitude in making arguments and drawing inferences from the evidence; it will not grant relief unless a defendant is deprived of a fair trial and is prejudiced by improper argument.

Cases that cite this headnote

[43] **Sentencing and Punishment** Arguments and conduct of counsel

The prosecutor's voir dire comments did not amount to prosecutorial misconduct, even though, according to the defendant, the prosecutor improperly equated justice with the death penalty and gave her personal opinion that death was the only just verdict; the prosecutor got the prospective jurors to agree that the trial should be a search for the truth and that the result should be justice.

1 Cases that cite this headnote

[44] **Sentencing and Punishment** Arguments and conduct of counsel

The prosecutor's closing argument comments did not amount to prosecutorial misconduct, even though, according to the defendant, the prosecutor improperly equated justice with the death penalty and gave her personal opinion that death was the only just verdict; the prosecutor's arguments were based on the evidence and focused on the jurors' duty to apply the law and the evidence and return the appropriate verdict.

1 Cases that cite this headnote

[45] **Sentencing and Punishment** Arguments and conduct of counsel

The prosecutor's improper reference during closing argument to the initial rape charges against defendant did not amount to prosecutorial misconduct, during resentencing for capital murder; the references were minimal and appeared to be inadvertent, and defendant failed to show any prejudice due to the references as the evidence was introduced to support the "avoid arrest" aggravator, and the jury did not find that the evidence supported the aggravator.

Cases that cite this headnote

[46] **Sentencing and Punishment** Review of Death Sentence

The doctrine of res judicata barred defendant's appellate argument that alleged the "heinous, atrocious, or cruel" aggravator was unconstitutionally vague, during resentencing for capital murder; where defendant had previously challenged the constitutionality of the aggravator, and the Court of Criminal Appeals had rejected defendant's argument.

Cases that cite this headnote

[47] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Evidence was sufficient to support the "heinous, atrocious and cruel" aggravator, during resentencing for capital murder; the victim's clothes were laying beneath a bulletin board that had been knocked off the wall, blood and brain matter were spattered around the victim's body, down her back, on the door frame and door, and six and one-half to seven feet up the wall, the victim had a massive skull fracture that ran across the skull from ear to ear, she had facial lacerations, a fractured nose, and a chipped tooth, she had five puncture wounds to her neck, and two of her ribs were fractured.

Cases that cite this headnote

[48] **Sentencing and Punishment** Presumptions

Sentencing and Punishment Verdict and findings

When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, the Court of Criminal Appeals reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt.

1 Cases that cite this headnote

[49] **Sentencing and Punishment** Vileness, heinousness, or atrocity

To prove the "especially heinous, atrocious or cruel" aggravator, the State must show that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty.

Cases that cite this headnote

[50] **Criminal Law** Grounds in general

A cumulative error argument has no merit when the Court of Criminal Appeals fails to sustain any of the other errors raised by appellant.

1 Cases that cite this headnote

[51] Criminal Law Grounds in general

When there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial.

Cases that cite this headnote

***644** An Appeal from the District Court of Oklahoma County; the Honorable Virgil C. Black, District Judge.

Attorneys and Law Firms

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OPINION

LUMPKIN, Judge.

¶ 1 Alfred Brian Mitchell, Appellant, was tried by a jury in June 1992 and convicted of First–Degree Malice Aforethought Murder, in violation of 21 O.S.1991, § 701.7; Robbery with a Dangerous Weapon, in violation of 21 O.S.1991, § 801; Larceny of an Automobile, in violation of 21 O.S.1991, § 1720; First–Degree Rape, in violation of 21 O.S.1991, §§ 1111, 1114; and Forcible Anal Sodomy, in violation of 21 O.S.1991, § 888; in the District Court of

Oklahoma County, Case No. CF–91–206. In the sentencing phase, the jury recommended a death sentence for the murder after finding: 1) the murder was "especially heinous, atrocious, or cruel"; 2) the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; and 3) there was a "probability that [Appellant] would commit criminal acts of violence that would constitute a continuing threat to society." *See* 21 O.S.1991, § 701.12(4), (5) and (7), respectively. In accordance with the recommendations of the jury, the trial court sentenced Appellant to death for the murder and to imprisonment for a total of 170 years for the other felonies.

¶ 2 Appellant appealed to this Court, and we affirmed his convictions and his sentences. *Mitchell v. State,* 1994 OK CR 70, 884 P.2d 1186 (hereinafter referred to as *Mitchell I*). This Court denied Appellant's petition for rehearing, and the United States Supreme Court denied his petition for certiorari. *Mitchell v. Oklahoma,* 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995). Appellant then sought post-conviction relief in this Court, which was denied. *Mitchell v. State,* 1997 OK CR 9, 934 P.2d 346 (hereinafter referred to as *Mitchell II*). The Supreme Court again denied Appellant's petition for certiorari. *Mitchell v. Oklahoma,* 521 U.S. 1108, 117 S.Ct. 2489, 138 L.Ed.2d 996 (1997).

¶ 3 Appellant then pursued federal habeas corpus relief in the United States District Court for the Western District of Oklahoma. *Mitchell v. Ward,* 150 F.Supp.2d 1194 (W.D.Okla.1999). The federal district court granted habeas relief on Appellant's convictions for rape and sodomy, vacating those convictions but leaving his other convictions and sentences intact.

¶ 4 Appellant appealed to the United States Court of Appeals for the Tenth Circuit. In *Mitchell v. Gibson,* 262 F.3d 1036 (10th Cir.2001),[1] the Tenth Circuit upheld Appellant's first-degree murder conviction, but vacated his death sentence and ordered a new capital sentencing proceeding. Pursuant to 21 O.S.2001, § 701.10a, a new jury was impaneled for the resentencing trial, which was held October 21–31, 2002. This time the jury found two aggravating circumstances: 1) the murder was "especially heinous, atrocious, or cruel"; and 2) the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." *See* 21 O.S.1991, § 701.12(4) and (5), respectively. The jury again recommended the death penalty, and the trial court so ordered. Appellant appealed to this Court. *Mitchell v. State,* 2006 OK CR 20, 136 P.3d 671 (hereinafter referred to as *Mitchell III*). This Court reversed Appellant's death sentence and remanded the case to the District Court for resentencing.

¶ 5 A second re-sentencing trial was held on November 26—December 6, 2007. The jury found the existence of the aggravating circumstance "especially heinous, atrocious, or cruel" and recommended the sentence of death. See 21 O.S.1991, § 701.12(4). On January 16, 2008,

the trial court sentenced Appellant in accordance with the jury's verdict. ***646** From this judgment and sentence, Appellant appeals. [2]

¶ 6 The facts of this case were summarized in this Court's opinion on direct appeal, which is incorporated herein by reference. *See Mitchell I,* 1994 OK CR 70, ¶¶ 2–3, 884 P.2d at 1191–92. The evidence presented at the second re-sentencing trial was sufficiently the same as that presented at the first re-sentencing so that we may rely on the brief summary of facts set forth in our earlier opinion:

> Briefly stated, on January 7, 1991, Alfred Brian Mitchell found Elaine Scott alone at the Pilot Recreation Center in Oklahoma City. The evidence presented at the resentencing established that Mitchell first attacked Scott near the Center's library, where a spot of blood, one of Scott's earrings, and a sign that she had been hanging were later found on the floor. Scott apparently ran for the innermost room of the Center's staff offices—as she had told her mother she would if she ever found herself in a dangerous situation at the Center—where there was a phone and a door that she could lock behind her. She almost made it. Although the exact sequence of events is unclear, the State established that Scott's clothing was taken off and that a violent struggle ensued, in which Mitchell beat and battered Scott, using his fists, a compass, a golf club (which ended up in pieces), and a wooden coat rack. The forensic evidence—including the condition of Scott's nude, bruised, and bloodied body—established that she was moving throughout the attack, until the final crushing blows with the coat rack, which pierced her skull and ended her life.

2006 OK CR 20, ¶ 6, 136 P.3d at 676–677.

¶ 7 Appellant raises eighteen (18) propositions of error in this appeal. These propositions will be addressed in the order in which they arose at trial.

JURY SELECTION

¶ 8 Appellant asserts in his fourth proposition of error that the trial court abused its discretion in denying the use of juror questionnaires and individual sequestered *voir dire*. Appellant argues that as he was denied the benefit of individual questioning, either through individual in person questioning or questionnaires, the jury selection process did not comport with due process and undermines the reliability of the capital sentence imposed.

¶ 9 In support of his claim, Appellant directs us to responses by three potential jurors during the court's initial questioning. Prospective Jurors R.M. and A.K. stated they remembered reading about Appellant's case in the newspapers. Prospective Juror R.L. stated his wife had been murdered, her murderer was on death row, and the process had been unpleasant for him. Appellant argues that if questionnaires or individual *voir dire* had been allowed the jury pool would not have been exposed to the highly inflammatory responses of the three potential jurors.

[1] **[2]** ¶ 10 The manner and extent of *voir dire* is within the discretion of the trial court whose rulings will not be disturbed on appeal absent a clear abuse of discretion. *Eizember v. State,* 2007 OK CR 29, ¶ 67, 164 P.3d 208, 228. No abuse of discretion will be found so long as the *voir dire* is conducted in a manner which affords the defendant a jury free of outside influence, bias or personal interest. *Id.*

[3] **[4]** **[5]** **[6]** ¶ 11 The purpose of *voir dire* examination is to ascertain whether there are grounds to challenge prospective jurors for either actual or implied bias and to facilitate the intelligent exercise of peremptory challenges. *Warner v. State,* 2006 OK CR 40, ¶ 15, 144 P.3d 838, 858. To that end, this Court has recently encouraged, but not mandated, the use of juror questionnaires. *See Eizember,* 2007 OK CR 29, ¶ 40, 164 P.3d at 221, n. 6.; *Jones v. State,* 2006 OK CR 17, ¶ 16, 134 P.3d 150, 156. Whether to conduct individual *voir dire* is within the trial court's discretion. *Eizember,* 2007 OK CR 29, ¶ 69, 164 P.3d at 228. Although a defendant may ***647** request individual *voir dire,* he has no automatic right to such a request. *Stouffer v. State,* 2006 OK CR 46, ¶ 12, 147 P.3d 245, 257. "Individual *voir dire* is appropriate where the record shows jurors were not candid in their responses about the death penalty, or that responses were tailored to avoid jury service." *Id.* quoting *Hanson v. State,* 2003 OK CR 12, ¶ 5, 72 P.3d 40, 46.

