

Capital Case

Case No. _____

In the Supreme Court of the United States

DARRELL WAYNE FREDERICK,

Petitioner,

v.

CHRISTE QUICK, WARDEN,

Oklahoma State Penitentiary,

Respondent.

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

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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Dated this 29th day of February, 2024

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versed. And we remand for the district court to answer the threshold question of whether Plaintiffs' fiduciary duty claim is subject to the exhaustion requirement.

AFFIRMED in part, REVERSED in part, and REMANDED FOR FURTHER PROCEEDINGS. Each party to bear its own costs.



Darrell Wayne FREDERICK,
Petitioner - Appellant,

v.

**Christe QUICK, Warden, Oklahoma
State Penitentiary, Respondent -
Appellee.¹**

No. 20-6131

United States Court of Appeals,
Tenth Circuit.

FILED August 14, 2023

Background: After defendant's state-court convictions for first-degree murder, attempted assault with a dangerous weapon, and domestic abuse, and his death sentence, were affirmed on direct appeal, 400 P.3d 786, and after his state-court application for post-conviction relief was denied after an evidentiary hearing and the denial was affirmed on appeal, defendant filed a federal habeas petition. The United States District Court for the Western District of Oklahoma, Scott L. Palk, J., 2020 WL 4352749, denied the petition. Defendant obtained a certificate of appealability from the Court of Appeals on his claims of ineffective assistance by appellate counsel and of cumulative error.

Holdings: The Court of Appeals, Mathe-son, Circuit Judge, held that:

- (1) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective for failing to present medical expert on cause of victim's injuries was based on a reasonable conclusion of no prejudice and on a reasonable determination of the facts;
- (2) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective in cross-examining medical examiner was based on a reasonable conclusion of no prejudice and on a reasonable determination of the facts;
- (3) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective in failing to object to statements by prosecutor in closing argument about medical examiner's testimony was based on a reasonable conclusion of no prejudice;
- (4) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective for failing to present testimony about defendant's family and troubled childhood in trial's penalty phase was based on a reasonable conclusion of no prejudice and on a reasonable determination of the facts;
- (5) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial

1. Christe Quick became warden of the Oklahoma State Penitentiary on July 3, 2023. We

substitute her for her predecessor, Jim Farris, as Respondent under Fed. R. App. P. 43(c)(2).

counsel was ineffective for failing to present evidence about defendant's organic brain damage in trial's penalty phase was based on a reasonable conclusion of no prejudice and on a reasonable determination of the facts;

- (6) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not providing with their appellate brief an expert report from an expert whom appellate counsel argued trial counsel was ineffective for failing to call was based on a reasonable conclusion of no prejudice; and
- (7) even assuming that defendant's appellate counsel performed deficiently in his direct appeal, those errors did not cumulatively have a substantial and injurious effect on that appeal.

Affirmed.

Rossman, Circuit Judge, filed dissenting opinion.

1. Habeas Corpus ⇌768

In reviewing a petition from a state prisoner seeking federal habeas relief, the federal court presumes that the factual findings of the state court are correct unless the petitioner presents clear and convincing evidence to the contrary. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇌842, 846

On appeal from an order denying a state prisoner's application for a federal writ of habeas corpus after a state court's denial of relief, the appellate court reviews the district court's legal analysis of the state-court decision de novo and the district court's factual findings, if any, for clear error. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇌765.1

The Antiterrorism and Effective Death Penalty Act (AEDPA) erects a formidable barrier to federal habeas relief and requires federal courts to give signifi-

cant deference to state-court decisions. 28 U.S.C.A. §§ 2254(d)(1), 2254(d)(2).

4. Habeas Corpus ⇌450.1, 705.1

A state prisoner seeking federal habeas relief after a state court's denial of relief carries the burden of proof in satisfying the Antiterrorism and Effective Death Penalty Act's (AEDPA) demanding standards and must show that there was no reasonable basis for the state court to deny relief. 28 U.S.C.A. §§ 2254(d)(1), 2254(d)(2).

5. Habeas Corpus ⇌450.1, 452

In reviewing a federal habeas petition from a state prisoner under the Antiterrorism and Effective Death Penalty Act (AEDPA) to determine whether a state court's denial of relief was contrary to or an unreasonable application of clearly established federal law, a court must first determine the relevant clearly established law. 28 U.S.C.A. § 2254(d)(1).