[7] ¶ 12 Prospective Jurors R.M. and A.K. stated they remembered reading about Appellant's case in the newspapers approximately 16 or 17 years earlier. No details of what they remembered reading were given. Both stated they could set aside what they remembered reading and decide the case on the evidence presented at trial.

¶ 13 Because of the obvious difficulty in reviewing juror candidness, we must rely and place great weight upon the trial court's opinion of the jurors. *See Eizember,* 2007 OK CR 29, ¶ 41, 164 P.3d at 221 ("[d]eference must be paid to the trial judge who sees and hears the jurors", *quoting Wainwright v. Witt,* 469 U.S. 412, 425, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)). Here, the trial court, who saw the prospective jurors and heard their responses firsthand, found no need to conduct individual *voir dire*. We find the record supports that conclusion as there is nothing in their responses that indicate the prospective jurors were anything less than candid.

[8] ¶ 14 Prospective Juror R.L., after giving the previously cited testimony regarding the murder of his wife, and at the request of defense counsel, was sequestered from the remainder of the jury pool and individual *voir dire* was conducted. At the end of which, he was excused for cause. Appellant has failed to show how this prospective juror's statements about his personal experiences, bereft of any personal opinions, impacted the remainder of the jury pool.

¶ 15 A recurring theme in Appellant's challenges to jury selection is that he was not given enough information to intelligently exercise his peremptory challenges. He claims the jury selection process was conducted in an "expedient manner" and that prospective jurors were not told what the law requires, but asked if they could follow it nonetheless.

¶ 16 The record reflects a very thorough *voir dire* was conducted spanning two and half days. Prior to the start of questioning, prospective jurors were informed of their purpose—to decide punishment—and given the three possible punishments. The trial judge explained the Bill of Particulars, the role of aggravating circumstances and mitigating evidence, the State's burden of proof, the process involved in finding the existence of an aggravating circumstance, the weighing of that evidence against the mitigating evidence and the determining of the appropriate sentence. The judge indicated the jury would receive all of this information in written instructions at the close of the evidence. The judge further informed the prospective jurors that a juror needed to be fair and impartial, able to listen to all of the evidence, and consider all three possible punishments.

¶ 17 The record in this case shows that the trial court did not rush through *voir dire*. There is no indication in the record that defense counsel was prevented from asking any questions pertinent to exercising peremptory challenges. Appellant used all nine peremptory challenges. However, nowhere in the record or appellate brief does he request additional challenges or specify which sitting jurors he would excuse if given additional challenges. Based upon this record, we find the trial court did not abuse its discretion in refusing the requests for questionnaires and individual sequestered *voir dire*. This proposition of error is denied.

[9] ¶ 18 In his fifth proposition of error, Appellant challenges the trial court's *sua sponte* removal for cause, over defense objections, of nine prospective jurors. Appellant asserts these removals were in violation of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) as the trial court failed to properly determine that these prospective jurors could not follow the law and consider all possible punishments.

[10] **[11]** ¶ 19 The decision whether to disqualify a prospective juror for cause rests in the trial court's sound discretion. *Grant v. State,* 2009 OK CR 11, ¶ 24, 205 P.3d 1, 13. ***648**

The trial court's decision will not be overturned unless an abuse of discretion is shown. *Id.* Once again, we generally defer to the impressions of the trial court, which can better assess whether a potential juror would be unable to fulfill his or her oath. *Id.*

[12] ¶ 20 "This Court has repeatedly recognized that the standard for capital juror acceptability in Oklahoma is whether, in a case where the law and facts make a defendant eligible for the death penalty, each juror will be willing to *consider* each of the three authorized punishments: the death penalty, life imprisonment without the possibility of parole, and life imprisonment (with the possibility of parole)." *Mitchell III,* 2006 OK CR 20, ¶ 39, 136 P.3d at 688–89 (emphasis in original). This Court will look to the entirety of the juror's *voir dire* examination to determine if the trial court properly excused the juror for cause. *Eizember,* 2007 OK CR 29, ¶ 42, 164 P.3d at 222.

¶ 21 Prospective Juror F.F. initially told the court "it was kind of hard to say" whether he could give meaningful consideration to all three punishments. (Tr. Vol. I, pg. 66). Upon further questioning by the court, it became clear the potential juror's knowledge of facts in an unrelated upcoming criminal trial would affect his ability to listen to the case against Appellant and make a decision. Despite the court's decision to excuse the juror, defense counsel was granted additional *in-camera* questioning. As a result, the prospective juror said that because of his knowledge of the other case, he could not be fair to either side in Appellant's case. Over defense counsel's objection, the court excused the juror, stating "he's got something external affecting him ... it's something that affects him from something else that would affect his ability to give both sides a fair trial." (Tr. Vol. I, pg. 70).

¶ 22 When asked if she could consider all three possible punishments or "are you excluding one or the other", Prospective Juror P.M. replied, "I would have to exclude one of the three." P.M. said her answer was unequivocal, she had felt that way for "quite a while", and there was nothing the trial judge could say that would convince her to change her mind. (Tr. Vol. I, pgs. 71–72).

¶ 23 Despite the court's decision to excuse her, defense counsel was allowed to *voir dire* P.M. further. In response to defense counsel's questions, P.M. said the death penalty was the penalty option she was not able to give meaningful consideration. She indicated she understood when defense counsel told her that she was still entitled to be a juror if she was able to put that personal opinion aside and follow the instructions of the court, that the court would never tell her she had to return a death verdict and just because she might have religious scruples against the death penalty, she could still sit as a juror. When asked if she was "in a position to be able to set your beliefs aside and follow the instructions of the court and listen to the evidence", P.M. replied, "I am against the death penalty and I would never vote for anyone's life to be taken." (Tr. Vol. I, pgs. 73–74).

¶ 24 In making her record concerning the excusal of P.M., defense counsel complained in part that the defense was entitled to know which punishment option a juror could not consider. The trial judge agreed to include that inquiry in his questioning of the remaining veniremen.

¶ 25 Prospective Juror S.A. told the court she had a "serious" problem considering all three punishments, that she was against the death penalty in all circumstances and that she was unequivocal in her decision. (Tr. Vol. I, pgs. 81). The following colloquy then occurred:

> THE COURT: Can you set that decision aside and render a verdict and decide the issues in this case based on the law and the evidence:
>
> PROSPECTIVE JUROR S.A.: I can decide a verdict.
>
> THE COURT: Pardon me?
>
> PROSPECTIVE JUROR S.A.: Decide a verdict?
>
> THE COURT: I'm sorry.
>
> PROSPECTIVE JUROR S.A.: I'm sorry.
>
> THE COURT: Okay, can you set aside your opinion and set it aside and not consider it any more and decide the issues in ***649** this case or are you period, no death penalty, no matter what.
>
> PROSPECTIVE JUROR S.A.: No matter what.

(Tr. Vol. I, pgs. 81–82).

¶ 26 Prospective Jurors N.B., K.D., K.B., and M.W. each said in turn that they could not give meaningful consideration to all three punishments, that they could not follow the court's instructions to consider all three punishments, and that their answers were unequivocal.

¶ 27 Prospective Juror J.W. said he could not give meaningful consideration to the death penalty and the life without parole option. He said there was no set of facts the court could give him that he could envision giving the death penalty or life without parole. J.W. said he was unequivocal in his determination that he could not consider those two punishment options, even if the court's instructions told him to give consideration to all three punishments.

¶ 28 Prospective Juror J.P. initially said he could not consider the death penalty because of religious scruples. Upon further questioning by the court, the prosecutor and defense counsel, the court found the juror had been equivocal in his answers regarding consideration of the death penalty. During an individual, sequestered *voir dire*, where he was questioned extensively by the court, the prosecutor and defense counsel, J.P. clarified his views and stated he could not consider all three punishments. In excluding J.P. for cause, the court noted that from observing him closely in chambers, J.P. was allowing matters outside the law and evidence, to influence his ability to consider to all three punishments.

¶ 29 As illustrated above, six of the challenged veniremen, N.B., K.D., K.B., M.W., J.W., and P.M. were unequivocal in their responses that they could not consider all three punishments. Because these prospective jurors could not consider all of the punishments provided by law, they could not discharge their duties as jurors. Accordingly, we find no abuse of discretion in their removal for cause. *Grant,* 2009 OK CR 11, ¶ 25, 205 P.3d at 13; *Patton v. State,* 1998 OK CR 66, ¶ 18, 973 P.2d 270, 282.

[13] ¶ 30 Any ambiguity in S.A.'s responses was cleared up by additional questioning from the trial court. In the potential juror's last recorded answer, she was unequivocal in her decision that she could not consider all three punishments. Therefore, we find no abuse of the trial court's discretion in excusing her for cause.

[14] ¶ 31 Appellant finds error in the trial court's refusal to allow the defense to further question the potential jurors. However, "[w]hen the proper questions have been asked by the trial court to determine whether prospective jurors can sit in the case, it is not error to deny defense counsel an opportunity to rehabilitate the excused jurors." *Littlejohn v. State,* 2004 OK CR 6, ¶ 49, 85 P.3d 287, 301–302. The initial question to each prospective juror was whether the juror could give meaningful consideration to all three possible punishments—life, life without parole and death. If the prospective juror indicated they could not consider all three punishments, in most cases the court went on to ask whether the juror could set aside their opinion and decide the issues in this case on the evidence and/or could the juror follow the court's instructions to consider all three punishments. [3] These were appropriate questions to ask the potential jurors. In the face of such unequivocal responses as in the present case, no further questioning was necessary. When the court received equivocal responses, such as those from F.F. and J.P. further questioning was conducted.

***650** ¶ 32 Appellant further challenges the death qualification questions asked by the trial court, arguing the court did not follow the uniform jury instructions. The record reflects that in his initial questioning, the trial judge followed the questions set out in Oklahoma Uniform Jury Instruction–Criminal (OUJI–CR 2d) 1–5. However, in further questioning, the court used the terms "meaningful consideration" and "equivocal", language not contained

in the uniform instruction. The record reflects the term "meaningful consideration" was used interchangeably with "consideration" or "consider" by the court, the prosecutor and defense counsel. While in a footnote to *Mitchell III*, we cautioned court's against attempts to define or further explain the term "consider", 2006 OK CR 20, ¶ 40, 136 P.3d at 690, n. 97, we find no error in the use of the term here. *See Powell v. State,* 2000 OK CR 5, ¶ 28, 995 P.2d 510, 520–521 (no error found in the trial court asking potential jurors if they could give "equal consideration" to the three sentencing options). There is no indication the term caused any confusion among the potential jurors.