6. Habeas Corpus ⇌450.1, 452

As used in the context of the Antiterrorism and Effective Death Penalty Act (AEDPA), "clearly established Federal law" means only Supreme Court holdings, not the Court's dicta.

See publication Words and Phrases for other judicial constructions and definitions.

7. Habeas Corpus ⇌452

A state court's decision is "contrary to" the Supreme Court's clearly established precedent, as could warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) after a state-court decision denying relief, if the state court applies a rule different from the governing law set forth in the Supreme Court's cases or if it decides a case differently than the Court has done

on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

8. Habeas Corpus ⇔450.1

A state court's decision is an "unreasonable application" of Supreme Court precedent, as could warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) after a state-court decision denying relief, if the state court correctly identifies the governing legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the particular case. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

9. Habeas Corpus ⇔450.1

Evaluating whether a state court's application of a rule of federal law was unreasonable, as could warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) after a state-court decision denying relief, requires considering the rule's specificity; the more general the rule, the more leeway state courts have in reaching outcomes in case-by-case determinations. 28 U.S.C.A. § 2254(d)(1).

10. Habeas Corpus ⇔450.1

For a state court's decision to be an "unreasonable application" of Supreme Court law, as could warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) after a state-court decision denying relief, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

11. Habeas Corpus ⇔450.1

For purposes of granting federal habeas relief to a state prisoner under the Antiterrorism and Effective Death Penalty Act (AEDPA), an "unreasonable application" by a state court of federal law is different from an incorrect application of federal law; the prisoner must show that the state court's decision is so obviously wrong that no reasonable judge could arrive at the same conclusion given the facts of the prisoner's case. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

12. Habeas Corpus ⇔450.1

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires a state prisoner seeking federal habeas relief to show that the state court's ruling denying the prisoner relief was so lacking in justification that there was an error beyond any possibility for fairminded disagreement; even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable. 28 U.S.C.A. § 2254(d)(1).

13. Habeas Corpus ⇔450.1

Although the Antiterrorism and Effective Death Penalty Act (AEDPA) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings, a federal court will not lightly conclude that the state's criminal-justice system has experienced the extreme malfunction for which federal habeas relief is the remedy. 28 U.S.C.A. § 2254(d)(1).

14. Habeas Corpus ⇔753

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court's review of a state prisoner's habeas petition is limited to the record that was

before the state court that denied relief. 28 U.S.C.A. § 2254(d)(1).

15. Habeas Corpus ⇌768

Any state-court findings of fact that bear upon a habeas petitioner’s claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence, and the presumption of correctness also applies to factual findings made by a state court of review based on the trial record. 28 U.S.C.A. § 2254(d)(2).

16. Habeas Corpus ⇌705.1

The burden, in a federal habeas action challenging a petitioner’s imprisonment on a state conviction, of showing that the state court’s factual findings are objectively unreasonable falls squarely on the petitioner’s shoulders. 28 U.S.C.A. § 2254(d)(2).

17. Habeas Corpus ⇌450.1

The standard for determining whether a state court’s decision denying relief to a state prisoner was based on an unreasonable determination of the facts, as could warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) after such a decision, is a restrictive one, and a federal habeas court may not characterize state-court factual determinations as unreasonable merely because it would have reached a different conclusion in the first instance. 28 U.S.C.A. § 2254(d)(2).

18. Habeas Corpus ⇌450.1

An imperfect or even an incorrect determination of the facts by a state court is not enough to warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) after a state-court decision denying relief, and it is not enough to show that reasonable minds reviewing the record might disagree about the finding in question. 28 U.S.C.A. § 2254(d)(2).

19. Habeas Corpus ⇌767

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court must accord substantial deference to a state court that denied relief to a state prisoner, and the federal court thus defers to a state court’s factual determinations so long as reasonable minds reviewing the record might disagree about the finding in question. 28 U.S.C.A. § 2254(d)(2).

20. Habeas Corpus ⇌767

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires a state prisoner seeking federal habeas relief to show that the state court’s decision denying the prisoner relief was based on a factual error. 28 U.S.C.A. § 2254(d)(2).