¶ 33 Also in a footnote to *Mitchell III*, this Court "agree[d] with the trial court's initial approach of avoiding the word "unequivocal" when questioning prospective jurors" finding "the term could confuse many jurors." 2006 OK CR 20, ¶ 41, 136 P.3d at 690, n. 99. In the record before us, we find no indication the use of the term caused any confusion.

[15] ¶ 34 Contrary to Appellant's claim that all the jurors now challenged were excused due to their views on capital punishment, the record shows that F.F. and J.P. were properly excused due to the influence of outside matters affecting their ability to sit as fair and impartial jurors. As the trial court was able to directly observe and evaluate the nine potential jurors discussed in this proposition, we find no abuse of discretion in their dismissal for cause.

[16] ¶ 35 In Proposition VI, Appellant contends that limitations placed on counsel during *voir dire* hindered his intelligent exercise of peremptory challenges and denied him due process of law under the federal and state constitutions. Specifically, Appellant complains the trial court erred in: 1) refusing his request to introduce the prosecution's crime scene photographs and publish them to the venire; 2) refusing to advise the jury of the aggravating circumstances alleged and give a definition of mitigating evidence, and 3) limiting the questions he could ask concerning the jurors' views on the death penalty.

¶ 36 In denying the defense requests, the trial court noted, "you can't try the case in *voir dire*." (Tr. Vol. I, pg. 356). While we have previously noted that an important aspect of *voir dire* is to educate the jury on what will be asked of them under the law, *Eizember,* 2007 OK CR 29, ¶ 40, 164 P.3d at 208, it has long been recognized that a party is not to present evidence or argue the law during *voir dire.* In *Scott v. State,* 1982 OK CR 108, ¶¶ 15–16, 649 P.2d 560, 562, *quoting Kephart v. State,* 93 Okl.Cr. 451, 229 P.2d 224, 229 (1951) this Court stated:

> However the attorneys are not permitted to make statements of the law and seek to get a statement in advance of the trial as to how the jurors would decide the case on a given set of facts.
>
> In the examination of a venireman ... neither party has the right to assume the facts of the case in detail, and assume that the court will instruct the jury in a particular way ...

See also Jones v. State, 20 Okl.Cr. 154, 201 P. 664 (1921).[4]

¶ 37 In the present case, the crime scene photographs had not been admitted into evidence at the time defense counsel sought to show them to the jury. Therefore the trial court appropriately denied the defense's request. The defense was able to address the ***651** issue of the photographs as both the State and the defense were permitted to ask the potential jurors if they could be fair despite gruesome photographs of the crime scene.

[17] ¶ 38 The trial court sufficiently informed the potential jurors of the role of aggravating circumstances in a capital trial, the State's burden to prove those aggravators beyond a reasonable doubt, the role of mitigating evidence and the jury's duty to weigh the evidence in aggravation against that in mitigation. The trial court did not abuse its discretion in preventing defense counsel from discussing the specific aggravators alleged in this case as that would have been a premature entry into the specific facts of the case.

[18] ¶ 39 In support of his argument that the trial court improperly limited his questioning of potential jurors concerning their views on the death penalty, Appellant directs us to the questioning of potential juror J.W. Defense counsel asked for the juror's viewpoint on capital punishment. This inquiry brought an objection from the prosecutor. A lengthy bench conference ensued in which judge, prosecutor, and defense counsel discussed questions designed to elicit a potential juror's view on the death penalty. One of defense counsel's suggestions was that a numerical scale be used to gauge the jurors' support of the death penalty. After an objection from the prosecutor, defense counsel admitted she was not trying to elicit views on issues this Court has found inappropriate, *e.g.,* the deterrent effect and cost effectiveness of the death penalty. The trial court advised counsel the most effective question was, "are you in favor of the death penalty" or "are you not opposed to the death penalty?" (Tr. Vol. II, pgs. 418–427). Defense counsel objected and noted the questions she sought to ask the potential jurors. The trial judge explained that defense counsel's questions were "phrased in such a way as to open up the door to all kinds of things not admissible." (Tr. Vol. II, pgs. 426–427). Counsel then asked each potential juror which of two phrases better fit their viewpoint on capital punishment—"I am in favor of capital punishment as a sentencing option" or "I am not opposed to capital punishment as a sentencing option." (Tr. Vol. II, pgs. 428).

[19] ¶ 40 The trial court may properly restrict questions on *voir dire* that are repetitive, irrelevant or regard legal issues upon which the trial court will instruct the jury. *Patton,* 1998 OK CR 66, ¶ 9, 973 P.2d at 280. The trial court's limitations in the present case did not deprive the defense of information necessary to intelligently exercise peremptory challenges. Appellant's constitutional rights were not violated when the trial court restricted

the questioning on *voir dire* as an impartial jury was seated without the specific inquiries sought by Appellant. Appellant's reference to the questioning of prospective juror D.F. as an example of the need for additional questioning actually supports the conclusion that the trial court granted additional questioning when necessary. Despite saying he could be fair and impartial, potential juror D.F.'s answers were equivocal on whether he could consider the mitigating evidence. Defense counsel's request for additional questioning was granted. The additional questioning showed the prospective juror would not be able to listen and consider all of the mitigating evidence. Therefore, he was properly excused for cause.

¶ 41 A review of the record shows the trial court did not abuse its discretion in the manner in which *voir dire* was conducted. The record clearly shows defense counsel was allowed sufficient *voir dire* to determine if there were grounds to challenge a particular juror for cause and to intelligently exercise peremptory challenges. In many instances, defense counsel's request for individual *voir dire* was granted.

¶ 42 Now on appeal, Appellant has not stated how he would have used his peremptory challenges differently given additional information nor has he cited to any sitting juror with any prejudices against him. Our review of the record shows a jury free of outside influence, bias and personal interest was selected to hear Appellant's case. Therefore, given the traditionally broad discretion accorded to the trial judge in conducting *voir dire*, and our inability to discern any possible prejudice from not allowing further general questioning, we find Appellant's ***652** constitutional rights were not violated by *voir dire*. Appellant's challenges to jury selection are hereby denied.

Issues Relating to the Sentencing Stage of Trial

[20] ¶ 43 Appellant asserts in his first proposition of error that upon remand from the Tenth Circuit Court of Appeals he was entitled to a new trial on guilt/innocence rather than merely resentencing under 21 O.S.2001, § 701.10a. Appellant argues that § 701.10a provides only for resentencing when prejudicial errors are found in the sentencing stage of trial, and that as the *Brady*[5] violation found in his case was a first stage error, he is entitled to a new guilt/innocence trial irrespective of the Tenth Circuit's remand for resentencing only.

¶ 44 Appellant first raised his *Brady* claim to the United States District Court for the Western District of Oklahoma. He argued the rape and sodomy convictions should be found invalid as the State did not disclose exculpatory information regarding the rape and sodomy charges, and that his death sentence was therefore tainted and unreliable and should be vacated. *Mitchell v. Ward,* 150 F.Supp.2d at 1220–21. The Western District found a *Brady* violation had occurred and that such error undermined the confidence in the rape and sodomy verdicts.

Habeas relief as to those convictions was granted. *Id.* 150 F.Supp.2d at 1229, 1263. However, the Court found sufficient evidence supported the three aggravating circumstances, even without the rape and sodomy convictions, and upheld the death sentence. *Id.* 150 F.Supp.2d at 1230. The Western District denied habeas relief on all challenges to the murder conviction, thus leaving the conviction intact. *Id.*

¶ 45 On appeal to the Tenth Circuit Court of Appeals, Appellant argued the invalid rape and sodomy convictions required vacation of the death sentence. *Mitchell v. Gibson,* 262 F.3d at 1060. The Tenth Circuit found that Appellant had shown that absent the *Brady* violation, there was a reasonable probability the result of the sentencing proceeding would have been different. *Id.* 262 F.3d at 1066. Therefore, the Tenth Circuit granted habeas relief on the claim that Appellant's sentence violated his right to due process and ordered Appellant be resentenced. *Id.* 262 F.3d at 1066. Habeas relief was denied on all challenges to the murder conviction and that conviction was upheld. *Id.*

[21] **[22]** ¶ 46 Appellant now attempts to recast his *Brady* argument as an attack on the validity of the murder conviction, despite the fact he has never previously argued the error touched upon the reliability of his murder conviction. [6] Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). *Res judicata* precludes the relitigation of any issue that was "necessarily decided" in a prior proceeding. *U.S. v. Howe,* 590 F.3d 552, 556 (8th Cir.2009). To determine what was "necessarily decided", we look to the record of the prior proceeding. *Id.*

¶ 47 In determining whether Appellant's current *Brady* claim is *res judicata,* we find the history of the proceedings in this case shows that two different federal courts have decided that the prosecution's suppression of exculpatory evidence relating to the rape and sodomy charges did not cast doubt on the validity of the murder conviction. In reaching this conclusion, the record shows the Western District and Tenth Circuit did not consider the *Brady* violation in a vacuum, but adjudicated the error in context of the overall trial. [7] The record shows the federal courts fully considered every dimension of the *Brady* ***653** violation, including its possible effect on Appellant's murder conviction. In upholding the validity of the murder conviction, the Western District and Tenth Circuit impliedly, if not explicitly, concluded the *Brady* violation had no effect on the underlying murder conviction. Whether Appellant was entitled to a new guilt/innocence trial on the murder conviction was necessarily decided by the federal courts. Therefore, his current challenge to the validity of that conviction is barred by the doctrine of *res judicata*. *See Pickens v. State,* 2001 OK CR 3, ¶ 16, 19 P.3d 866, 875. [8] *See also Wells v. Sheriff, Carter County,* 1968 OK CR 109, ¶ 20, 442 P.2d 535, 540 (full faith and credit must be accorded a final judgment of a foreign state

or the federal courts so long as it is sufficiently shown that such court possessed jurisdiction to determine the issues involved). This proposition of error is denied.

[23] ¶ 48 In Proposition II, Appellant contends he should have been accorded a *Jackson v. Denno*[9] hearing at his resentencing trial. Appellant's custodial statements have repeatedly been found voluntary. *See Mitchell I,* 1994 OK CR 70, ¶¶ 12–14, 884 P.2d at 1194–1195[10]; *Mitchell v. Ward,* 150 F.Supp.2d at 1213[11]; *Mitchell v. Gibson,* 262 F.3d at 1060.[12] Appellant did not seek a petition for rehearing or rehearing *en banc* before the Tenth Circuit nor a petition for a writ of certiorari in the United States Supreme Court to challenge the denial of his involuntary statement claim.

¶ 49 The admissibility of Appellant's previously determined voluntary statements is specifically permitted under 21 O.S.2001, § 701.10a(4) ("[a]ll exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding").