21. Habeas Corpus ⇌767

The decision of a state court denying relief to a state prisoner is not “based on” a factual finding, for purposes of determining whether the state court’s reliance on an erroneous factual finding could warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), if (1) the state court made the finding in addressing only subsidiary issues, or (2) other reasons supported the state court’s decision. 28 U.S.C.A. § 2254(d)(2).

22. Habeas Corpus ⇌450.1

The factual finding of a state court that denied relief to a state prisoner may be “unreasonable,” as could warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) after such a decision, only if the state court plainly misapprehended or misstated the record and the misapprehension goes to a material factual issue that is central to the prisoner’s claim. 28 U.S.C.A. § 2254(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

23. Criminal Law ⇌1881

To establish ineffective assistance of counsel under *Strickland*, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense. U.S. Const. Amend. 6.

24. Criminal Law ⇌1882

To establish the deficient-performance prong of the *Strickland* test for ineffective assistance of counsel, a defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. U.S. Const. Amend. 6.

25. Criminal Law ⇌1969

To establish that appellate counsel's performance was deficient under the *Strickland* test for ineffective assistance of counsel, a defendant must show that appellate counsel performed deficiently in failing to raise a particular issue on appeal. U.S. Const. Amend. 6.

26. Criminal Law ⇌1969

The Sixth Amendment does not require appellate counsel to raise every non-frivolous issue, and appellate attorneys frequently winnow out weaker claims in order to focus effectively on those more likely to prevail. U.S. Const. Amend. 6.

27. Habeas Corpus ⇌486(5)

In evaluating whether appellate counsel performed deficiently in failing to raise an issue on appeal, a federal habeas court typically examines the merits of the omitted issue; if the omitted issue is meritless, its omission will not constitute deficient performance. U.S. Const. Amend. 6.

28. Criminal Law ⇌1871

Courts review ineffective-assistance claims with a strong presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must over-

come the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. U.S. Const. Amend. 6.

29. Criminal Law ⇌1883

To establish the prejudice prong of the *Strickland* test for ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

30. Criminal Law ⇌1969

In the context of a claim of ineffective assistance of appellate counsel, to establish the prejudice prong of the *Strickland* test, a defendant must show a reasonable probability that, but for his appellate counsel's unreasonable failure to raise a particular nonfrivolous issue, the defendant would have prevailed on his appeal. U.S. Const. Amend. 6.

31. Criminal Law ⇌1888

A court reviewing a defendant's claim of ineffective assistance of counsel may address the two *Strickland* prongs, deficient performance and prejudice, in either order and need not address both if the defendant has failed to satisfy one. U.S. Const. Amend. 6.

32. Habeas Corpus ⇌486(1), 773

The standards created by *Strickland* for an ineffective-assistance claim and by the Antiterrorism and Effective Death Penalty Act (AEDPA) for review of a state prisoner's federal habeas claim are both highly deferential, and when the two apply in tandem, review is doubly so. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

33. Habeas Corpus ⇌486(3), 773

Given the two layers of deference applicable to a claim of ineffective assistance of counsel raised by a state prisoner in a

federal habeas action, a federal court, when reviewing such a claim under the Antiterrorism and Effective Death Penalty Act (AEDPA), must consider whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

34. Habeas Corpus ⇌486(1)

A state court's application of *Strickland* is reasonable, and federal habeas relief is not available under the Antiterrorism and Effective Death Penalty Act (AEDPA) to a state prisoner for the state court's denial of an ineffective-assistance claim, at least so long as fairminded jurists could disagree on the correctness of the state court's decision. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

35. Habeas Corpus ⇌486(1)

If all fairminded jurists would agree that a state-court decision rejecting a state prisoner's ineffective-assistance claim was incorrect, then the decision was unreasonable, and a federal habeas corpus writ should be granted to the prisoner under the Antiterrorism and Effective Death Penalty Act (AEDPA); if, however, some fairminded jurists could possibly agree with the state-court decision, then it was not unreasonable, and the writ should be denied. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

36. Criminal Law ⇌1969

Courts use two approaches to assess a claim that appellate counsel provided ineffective assistance by failing to argue on direct appeal that trial counsel provided ineffective assistance: first, a court may analyze whether appellate counsel's performance on direct appeal was deficient, and if so, whether that deficiency caused prejudice on direct appeal; second, a court may analyze whether trial counsel's performance was deficient and if so, whether that deficiency caused prejudice at trial,

and if trial counsel's performance was not deficient, or if any deficiency did not cause prejudice, then appellate counsel could not have been ineffective. U.S. Const. Amend. 6.