¶ 50 The only new argument raised by Appellant is that at the second resentencing trial, Detective Maddox testified that Appellant was a suspect when the interviews with police began on September 8, 1991, while in 1992 Detective Maddox testified that Appellant was not a suspect when the interviews began and did not become a suspect until later that day. Contrary to Appellant's claim, this change in testimony does not cast the entire police interview in a different light. ***654** Detective Maddox testified in 1992 and in 2007 that Appellant was *Mirandized*[13] prior to the beginning of the police interview on September 8, 1991. *Mitchell I,* 1994 OK CR 70, ¶ 5, 884 P.2d at 1192. Maddox's 2007 testimony at most shows a witness with a faulty memory. The trial court's failure to hold a second *Jackson v. Denno* hearing is not grounds for relief. This proposition is denied.

[24] ¶ 51 In his third proposition of error, Appellant asserts the trial court erred in admitting his testimony from his first trial claiming its admission violated the due process guarantees of the federal and state constitutions. Relying on *Harrison v. United States,* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968) and *Littlejohn v. State,* 2004 OK CR 6, 85 P.3d 287, Appellant argues it was error to admit his prior testimony because his testimony was induced by the false and misleading evidence given by state's witness Joyce Gilchrist. Appellant asserts that but for Ms. Gilchrist's testimony in the first trial, that the semen she found on rectal and vaginal swabs were consistent with Appellant, he would not have testified to specifically deny the rape and sodomy charges.

¶ 52 In *Littlejohn*, this Court stated:

> In *Harrison,* 392 U.S. at 222, 88 S.Ct. at 2010, the Supreme Court recognized the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. "A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." *Id.* However, where a defendant, like in *Harrison,* is compelled to testify to rebut inadmissible confessions sponsored by the State, later use of the defendant's former testimony against him is prohibited. *Id.*

2004 OK CR 6, ¶ 31, 85 P.3d at 298.

¶ 53 Appellant's argument focuses on a small portion of his trial testimony; his responses to three questions by the prosecutor in which he unequivocally denied raping or sodomizing the deceased. Appellant concedes that the remainder of his testimony was cumulative to that of other witnesses.

¶ 54 In *Mitchell III*, this Court stated that based upon the evidence, the prosecution was prohibited from arguing that Appellant raped the deceased but the State could argue that Appellant attempted to rape the deceased. 2006 OK CR 20, ¶ 32, 136 P.3d at 687, n. 82. Reading the challenged testimony in context, no reference is made to the filing of any criminal charges against Appellant for rape or sodomy. Appellant's responses negate any implication of having committed either offense. His brief denials were the only testimony addressing the tainted Gilchrist evidence. The record shows that the reason Appellant took the witness stand in his first trial was to explain why he had given so many different stories to the police, both before and after he was arrested, and to exculpate himself and inculpate "C. Ray." In light of testimony from witnesses at the scene placing Appellant there both before and after the murder, and evidence of his shoe print found in the deceased's blood, Appellant's claim that but for the Gilchrist testimony he would not have testified is untenable.

¶ 55 Even if this brief portion of Appellant's prior trial testimony should have been excluded, any error stemming from its admission was harmless beyond a reasonable doubt and did not contribute to the death sentence. Evidence of Appellant's attempted rape of the deceased was presented in support of the "avoid arrest" aggravator. That aggravator was rejected; the jury finding the evidence sufficient to establish the existence of only the "heinous, atrocious or cruel" aggravator. As discussed later in this opinion, this aggravator was supported by sufficient evidence, separate and apart from evidence of any sexual assault of the deceased. Therefore, Appellant's request to vacate his death sentence due to the introduction of this ***655** limited portion of his trial testimony is denied.

[25] ¶ 56 In his seventh proposition of error, Appellant challenges the admission of photographs of the deceased and the crime scene. He claims that fourteen (14) crime scene photographs showing the deceased's partially nude, beaten body; eleven (11) autopsy photographs and thirty (30) general crime scene photographs were gruesome and unfairly prejudicial because the State did not publish them to the jury at the time of their introduction but waited until closing argument. Defense counsel's objection at trial has properly preserved the issue for appellate review.

[26] **[27]** **[28]** ¶ 57 The admissibility of photographs is a matter within the trial court's discretion and absent an abuse of that discretion, this Court will not reverse the trial court's ruling. *Warner,* 2006 OK CR 40, ¶ 167, 144 P.3d at 887. Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect. *Id.* The probative value of photographs of murder victims can be manifested in numerous ways, including showing the nature, extent and location of wounds, establishing the *corpus delicti,* depicting the crime scene, and corroborating the medical examiner's testimony. *Id.*

¶ 58 Many of the photographs in this case were introduced during the testimony of Tom Bevel and illustrated his theory of blood spatter and blood transfer evidence. Bevel testified that the deceased had been stabbed in the neck with the school compass [14] that was found underneath her. He also testified the blood smear and blood transfer evidence showed that the deceased was moving during the attack and that the attack was particularly violent and brutal. Photographs illustrating this testimony aided the jury in understanding the nature of the attack on the deceased and helped explain the final location of her body.

¶ 59 Autopsy photographs supported the testimony of the medical examiner and aided the jury in understanding the nature of the wounds suffered by the deceased. The photographs were relevant to support the State's allegation of the existence of the "heinous, atrocious or cruel" aggravator as they showed the deceased suffered serious physical abuse prior to her death.

¶ 60 Appellant's argument that the photographs were unduly prejudicial because the manner of death was not disputed has been previously rejected by this Court. *See Patton,* 1998 OK CR 66, ¶ 59, 973 P.2d at 290. Likewise, Appellant's argument that the photographs were unduly prejudicial because his guilt was not contested fails. Title 21 O.S.2001, § 701.10a specifically provides that "[a]ll exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding[.]" *See Fitzgerald v. State,* 2002 OK CR 31, ¶ 11, 61 P.3d 901, 905.

¶ 61 Further, Appellant's argument that the photographs were unduly prejudicial because they were gruesome does not warrant relief. In *Patton,* we said:

> The fact that the photographs may be gruesome does not of itself cause the photographs to be inadmissible. "Gruesome crimes result in gruesome pictures." *McCormick v. State,* 845 P.2d 896, 898 (Okl.Cr.1993). There is no requirement that the visual effects of a particular crime be down played by the State. *Id.* "The only consideration to be made is whether the pictures are unnecessarily hideous, such that the impact on the jury can be said to be unfair". *Id.*

1998 OK CR 66, ¶ 60, 973 P.2d at 290.

¶ 62 As neither the manner of death nor Appellant's guilt is disputed, "[w]e are unable to sympathize with Appellant when he complains that the photos are graphic and are somewhat confused that he would expect them to be otherwise." *Smallwood v. State,* 1995 OK CR 60, ¶ 35, 907 P.2d 217, 228.

***656** ¶ 63 Appellant's complaint about the volume of photographs also does not warrant relief. In *Mitchell III,* this Court was troubled by the admission of photographs of the crime scene as well as a videotape of the crime scene showing the deceased's body. 2006 OK CR 20, ¶ 53, 136 P.3d at 695. This Court found much of the evidence was admissible, but the trial court had abused its discretion by failing to properly constrain the State in its presentation of the evidence, much of which was cumulative. *Id.* The record of this second resentencing reflects that the trial court was well aware of this Court's rulings in *Mitchell III*, and worked hard not to commit the same errors. The crime scene videotape was not admitted into evidence in the second resentencing and the number of photographs admitted was reduced. While there was some duplication in the images reflected in the photographs, Appellant has failed to meet his burden of showing the repetition was needless or inflammatory. *Warner,* 2006 OK CR 40, ¶ 168, 144 P.3d at 887.

[29] ¶ 64 Finally, Appellant finds error in the prosecution's publication of some of the photographs during closing argument, instead of when they were introduced during a witnesses' testimony. Defense counsel argued at trial that withholding the photographs throughout trial until closing argument was so inflammatory as to violate due process and fundamental fairness. Denying Appellant's objection, the trial court found the photographs had been admitted into evidence therefore they could be published to the jury and the jury could take them to deliberations. The judge noted that many of the photographs had been cropped and cut down and that the total number of admissible photographs had been reduced.

¶ 65 Appellant does not cite any authority requiring that all exhibits admitted into evidence be published prior to closing argument. Further, he has failed to show any prejudice resulting from the timing of the admission of the photographs.

¶ 66 Having found the photographs relevant, they may still be excluded from evidence if the probative value of the photographs is outweighed by their prejudicial impact on the jury. 12 O.S.2001, § 2403. "In reviewing the prejudicial impact of photographs this Court has said that '[w]here the probative value of photographs ... is outweighed by their prejudicial impact on the jury that is, the evidence tends to elicit an emotional rather than rational judgment by the jury then they should not be admitted into evidence.' " *Short v. State,* 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094. Applying that standard to this case, we find the photographs introduced were probative and that probative value was not outweighed by any prejudicial impact. The evidence overwhelmingly supported the "heinous, atrocious or cruel" aggravator and there is no indication the jury's verdict was an emotional response rather than a rational judgment based on the evidence.

¶ 67 Based upon our review of the photographic evidence introduced in this case, we find the errors committed in the first resentencing concerning admission of this evidence were not repeated in this case. The trial court properly "constrained" the State's presentation of this evidence and did not abuse its discretion in the admission of the photographs. This proposition of error is denied.

[30] ¶ 68 In his eighth proposition of error, Appellant argues that the crime scene reconstruction testimony of Tom Bevel was unnecessary and usurped the fact finding function of the jury. As in the 2002 resentencing trial, Bevel's crime scene reconstruction testimony was used to help establish the various events involved in Appellant's attack upon the deceased and the most likely sequence of those events. In *Mitchell III,* this Court summarized Bevel's testimony at Appellant's 2002 resentencing trial:

> Bevel testified extensively about what the physical evidence at the crime scene—including the bloodstain patterns, the position of Scott's body, the location of various objects, *etc.*—suggested about the "weapons" Mitchell used to attack Scott (including his hands, a golf club, a compass, and a coat rack) and the order in which they were used. Bevel also testified about the likelihood of some type of sexual attack ***657** upon Scott prior to her death. He noted hip bruises consistent with someone exerting pressure in this area, and also that the lack of significant blood on her clothing was inconsistent with a scenario in which the clothing was removed after her death.

2006 OK CR 20, ¶ 68, 136 P.3d at 700–01, n. 150.

¶ 69 Bevel's testimony in the 2007 resentencing was substantially the same. In *Mitchell III,* this Court found Bevel's testimony establishing the various events involved in Appellant's attack upon the deceased and the most likely sequence of those events relevant to the jury's determination regarding the "heinous, atrocious, or cruel" aggravating circumstance. *Id.* 2006 OK CR 20, ¶ 68, 136 P.3d at 701. We do so again.