37. Habeas Corpus ⇌486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief reasonably concluded that defendant was not prejudiced by appellate counsel's failure to assert that defendant's trial counsel was ineffective for not consulting with and presenting a medical expert on the cause of victim's injuries in defendant's trial for first-degree murder and related crimes, and federal habeas relief was thus not available for the alleged ineffective assistance of defendant's appellate counsel, where there was overwhelming evidence of defendant's guilt, and his trial counsel had cross-examined the state's medical experts. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

38. Habeas Corpus ⇌486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief did not make an unreasonable determination of the facts in the course of rejecting defendant's argument that his appellate counsel was ineffective for failing to assert that defendant's trial counsel was ineffective for not consulting with and presenting a medical expert on the cause of victim's injuries in defendant's trial for first-degree murder and related crimes, and federal habeas relief thus was not available for the alleged ineffective assistance of defendant's appellate counsel, even if the state court's opinion on defendant's direct appeal contained an error of fact about victim's injuries, where the postconviction opinion did not mention, and was not based on, that fact. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(2).

39. Habeas Corpus ⇨486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief reasonably concluded that defendant was not prejudiced by appellate counsel's failure to assert that defendant's trial counsel was ineffective in his cross-examination of medical examiner about the manner and cause of victim's death in defendant's trial for first-degree murder and related crimes, and federal habeas relief was thus not available for the alleged ineffective assistance of defendant's appellate counsel, where medical examiner testified in post-conviction proceeding that he stood by his original findings, and trial counsel did challenge medical examiner's testimony on cross-examination about possibility that victim's injuries had come from a fall. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

40. Habeas Corpus ⇨486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief reasonably concluded that defendant was not prejudiced by appellate counsel's failure to assert that defendant's trial counsel was ineffective for failing to object to the state's mischaracterization during closing argument of medical examiner's testimony about manner and cause of victim's death in defendant's trial for first-degree murder and related crimes, and federal habeas relief was thus not available for alleged ineffective assistance of defendant's appellate counsel, where prosecutor had erroneously stated that medical examiner had ruled out a fall as the cause of victim's injuries, but another medical witness had repeatedly said that victim's injuries were not consistent with a fall. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

41. Habeas Corpus ⇨486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief did not make an unreasonable

determination of the facts in the course of rejecting defendant's argument that his appellate counsel was ineffective for failing to assert that defendant's trial counsel was ineffective in his cross-examination of medical examiner about the manner and cause of victim's death, and about examiner's purported reliance on errors in an investigator's report, in defendant's trial for first-degree murder and related crimes, and federal habeas relief was thus not available for the alleged ineffective assistance of defendant's appellate counsel, where examiner testified in state postconviction proceedings that he stood by his findings regardless of the disputed report. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(2).

42. Habeas Corpus ⇨486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief reasonably concluded that defendant was not prejudiced by appellate counsel's failure to assert that defendant's trial counsel was ineffective for failing to investigate and present testimony from his family about his relation to victim and his troubled childhood in death-penalty phase of defendant's trial for first-degree murder and related crimes, and federal habeas relief was thus not available for alleged ineffective assistance of appellate counsel, even if trial counsel's failure to call family members was deficient performance, where evidence that he had cared for victim was mainly hearsay and was disputed, and testimony about his childhood had little value and could have backfired. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

43. Habeas Corpus ⇨486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief did not make an unreasonable determination of the facts in the course of rejecting defendant's argument that his appellate counsel was ineffective for failing to assert that defendant's trial counsel was

ineffective for failing to investigate and present testimony from his family about his troubled childhood in death-penalty phase of defendant's trial for first-degree murder and related crimes, and federal habeas relief was thus not available for alleged ineffective assistance of appellate counsel; testimony in postconviction proceeding supported state appellate court's conclusion that many incidents of misconduct by defendant's father reported by witness occurred after defendant had left home. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(2).