¶ 70 Appellant also argues Bevel's testimony was unreliable as he could not say how long the entire event lasted from start to finish, and his theory that it all happened in at most five minutes was simply impossible. The starting point for the sequence of events which included the deceased's murder was the departure of Carolyn Ross from the Pilot Center and ended with the arrival of Allen Briggs at the Center. Both Ms. Ross and Mr. Briggs gave approximate times for their departure and arrival. Bevel testified that due to these approximate times, he did not have sufficient information to say exactly how long the assault inside the Pilot Center lasted. The weight and credit to be given Bevel's testimony was within the province of the jury. *See Bland v. State,* 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714.

[31] ¶ 71 Relying on 12 O.S.2001, § 2403, Appellant also argues Bevel's testimony was needlessly cumulative to that of Carolyn Ross and Captain Vance Allen. Section 2403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise. When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. *Mayes v. State,* 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310.

¶ 72 Ms. Ross and Captain Allen testified to events occurring immediately before and after Appellant's assault on the deceased. Bevel's expert testimony was based in part on evidence provided by Ross and Allen. His testimony exceeded that given by Ross and Allen and his references to their testimony showed how the various accounts of that day were interconnected. Contrary to Appellant's argument, the order in which the events of January 7, 1991, occurred was relevant in the resentencing proceeding as it showed that the deceased suffered serious physical abuse prior to her death thus establishing the aggravator of "especially heinous, atrocious or cruel." Appellant was not denied a fair sentencing by the admission of the crime scene reconstruction testimony. This proposition is denied.

[32] ¶ 73 In Proposition IX, Appellant asserts the DNA evidence should have been suppressed as the State failed to prove the chain of custody. Specifically, he complains that no evidence was introduced to indicate where samples sent by Joyce Gilchrist to Brian Wraxall came from and at what point Ms. Gilchrist obtained them. [15] Appellant raised this objection before the trial court and has therefore properly preserved the issue for appellate review. [16]

[33] **[34]** ¶ 74 The purpose of the chain of custody rule is to guard against substitution of or tampering with the evidence between the time it is found and the time it is analyzed. *Alverson v. State,* 1999 OK CR 21, ¶ 22, 983 P.2d 498, 509. Although the State has the burden of showing the evidence is in substantially the same condition at the time of offering as when the crime was committed, ***658** it is not necessary that all possibility of alteration be negated. *Id.* If there is only speculation that tampering or alteration occurred, it is proper to admit the evidence and allow any doubt to go to its weight rather than its admissibility. *Id.*

¶ 75 Mr. Wraxall testified that in 1992 he performed DNA analysis on evidence received from the Oklahoma City Police Department Laboratory. In a further analysis conducted in 2002 he extracted a sperm cell from a sample of semen found on the deceased's body. He compared the DNA found therein to the DNA in a known blood sample from Appellant and discovered the DNA profiles matched with the odds of anyone else having the same DNA as 1 in 9 trillion.

¶ 76 On cross-examination, Mr. Wraxall said that all of the samples he tested he had received from Ms. Gilchrist. He said he did not know how the samples were collected or where they had been before he received them. Ms. Gilchrist was not a witness in this resentencing proceeding.

¶ 77 Evidence at the resentencing established that Appellant admitted to masturbating on or near the deceased's body and that the semen found on the deceased's body could have only come from ejaculate onto the deceased's body or the sheet in which her body was carried from the crime scene. Appellant offers only speculation that some sort of tampering or substitution of evidence occurred prior to the time Gilchrist sent the evidence to Wraxall. Therefore, any doubts about the credibility of the evidence went to its weight not its admissibility. This proposition is denied.

[35] ¶ 78 In Proposition XI, Appellant contends that as he was only two weeks past his eighteenth birthday when he killed the deceased, the proscription against capital punishment of juvenile murderers set forth in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), should be extended to him in light of the mitigating evidence he presented. Appellant's motion to dismiss the Bill of Particulars on this ground was overruled by the trial court.

¶ 79 This is an issue of first impression for this Court. In *Roper,* the United States Supreme Court declared it unconstitutional under the Eighth Amendment for a state to execute any individual who was under the age of eighteen (18) at the time of the offense. Noting that a majority of states have rejected the imposition of the death penalty on juveniles under 18, the

Court found evidence sufficient to demonstrate a "national consensus".[17] 543 U.S. at 564, 125 S.Ct. at 1192. "The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." *Id.* In justifying the prohibition of the death penalty on those less than 18 years of age, the Supreme Court noted three general differences between juveniles under 18 and adults which demonstrated that juvenile offenders cannot with reliability be classified among the worst offenders. These three factors were lack of maturity and an underdeveloped sense of responsibility, vulnerability to outside influences, and that a juvenile's character is not as well formed as that of an adult. 543 U.S. at 569, 125 S.Ct. at 1195. Appellant recognizes the application of *Roper* but asserts his lack of maturity and an underdeveloped sense of responsibility, his vulnerability to outside influences, and character deficiencies exclude him from the death penalty.

¶ 80 In *Bowling v. Commonwealth of Kentucky,* 224 S.W.3d 577 (Ky.2006), the appellant argued for an extension of *Roper* to offenders who committed murder while their mental age was less than 18 years. The appellant argued that the three factors relied on in *Roper* applied to him because his mental age was below 18 years due to his mental retardation. In rejecting the appellant's argument, the *Bowling* Court noted that *Roper* had established a "bright line demarcation", stating, "[t]he age of 18 is the point where society draws the line for many purposes ***659** between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Id.* 224 S.W.3d at 580. The *Bowling* Court held that "[t]he plain language of *Roper* compels the conclusion that its prohibition is limited to 'the execution of an offender for any crime committed before his 18th birthday....' " *Id.* at 583 *quoting Roper*, 543 U.S. at 588, 125 S.Ct. at 1206, 161 L.Ed.2d at 38 (O'Connor, J. dissenting).

¶ 81 The *Bowling* Court noted it was not unaware of the concept of juvenile mental age as a basis to preclude the death penalty as discussed in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). *Id.* However, finding no language in *Roper* to support such a conclusion and that the Supreme Court "would have explicitly adopted mental age as a criterion had it wished to do so," the appellant's failure to cite any published authority prohibiting the death penalty based upon "juvenile mental age," and his failure to demonstrate a national consensus that mental age should be a criterion by which to exclude the death penalty, the *Bowling* Court concluded that *Roper* only prohibited the execution of those offenders whose chronological age was below eighteen at the time of the commission of the offense. *Bowling,* 224 S.W.3d at 584.

¶ 82 We find the *Bowling* decision well reasoned and persuasive. Appellant has not cited any authority to the contrary. The U.S. Supreme Court has drawn a bright line at eighteen (18) years of age for death eligibility and we therefore reject Appellant's argument that being two weeks beyond his eighteenth birthday at the time of the murder exempts him from capital

punishment. Under the plain language of *Roper*, the prohibition against capital punishment is limited to the execution of an offender for any crime committed before his 18th birthday.

[36] ¶ 83 Appellant further argues *Roper* prohibits the use of juvenile adjudications to support aggravating circumstances. The trial court overruled Appellant's motion to preclude use of his juvenile adjudication of rape pursuant to *Roper*. Again, this is a case of first impression for this Court.

¶ 84 This Court has consistently held that evidence of unadjudicated bad acts, non-violent bad acts and juvenile offenses are admissible in a capital case to prove a defendant constitutes a continuing threat to society. *Douglas v. State,* 1997 OK CR 79, ¶¶ 85–87, 951 P.2d 651, 675–76 and cases cited therein. Nothing in the language of *Roper* suggests that the State is prohibited from relying on prior juvenile adjudications to support an aggravating circumstance.

¶ 85 This conclusion is not novel. In *Lowe v. State,* 2 So.3d 21, 46 (Fla.2008) the appellant claimed that his death sentence was unconstitutional because the State used prior convictions which arose from crimes committed by Lowe before he was eighteen years of age to establish an aggravating factor, and that the use of the juvenile convictions is in violation of the Eighth Amendment and *Roper v. Simmons.* The Florida Supreme Court rejected the argument stating "*Roper* does not stand for this proposition." *Id.*

¶ 86 In *United States v. Wilks,* 464 F.3d 1240 (11th Cir.2006) the appellant argued that *Roper* prohibited the use of his youthful offender convictions for sentence enhancement. In rejecting this argument, the Eleventh Circuit Court of Appeals stated:

> Our conclusion that youthful offender convictions can qualify as predicate offenses for sentence enhancement purposes remains valid because *Roper* does not deal specifically—or even tangentially—with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. *Roper* does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.

464 F.3d at 1243.

¶ 87 We find nothing in *Roper* to support Appellant's claim of exclusion from the death penalty and no abuse of discretion in the trial court's admission of Appellant's prior juvenile adjudication to support the "continuing threat" aggravator. Further, Appellant has failed to show any resulting prejudice by the admission of his juvenile adjudication as the ***660** jury

rejected both the "continuing threat" and the "avoid arrest" aggravators that relied on the evidence. This proposition is therefore denied.

Jury Instructions

[37] ¶ 88 In Proposition XII, Appellant contends the trial court erred in failing to instruct the jury to give consideration to any questions it might have concerning Appellant's guilt of first degree murder. His claim is based on a note received from the jury during deliberations asking whether Appellant had been convicted of premeditated murder. Appellant asserts the note indicates that at least one juror harbored some doubt regarding the murder conviction. We review only for plain error as this objection is being raised for the first time on appeal. *Bernay v. State,* 1999 OK CR 37, ¶ 49, 989 P.2d 998, 1012.

[38] ¶ 89 Resentencing proceedings should not be viewed as a second chance at revisiting the issue of guilt. *Rojem v. State,* 2006 OK CR 7, ¶ 56, *130 P.3d 287,* 299. Evidence relating to residual doubt is "not relevant to the defendant's character, record, or any circumstance of the offense." *Id. quoting Bernay,* 1999 OK CR 37, ¶ 50, 989 P.2d at 1012. To tell the jury as defense counsel did in opening statement that Appellant had been convicted of first degree murder, yet later tell them to consider residual doubt as mitigation evidence would be inconsistent and confusing. *Rojem,* 2006 OK CR 7, ¶ 55, 130 P.3d at 298. We find no plain error in the trial court's failure to instruct the jury on residual doubt.