44. Criminal Law ⇌1955

For purposes of determining whether a defendant's counsel provided ineffective assistance by failing to introduce evidence of organic brain damage in mitigation at sentencing, because not all evidence of brain damage has the same potency in the *Strickland* prejudice analysis, a court must examine the precise nature of the alleged organic brain damage, and in some instances, brain-damage evidence may be just as likely—if not more likely—to have an aggravating effect rather than a mitigating effect on a sentencing jury. U.S. Const. Amend. 6.

45. Habeas Corpus ⇌486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief reasonably concluded that defendant was not prejudiced by trial counsel's failure to present evidence of defendant's organic brain damage at death-penalty phase in trial for first-degree murder and related crimes, and that appellate counsel thus was not ineffective for failing to argue on direct appeal that trial counsel was ineffective for failing to present such evidence, and federal habeas relief was thus not available for alleged ineffective assistance of appellate counsel, even though organic brain damage provided a well-recognized ground for mitigation, where the proffered evidence failed to link

defendant's brain damage to the murder and would have opened the door to harmful evidence. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

46. Habeas Corpus ⇌486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief did not make an unreasonable determination of the facts in the course of rejecting, on grounds of lack of prejudice, defendant's argument that his appellate counsel was ineffective for failing to assert that defendant's trial counsel was ineffective for failing to present testimony about defendant's organic brain damage in death-penalty phase of defendant's trial for first-degree murder and related crimes, and federal habeas relief was thus not available for alleged ineffective assistance of appellate counsel; state court plausibly understood expert's trial testimony as showing that defendant's brain damage would not impair his day-to-day activities and was not connected to his crime. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(2).

47. Habeas Corpus ⇌450.1

When a factual determination made by a state court that denied relief to a state prisoner is based on its review of a recorded exchange, for that determination to be reasonable, such that federal habeas relief based on a challenge to the determination is unavailable under the Antiterrorism and Effective Death Penalty Act (AEDPA), the state court is required only to offer a plausible reading of the exchange. 28 U.S.C.A. § 2254(d)(2).

48. Habeas Corpus ⇌486(5)

State appellate court that affirmed denial of defendant's application for postconviction relief reasonably concluded that defendant was not prejudiced by appellate counsel's failure to supply with its appellate brief a report from an expert whom appellate counsel argued trial counsel

should have called, and was ineffective for not calling, in death-penalty phase of defendant's trial for first-degree murder, where it was not reasonably probable that report would have changed result on defendant's direct appeal, and federal habeas relief was thus not available for appellate counsel's alleged ineffective assistance; court had found on direct appeal that not calling expert was reasonable trial strategy and had also concluded that failure to call expert did not prejudice defendant. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

49. Criminal Law ⇌1871

Absent a showing to the contrary by a defendant raising an ineffective-assistance claim, the conduct of a defendant's attorney is presumed objectively reasonable because it could be considered part of a legitimate trial strategy. U.S. Const. Amend. 6.

50. Habeas Corpus ⇌461

A cumulative-error analysis on federal habeas review of a state prisoner's petition aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless; this analysis applies only when there are two or more actual errors, and an appellate court only cumulates errors on claims on which it granted a certificate of appealability (COA). 28 U.S.C.A. § 2254.

51. Habeas Corpus ⇌461

A state prisoner's claims of ineffective assistance of counsel should be included in the cumulative-error calculus for federal habeas relief if those claims have been individually denied for insufficient prejudice. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

52. Habeas Corpus ⇌461

Even assuming that defendant's appellate counsel performed deficiently in de-

fendant's direct appeal of his conviction and death sentence for first-degree murder and related crimes by not raising a claim about trial counsel's failure to consult and present a medical expert, not raising a claim about trial counsel's cross-examination of medical examiner, and not providing a certain expert's report on appeal in support of a claim of ineffective assistance by trial counsel for failing to call that expert, those errors did not cumulatively have a substantial and injurious effect on the direct appeal, and federal habeas relief was thus not available based on cumulative error. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

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

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

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

Before MATHESON, CARSON, and ROSSMAN, Circuit Judges.

MATHESON, Circuit Judge.

An Oklahoma state court jury convicted Darrell Wayne Frederick of first-degree murder, attempted assault with a dangerous weapon, and domestic abuse. Based on the jury's recommendation, the court sentenced Mr. Frederick to death for the murder. After his direct appeal and state post-conviction proceedings were unsuccessful, Mr. Frederick filed a habeas corpus application in federal court under 28 U.S.C. § 2254. The district court denied

relief. We granted a certificate of appealability (“COA”) on his claims that appellate counsel provided ineffective assistance and that there was cumulative error.