Victim Impact Evidence

[39] ¶ 90 In his thirteenth proposition of error, Appellant raises three challenges to the victim impact evidence; 1) it focused solely on the emotional aspect of the family's loss and described the Scott's family life prior to the homicide, 2) it operates as a super aggravator under Oklahoma's death penalty scheme and has no place in our weighing system, and 3) OUJI–CR (2d) 9–45 improperly instructed the jury as to the scope of victim impact evidence.

¶ 91 Three victim impact witnesses testified at the re-sentencing—the deceased's father, mother, and brother. This testimony comprised only eleven pages out of the 1,664 pages of transcript. The victim impact statements appear to be substantially the same as those given in the first re-sentencing trial. Cognizant of our review of the evidence presented in the first re-sentencing proceeding, the trial court reviewed the statements *in camera* and significantly pared them down. Having thoroughly reviewed the victim impact statements given in this case, we find they did not focus too much on the emotional aspects of the decedent's death

or her family's life prior to her death. Therefore, the evidence did not violate due process or deprive Appellant of a fair sentencing proceeding.

¶ 92 Appellant's claim that victim impact evidence acts as a "super aggravator" is *res judicata* as the same claim was raised and rejected by this Court in *Mitchell III,* 2006 OK CR 20, ¶ 76, 136 P.3d at 703. We will not consider the issue further.

[40] ¶ 93 The uniform jury instruction on victim impact evidence, OUJI–CR (2d) 9–45, states in pertinent part:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. It is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family.

¶ 94 Appellant initially requested this instruction be given to the jury. Later, Appellant again included the "unique loss to society" language in proposed instructions. However, during the settling of the instructions at the close of evidence, Appellant objected to the term "society" being included in the instruction arguing the term made the instruction broader than the statute which addresses the impact of the crime on the family. The trial court overruled the defense ***661** objection as the instruction given was the uniform instruction.

¶ 95 In his appeal to the first re-sentencing, Appellant raised the same objection to the "loss of society" language. This Court stated in part:

> [V]ictim impact evidence suggesting that a particular victim was a uniquely valuable member of his or her community and our society is not *per se* inadmissible in a capital sentencing proceeding. Furthermore, we conclude that the single reference to the "loss to society" within our uniform jury instruction is constitutional and is also appropriate under Oklahoma law. Hence this portion of Mitchell's victim impact claim is rejected.

2006 OK CR 20, ¶ 80, 136 P.3d at 703–04.

¶ 96 Appellant's current challenge to the instruction is *res judicata* and we will not revisit the issue further.

Prosecutorial Misconduct

[41] **[42]** ¶ 97 Appellant asserts in his fourteenth proposition of error that four areas of prosecutorial misconduct deprived him of a fair sentencing proceeding. In reviewing this claim, we evaluate the alleged misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Hanson,* 2009 OK CR 13, ¶ 18, 206 P.3d at 1028. We are mindful that parties have great latitude in making arguments and drawing inferences from the evidence; we will not grant relief unless a defendant is deprived of a fair trial and is prejudiced by improper argument. *Id.*

[43] ¶ 98 Appellant first argues that from *voir dire* through closing argument, the prosecutor improperly equated justice with the death penalty and gave her personal opinion that death was the only just verdict. We review only for plain error as none of the remarks now challenged were met with contemporaneous objections at trial. *Bland,* 2000 OK CR 11, ¶ 89, 4 P.3d at 726.

¶ 99 A review of the comments made in *voir dire* does not support Appellant's argument. None of the comments equate justice with the death penalty or express the prosecutor's personal opinion on the death penalty. At most, the prosecutor got the prospective jurors to agree that the trial should be a search for the truth and that the result should be justice. Other comments suggested that justice might be a sentence other than death. We find no plain error in the prosecutor's *voir dire* comments.

[44] ¶ 100 As for closing arguments, the prosecutor's arguments were based on the evidence and focused on the jurors' duty to apply the law and the evidence and return the appropriate verdict. The comments did not convey the message that the jury had to vote for the death penalty or that they were to decide the case based on emotional reaction. *See Moore v. State,* 1987 OK CR 68, ¶ 33, 736 P.2d 161, 167. We find no plain error.

[45] ¶ 101 Next, Appellant asserts the State presented testimony of and repeatedly referred to the initial rape charges against Appellant despite this Court's opinion in *Mitchell III* prohibiting such evidence and argument. Appellant admits that some incidents were inadvertent but argues that other instances were purposeful, and regardless, the statements were "particularly prejudicial".

¶ 102 In *Mitchell III,* this Court found "that the evidence at the crime scene is sufficient for the State to argue that Mitchell attempted to rape Scott..." 2006 OK CR 20, ¶ 32, 136 P.3d at 687. Further, this Court concluded that "a completed 'rape' is not a legally permissible inference

that the State can argue." *Id.* at n. 82. Therefore, in the second re-sentencing proceeding, evidence that Appellant had attempted to rape the deceased then killed her because she could identify him was properly presented and argued in support of the "avoid lawful arrest" aggravator.

¶ 103 Twice during closing argument, the prosecutor said "rape" instead of "attempted rape." In the first instance, the prosecutor immediately corrected herself. Defense counsel objected, and the trial court admonished the jury that the prosecutor "stumbled ***662** over some of the evidence and incorrectly stated something. Please disregard that part." (Tr. Vol. IX, pgs. 1547–1550).

¶ 104 After the second reference to a "rape," defense counsel objected and the prosecutor told the court it was inadvertent, that she meant to say "attempted rape." The trial court overruled the defense objections and admonished the prosecutor not to do it again. Thereafter, the prosecutor referred to the evidence of the "sexual assault".

¶ 105 The prosecutor's references to rape instead of attempted rape were minimal and appear to be inadvertent. Even if the references were intentional, Appellant has failed to show any prejudice. The improper term was used only twice in a closing argument covering 26 pages of transcript. The evidence was introduced to support the "avoid arrest" aggravator; however the jury did not find that aggravator was supported by the evidence. Appellant has failed to show any resulting prejudice or impact on the sole aggravator found by the jury as the "heinous, atrocious, or cruel" aggravator was supported by sufficient evidence, apart from any reference to a sexual assault. We are not convinced that the prosecutor's improper remarks rendered Appellant's resentencing trial unfair.

¶ 106 Appellant also argues the State introduced needless cumulative evidence about the crime scene and the homicide in an attempt to strengthen the evidence supporting the "heinous, atrocious, or cruel" aggravator. Specifically, Appellant asserts the admission of the photographs and cumulative testimony of Ms. Ross, Capt. Allen and Mr. Bevel went beyond what was necessary for the limited purpose of re-sentencing.

¶ 107 As addressed in Proposition VII, herein, admission of the photographic evidence and presentation to the jury was proper and not needlessly cumulative or unduly prejudicial. In Proposition VIII, herein, we found the crime scene reconstruction testimony of Mr. Bevel relevant and not cumulative. Appellant has not presented any new arguments in this proposition which cause us to reconsider our conclusions. Therefore, the presentation of the evidence and arguments to the jury were not indicative of prosecutorial misconduct. This proposition is denied.

Aggravating Circumstances

¶ 108 Appellant argues in Proposition X that the trial court erred in instructing the jury on the "continuing threat" aggravator when his prior re-sentencing jury had failed to unanimously find the aggravator beyond a reasonable doubt. We have previously rejected this argument in *Hogan v. State,* 2006 OK CR 19, ¶¶ 52–59, 139 P.3d 907, 926–930 and *Harris v. State,* 2007 OK CR 28, ¶ 13, 164 P.3d 1103, 1110. Appellant's arguments to the contrary are not persuasive.

¶ 109 Further, Appellant's request for relief is unavailing as the jury rejected the "continuing threat" aggravator in this second re-sentencing proceeding finding only the existence of the "heinous, atrocious or cruel" aggravator. As addressed in our mandatory sentence review, sufficient evidence was presented to support the aggravator found by the jury. This proposition is denied.

[46] ¶ 110 In Proposition XV, Appellant asserts the "heinous, atrocious, or cruel" aggravator is unconstitutionally vague and overbroad as applied, and that the evidence was insufficient to support the aggravator. The first part of Appellant's argument is *res judicata* as he has previously challenged the constitutionally of the aggravator. In *Mitchell III,* we said:

> In Proposition XIV, Mitchell argues that the "heinous, atrocious, or cruel" aggravating circumstance is "unconstitutionally vague and applied in an overbroad manner." We have repeatedly rejected the claim that this aggravator, as narrowed by this Court, is unconstitutionally vague. In addition, we have recently addressed the argument that this aggravator is "overbroad as applied" and explained that an aggravating circumstance does not become "overbroad" based upon the manner it is applied to particular cases.

2006 OK CR 20, ¶ 104, 136 P.3d at 711.

[47] ¶ 111 In challenging the sufficiency of the evidence to support the aggravator, Appellant again argues that certain evidence ***663** was improperly admitted. Specifically he refers to the crime scene reconstruction testimony of Tom Bevel, and the crime scene photographs. We have previously found both the crime scene reconstruction testimony and the crime scene photographs properly admitted. *See* Propositions VII and VIII herein.

¶ 112 Appellant further argues that absent the improperly admitted evidence there is insufficient evidence to support the "heinous, atrocious or cruel" aggravator. This same argument was raised and rejected in *Mitchell III,* wherein this Court found the supporting evidence "simply compelling", noting in 223, "[t]he properly admitted evidence

overwhelmingly established 'serious physical abuse' by Mitchell, resulting in 'conscious physical suffering' by Scott". 2006 OK CR 20, ¶ 105, 136 P.3d at 711, n. 223. [18]

¶ 113 On habeas review of the original judgment and sentence, the United States District Court for the Western District found the evidence presented at trial sufficient to support the aggravator stating:

> Given the horrific nature of the assault on Ms. Scott prior to her death, including the evidence of struggle which was introduced at trial, there is absolutely no question that the heinous, atrocious and cruel aggravator is well-supported in this case.

150 F.Supp.2d at 1230.

¶ 114 The evidence supporting the aggravator presented at the second re-sentencing appears to be the same as that presented at the first re-sentencing and at the initial trial. The summary of the supporting evidence contained in 54 of the Western District's opinion appropriately summarizes the evidence presented to the jury at the second re-sentencing.

> For example: Ms. Scott's clothes were laying beneath a bulletin board which had been knocked off the wall. The phone cord had been yanked from the phone so that the phone would not work. Blood and brain matter were spattered around Ms. Scott's body, down her back, on the door frame and door, and six and one-half to seven feet up the wall. According to the medical examiner, Ms. Scott's brain could be seen on external exam and the "brain was massively torn. There were a lot of wood ... splinters in the wound, in the hair. One of the wood splinters had literally been driven into [sic] the-through the brain and into the internal part of the skull. There was a massive skull fracture which ran across the skull from ear to ear on the inside part of the skull." *Id.* at 878. These wounds were caused by approximately four or five blows with a wooden coat tree. *Id.* at 878–79. Ms. Scott also had a laceration to her scalp which could have been made with a golf club which was found at the scene, broken. *Id.* at 879–80. In addition, Ms. Scott had various abrasions and lacerations to her face, as well as a fractured nose and chipped tooth, all caused by a blunt force such as a blow from the golf club. *Id.* at 880–81. There were also five puncture wounds around Ms. Scott's neck which could have been caused by a compass which was found beneath Ms. Scott's body. *Id.* at pp. 882–83. There were multiple bruises on her arms, left shoulder, knees, pelvic area and legs. *Id.* at 885–86. There were also scratches and abrasions on Ms. Scott's back and buttocks, as well as her fingers. *Id.* Finally, two of Ms. Scott's ribs were fractured. *Id.*

Id. at n. 54 (internal citations to the record omitted).

¶ 115 Although the Western District's opinion was ultimately overruled and Appellant's case was eventually sent back for re-sentencing, the finding that the "heinous, atrocious or cruel" aggravator was supported by sufficient evidence has remained unchanged.

[48] **[49]** ¶ 116 When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, this Court reviews the evidence in the light most favorable to the ***664** State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt. *Jones v. State,* 2009 OK CR 1, ¶ 78, 201 P.3d 869, 889. To prove the "especially heinous, atrocious or cruel" aggravator, the State must show that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty. *Id.* After making the above determination, the attitude of the killer and the pitiless nature of the crime can also be considered. *Id.*

¶ 117 The decedent was first assaulted by Appellant in the Center's library and in a desperate attempt to get away from him, ran for the innermost room of the Center's staff office where she could lock the door behind her and phone for help. However, before she could secure herself behind the locked door, Appellant forced his way into the office and a violent struggle ensued. The decedent's clothing was removed and she was beaten by Appellant using his fist, a school compass, a golf club and a wooden coat rack. The decedent moved and attempted to defend herself throughout the attack until Appellant inflicted the final blow to her head with the coat rack. This evidence clearly shows the decedent's conscious physical suffering as a result of Appellant's repeated physical assaults to her body. Further, her great mental anguish is evident as she surely realized her options for getting past Appellant and out of the office to safety were dwindling.

¶ 118 Considering the unprovoked manner of the killing in this case, the conscious suffering of the decedent, both physically and mentally, and the attitude of the killer as evidenced by Appellant's attacks upon a victim whom he clearly overpowered and who did not have the means to adequately defend herself, the jury's finding of the "heinous, atrocious or cruel" aggravator was supported by sufficient evidence. This proposition is denied.

Issues Raised in Previous Appeals

¶ 119 In his sixteenth proposition of error, Appellant asks this Court to reconsider its prior rulings on nine different issues, noting that he is raising these claims in order to preserve them for the purpose of further review in any subsequent proceedings.

¶ 120 Appellant first complains that the sentencing phase jury instructions seriously diminished the effect of the mitigating evidence by instructing the jury that evidence in mitigation is that which "may be considered as extenuating or reducing the degree of moral culpability or blame." Appellant asserts this permissive language contained in OUJI–CR (2d) 4–78 improperly allowed the jury the option of ignoring mitigating circumstances altogether.

¶ 121 Having thoroughly reviewed the jury instructions in this case, we do not find any which contain the language now objected to by Appellant. A modified version of 4–78 was given which instructed the jury in part that "mitigating circumstances are those which, in fairness, sympathy and mercy, may extenuate or reduce the degree of moral conduct or blame." (O.R. 1359).

¶ 122 Appellant next complains that Instruction No. 10 (OUJI–CR (2d) 4–76), erroneously implies that a life sentence is appropriate only if the jury failed to find the existence of an aggravating circumstance. This allegation was rejected in *Bryson v. State,* 1994 OK CR 32, ¶ 64, 876 P.2d 240, 262–63. Appellant has not convinced us to revisit the issue.

¶ 123 Appellant next challenges Instruction No. 15 (OUJI–CR (2d) 4–80) instructing the jury how to weigh the mitigating evidence and the aggravating circumstances. Appellant concedes the uniform instruction has been approved by the Court but argues the procedure it provides contravenes the heightened need for reliability in death penalty cases. This claim was raised and rejected in *Welch v. State,* 1998 OK CR 54, ¶¶ 76–77, 968 P.2d 1231, 1250–51 (approving OUJI–CR No. 440, the predecessor to OUJI–CR (2d) 4–80). Appellant has not convinced us to reconsider the issue.

¶ 124 Appellant's challenge to the constitutionality of the death penalty is *res judicata* as this claim was raised and rejected in his first direct appeal. *See Mitchell I,* 1994 OK CR 70, ¶ 47, 884 P.2d at 1203.

***665** ¶ 125 Appellant's next three claims, that Oklahoma's death penalty scheme is unconstitutional because it requires special findings of fact, trial court error in overruling his request for an instruction on the presumption of life, and his request for allocution and to argue last were rejected in *Duckett v. State,* 1995 OK CR 61, ¶¶ 54–60, 63, 91, 919 P.2d 7, 20–22, 27. We will not consider these issues further.

¶ 126 Appellant also argues that Oklahoma's use of lethal injection is cruel and unusual punishment. He contends that the protocol leaves discretion with the Warden for decisions surrounding the actual administration of the chemicals, except for the dosage and sites for IVs, the identities of the executioner themselves are kept confidential, there is no "back up plan" should a doctor be unavailable to assist in the execution, and the IV is inserted by

the person recruited by the Warden, not specifically a doctor. These same arguments were raised and rejected in *Malicoat v. State,* 2006 OK CR 25, ¶¶ 2–11, 137 P.3d 1234, 1235–39. Appellant offers nothing new to support his claim; therefore, we will not revisit the issue.

¶ 127 Appellant contends the sentencing proceeding was fundamentally flawed because the jury was not instructed that it must find that any aggravating factor[s] must outweigh the mitigating circumstances beyond a reasonable doubt in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. This argument was rejected in *Torres v. State,* 2002 OK CR 35, ¶¶ 5–7, 58 P.3d 214, 216, and we do so again here.

Cumulative Error

[50] **[51]** ¶ 128 In Proposition XVII, Appellant contends that even if no individual error merits reversal, the cumulative effect of such errors warrants either reversal of his conviction or a modification of his sentence. A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Eizember,* 2007 OK CR 29, ¶ 158, 164 P.3d at 245. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Id.*

¶ 129 We have reviewed each of Appellant's claims for relief and the record in this case and conclude that although his resentencing trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require relief because they did not render his resentencing trial fundamentally unfair, taint the jury's verdict, or render his sentencing unreliable. Any errors were harmless beyond a reasonable doubt, individually and cumulatively. Therefore, no modification of sentence is warranted and this proposition of error is denied.

Mandatory Sentence Review

¶ 130 In Proposition XVIII, Appellant contends that sentencing relief is warranted under our mandatory sentence review. Pursuant to 21 O.S.2001, § 701.13(C), we must determine (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and (2) whether the evidence supports the jury's finding of the aggravating circumstances as enumerated in 21 O.S.2001, § 701.12. Appellant recognizes our limited considerations under § 701.12, but argues that allegations of error raised previously in this appeal showed his resentencing trial was fundamentally flawed. He further asserts that as he has lived more years on Oklahoma's Death Row than he lived prior to the conviction,

there is "no penological justification" for carrying out a death sentence after so many years against a defendant who has twice been found not to be a continuing threat to society.

¶ 131 Each allegation of error raised by Appellant has been thoroughly addressed in this opinion and none have been found to warrant relief. His passage of time complaint also does not warrant relief as the United States Supreme Court has twice declined the opportunity to review Eighth Amendment passage of time claims. *Elledge v. Florida,* 525 U.S. 944, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998) (23 years on death row); *Lackey v. Texas,* 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (17 years on death row). Further, the fact that two juries ***666** could not unanimously find he was a continuing threat beyond a reasonable doubt does not warrant sentencing relief. In each instance, the "continuing threat" aggravator was not the sole aggravating circumstance alleged and in each instance, the jury found the existence of another aggravator sufficient to support the death penalty.

¶ 132 Turning to the second portion of our mandate under § 701.12, the jury found the existence of the "heinous, atrocious or cruel" aggravating circumstance. *See* 21 O.S.2001, § 701.12(4). As discussed in Proposition XV, this aggravator was supported by sufficient evidence.

¶ 133 Appellant presented twenty-four witnesses in mitigation. These witnesses testified generally that Appellant had just turned 18 years old at the time of the homicide; Appellant grew up in poverty in a high crime and violent neighborhood and in a house shared by many other siblings and family members; his father drew disability; his mother received Aid to Families with Dependent Children; his parents drank during his early developmental years; one of his teachers believed that his parents neglected Appellant and his siblings; his mother and father would often have violent physical fights in front of Appellant and his siblings and it would make him feel helpless and scared; his growth years were marred by a dysfunctional family where physical, emotional, and verbal abuse were common along with the abuse of alcohol; Appellant's low income and violent neighborhood contributed to the amount of violence he was exposed to and had a negative impact on his growth; exposure to domestic violence in his home had a very negative impact on Appellant's development and later manifested in violent outbursts toward others; Appellant was sexually molested as a child and the effect had a negative impact on his growth and development; at Rader juvenile center, Appellant expressed concerns to staff about his anger and problems controlling it and even though he had made little progress, and his prognosis was not good, he was released at 18 instead of being held for another year until his 19th birthday; he has been in prison for more than 15 years and has never received a misconduct or disciplinary report of any kind; Appellant's behavior in prison demonstrates that he has the strength of character to live a peaceful, productive life within the structured environment of a prison; the Department of Corrections has no record that Appellant has ever been threatening or caused harm to

anyone while in the Department of Corrections; after more than 16 years since the crime, Appellant is an older and more mature person that he was in 1991 at the time of the homicide; Appellant has family and friends who love and care for him and his life has meaning and significance to them; Appellant cares about his family and sends them cards and letters and tries to encourage family members to better themselves and stay out of trouble; and Appellant has been and is a positive influence on the younger members of his family. This evidence was summarized and presented to the jury in Instruction No. 14 along with any other mitigating evidence the jury might find existed.

¶ 134 Upon our review of the record and careful weighing of the aggravating circumstance and the mitigating evidence, we find the sentence of death to be factually substantiated and appropriate.[19] Based upon the record before this Court, we cannot say the jury was influenced by passion, prejudice, or any other arbitrary factor contrary to 21 O.S.2001, § 701.13(C), in finding that the aggravating circumstance outweighed the mitigating evidence. Accordingly, we find no error warranting sentence modification

DECISION

¶ 135 The **SENTENCE** of death is AFFIRMED. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

CHAPEL, J.: not participating.[20]

C. JOHNSON, P.J. and LEWIS, J. and ***667** TAYLOR, S.J.[21]: concur.

All Citations

235 P.3d 640, 2010 OK CR 14

Footnotes

1 The State did not appeal the district court's grant of relief on the rape and sodomy convictions. *Id.* 262 F.3d at 144, n. 2. The robbery and larceny convictions were not addressed in Appellant's habeas appeal and are therefore final adjudications that are not at issue. *Id.* at 1044, n. 1.

2 Appellant's Petition in Error was filed in this Court on July 17, 2008. His brief was filed on February 24, 2009, and the State's brief was filed on July 31, 2009. Mitchell's reply brief was filed on August 27, 2009. Oral argument was held on December 8, 2009.

3 In *Mitchell III,* this Court said that the standard for determining a potential juror's willingness to consider the death penalty does not "require that a juror be willing to state that he or she can think of some situation in which he or she will actually vote to impose or recommend a death sentence." 2006 OK CR 20, ¶ 39, 136 P.3d at 690. In the present case, various forms of the question whether the juror could envision a set of circumstances where the juror could give the death penalty were posed by the trial court. However, that question was almost always followed by an inquiry into whether the juror could follow the court's instructions to consider all three punishments. Any error in asking the "set of circumstances" question was cured by the court's question referencing its instructions and the juror's ability to follow such.

4 In *Jones,* 201 P. at 668, this Court said:

> It is generally held that a party examining a venireman has no right to assume the facts of the case on trial, and to ascertain the juror's opinion on them in advance; and that a hypothetical question put to a venireman, calling for his decision on a question of law and for a statement by him as to the party in whose favor he would decide it in a supposed state of the evidence, calls for a prejudgment of the case, and that the sustaining of an objection to such a question is not error.

5 *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

6 This includes Appellant's failure to raise the issue in the direct appeal of his first resentencing, despite having every opportunity to do so.

7 Following oral argument, this Court directed supplementation of the record, pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), with the briefs filed by Appellant in both the Western District and the Tenth Circuit. Upon review of those briefs, we find those courts appropriately adjudicated the propositions of error as raised.

8 On February 4, 1990, Pickens committed first degree murder and robbery in Creek County. Five days later, he committed another murder in Tulsa County. Approximately one month later, he confessed to the crimes committed in both counties. In *Pickens v. State,* 1993 OK CR 15, 850 P.2d 328 (referred to as *Pickens I*), this Court affirmed the conviction and death sentence for crimes committed in Tulsa County. This Court rejected Pickens' claim that his confession was taken in violation of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). 1993 OK CR 15, ¶¶ 11–17, 850 P.2d at 333–334. In *Pickens v. State,* 1994 OK CR 74, 885 P.2d 678, *overruled in part on other grounds,* 1996 OK CR 19, 917 P.2d 980 (hereinafter referred to as *Pickens II*), this Court reversed and remanded for a new trial the convictions from Creek County. On re-trial, Pickens was again convicted and sentenced to death. This Court affirmed the judgment and sentence in *Pickens v. State,* 2001 OK CR 3, 19 P.3d 866, 875. In that appeal, Pickens asserted his statement to Creek County law enforcement was improperly admitted because he had previously invoked his right to counsel during his interrogation on the Tulsa County charges. This Court held that as it had been determined in *Pickens I* that the Tulsa confession was not obtained in violation of Pickens' Fifth Amendment rights, his subsequent challenge to the confession was barred by the doctrine of *res judicata.* 2001 OK CR 3, ¶ 16, 19 P.3d at 875.

9 *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

10 This Court stated in part:

> Mitchell's argument must finally fail because he cites no instances of coercion, relying only on a picture of a pitifully confused defendant. Even were this description correct, any confession is voluntary absent coercion. Mitchell's worst accusation here appears to be continued interrogation. This simply is not coercion and cannot be used to support this claim.

1994 OK CR 70, ¶ 14, 884 P.2d at 1195.

11 The Western District stated in part:

> This Court cannot say, and, in fact, Petitioner does not argue, that the Court of Criminal Appeals' decision [regarding the voluntariness of his statements] is contrary to, or involves an unreasonable application of, Federal law as determined by the Supreme Court.

150 F.Supp.2d at 1213.

12 "We see nothing in the totality of the circumstances to show that any factor undermined the voluntariness of his statements." 262 F.3d at 1060.

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

14 *Websters II New Riverside University Dictionary* 289 (1984) defines compass as "a v-shaped device for drawing circles or circular arcs, having a pair of rigid, end-hinged, and continuously separable arms, one of which is equipped with a writing implement and the other with a sharp point providing a central anchor or pivot about which the drawing arm is turned."

15 Ms. Gilchrist worked in the Oklahoma City Police Department Laboratory. Mr. Wraxall was the Executive Director and Chief Forensic Serologist of the Serological Research Institute in Richmond, California.

16 The trial court denied the objection based on the defense's failure to make a written demand for every person in the chain of custody to be presented, pursuant to 22 O.S.2001, § 751.1(C)(2).

17 While I cannot find a legal basis in either the federal or Oklahoma constitution for the use of polls in the interpretation of a constitutional right, I accede to the fact this "national consensus" mantra is a part of the federal death penalty jurisprudence.

18 While I continue to adhere to the rule that matters contained in footnotes are dicta. *See Cannon v. State,* 1995 OK CR 45, 904 P.2d 89, 108 (Lumpkin, concur in results) citing *Wainwright v. Witt,* 469 U.S. 412, 422, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (1985), I acknowledge that from time to time there is slippage in the rule.

19 This fact is further substantiated through the verdicts of three separate juries over a span of fifteen (15) years, each determining that death was the appropriate sentence for this crime.

20 While Judge Chapel was present for the Oral Argument in this case on December 8, 2009, he retired from the Court on March 1, 2010, and is not participating in the final decision in this case.

21 The Honorable Steven W. Taylor, sitting by assignment in lieu of Judge Arlene Johnson, who recused.

Appendix D

FILED
United States Court of Appeals
Tenth Circuit

February 3, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALFRED BRIAN MITCHELL,

Petitioner - Appellant,

v.

TOMMY SHARP, Interim Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 16-6258

ORDER

Before **HOLMES**, **MATHESON**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix E

CERTIFICATE OF LIVE BIRTH

STATE OF OKLAHOMA – DEPARTMENT OF HEALTH

STATE FILE NO 135 - 72-038735

LOCAL REG NO

1. CHILD — NAME (Type or print): First: ALFRED | Middle: BRIAN | Last: MITCHELL

2. DATE OF BIRTH: Month 12 | Day 23 | Year 72

3. HOUR: 10:58 A.M.

4. SEX: male

5a. THIS BIRTH: SINGLE X TWIN ☐ TRIPLET ☐

5b. IF TWIN OR TRIPLET, WAS CHILD BORN: 1st ☐ 2d ☐ 3d ☐

6a. COUNTY OF BIRTH: Oklahoma

6b. CITY, TOWN, OR LOCATION OF BIRTH: Oklahoma City

6c. INSIDE CITY LIMIT: Yes X No ☐

6d. HOSPITAL – NAME (If not in hospital, give street and number): Grandway General Hospital

7. MOTHER — MAIDEN NAME: First: Incy (Ned) | Middle: | Last: Tall Bear

8. AGE (at time of this birth): 26

9. BIRTHPLACE (State or foreign country): Oklahoma

10a. RESIDENCE – STATE: Oklahoma

10b. COUNTY: Oklahoma

10c. CITY, TOWN, OR LOCATION: Oklahoma City

10d. INSIDE CITY LIMIT: Yes X No ☐

10e. STREET ADDRESS: 1620 NW Third

1620 NW 3rd

11. FATHER — NAME: First: John | Middle: | Last: Mitchell

12. AGE (at time of this birth): 27

13. BIRTHPLACE (State or foreign country): Oklahoma

14a. INFORMANT'S SIGNATURE OF EITHER PARENT: Johnnie Mitchell

14b. IF UNABLE TO OBTAIN ONE OF PARENTS SIGNATURE, STATE REASON THEREFORE.

15. MOTHER'S MAILING ADDRESS — STREET or R.F.D. NO.: 1620 Northwest Third | POSTOFFICE: Oklahoma City, Oklahoma | STATE | ZIP CODE NO.: 73106

16a. WAS BLOOD OF THIS CHILD'S MOTHER TESTED FOR SYPHILIS? Yes X No ☐

16b. DATE TEST MADE: 12-22-72

16c. IF NO TEST, STATE REASON THEREFORE

17. WEIGHT OF CHILD AT BIRTH: 9 LBS. 6½ OZS.

18. WAS PROPHYLACTIC DRUG USED IN BABY'S EYES? Yes X No ☐

I hereby certify that this child was born alive on the date stated above.

19a. SIGNATURE OF ATTENDANT: G. E. Finley MD

19b. DATE SIGNED: 12-23-72

19c. NAME OF ATTENDANT (Print or Type): G. E. Finley, M. D.

19d. ATTENDANT AT BIRTH: M.D. X D.O. ☐ D.C. ☐ Midwife ☐ Other ☐ (Specify)

19e. ADDRESS OF ATTENDANT — STREET or R.F.D. NO.: 128 Northeast Second | POSTOFFICE: Oklahoma City, Oklahoma | STATE | ZIP CODE NO.: 73104

20a. DATE RECEIVED BY LOCAL REG: DEC 28 1972

20b. LOCAL REGISTRAR'S SIGNATURE

21. DATE RECEIVED BY STATE REGISTRAR: DEC 29 1972

THIS SPACE FOR USE OF STATE REGISTRAR

22a. DATE CORRECTIONS MADE

22b. ITEMS CORRECTED

22c. AUTHORITY

22d. CLERK

State Department of Health

State of Oklahoma

OKLAHOMA CITY, OKLAHOMA 73152

ROGER C. PIRRONG

STATE REGISTRAR OF VITAL STATISTICS

CERTIFIED COPY MUST HAVE EMBOSSED SEAL

I hereby certify the foregoing to be a true and correct copy, original of which is on file in this office. In testimony whereof, I have hereunto subscribed my name and caused the official seal to be affixed, at Oklahoma City, Oklahoma, this date.

DEC 29 1972

159a.

Respectfully Submitted,

By: */s/John T. Carlson*
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