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

I. BACKGROUND

A. *Factual History*

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

On March 26, 2011, between 5:30 and 6:30 p.m., Da’Jon Diggs arrived at the home of her grandmother, Connie Frederick (hereinafter referred to as the deceased). The deceased was 85 years old and had been deaf and mute her entire life. She lived in the same house in northeast Oklahoma City in which she had raised six children. Ms. Diggs attended college in another city but frequently stopped by to check on the deceased. Ms. Diggs, like much of her family, communicated with the deceased through sign language. Also living at the deceased’s home at the time was Appellant [Mr. Frederick], her fifty-five (55) year old son. He had been living with the deceased since his release from prison in 2009.

Ms. Diggs entered the home to find Appellant and the deceased “fussing” in the kitchen. Ms. Diggs later explained that despite being mute for speech purposes, the deceased could still make some sounds and was “yelling” at Appel-

lant through guttural noises and sign language involving exaggerated movements with her hands. Ms. Diggs saw Appellant aggressively grab food out of the deceased’s hands. Appellant called the deceased a “bitch” and told her to get out of the kitchen. He then shoved her against the kitchen counter. Ms. Diggs intervened and took the deceased to her bedroom, where she was able to calm her.

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

While out of the house, Ms. Diggs phoned both her mother, who lived out of state, and her uncle, Tobias Frederick, to discuss her frustrations with Appellant. Both were the deceased’s children and Tobias Frederick was an Oklahoma City Police Officer. Ms. Diggs told both her mother and her uncle that she was afraid Appellant would seriously hurt her or the deceased. When Ms. Diggs returned to the house, she heard Appellant answer the phone. Ms. Diggs was able to determine that it was her uncle Tobias that had called. He told Appellant that he had to leave the deceased’s home and find another place to live. Appellant replied angrily, “man, I ain’t got time for this” and hung up the phone. Ms. Diggs could hear Appellant yelling into the phone. Ms. Diggs headed for the deceased’s bedroom and told her to stay in the bedroom no matter what hap-

pened. Ms. Diggs then shut the bedroom door.

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

Outside, neighborhood kids were playing. Seeing Appellant chase after Ms. Diggs, they shouted at her that Appellant had a brick or rock in his hand. Appellant chased Ms. Diggs around the yard, waving the brick or rock at her. Ms. Diggs ran to the neighbor’s home and borrowed a phone to call the police. Appellant, who was dressed only in pajama pants, shouted at the neighborhood children and ran inside the house. He returned a few minutes later, fully dressed. By the time police arrived, Appellant had run around the back of the house. Bystanders heard the rattle of a chain link fence and Appellant was not seen or heard from the rest of the day. Ms. Diggs followed police into the deceased’s home. They found the deceased lying face down on the floor in her bedroom. The deceased had severe bruising and swelling on both sides of her head to the extent that one eye was nearly swollen shut. When asked who injured her, the deceased signed the letter “D” which she used to identify Appellant. The deceased was taken to the hospital. Once there, she was immediately operated on to reduce the pressure in her brain. She had developed a significant subdural hematoma on the left side of her skull. The deceased survived the surgery but never regained consciousness. She passed away two to three weeks later. The

cause of death was listed as blunt force trauma to the head.

Appellant was located a day after the deceased’s beating. He was found walking along the street approximately three blocks from the deceased’s home. When approached by police, he initially gave a false name but soon admitted his identity. His right hand was significantly swollen and his right finger was cut and bleeding. There was blood on his clothes. Bloodstains were also found in his bedroom at the decedent’s home.

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

B. Procedural History

1. State Proceedings

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

- 1) Catherine Hammarsten represented Mr. Frederick until 11 months before trial;
- 2) James Rowan replaced Ms. Hammarsten and represented Mr. Frederick at trial; and
- 3) Gina Walker represented Mr. Frederick in his direct appeal to the OCCA.

a. Trial

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

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

During the penalty phase, the State introduced substantial testimony in support

of the three aggravators the jury relied on to support its death penalty recommendation:

- 1) Mr. Frederick “was previously convicted of a felony involving the use of threat of violence to the person;”
- 2) “the murder was especially heinous, atrocious and cruel;” and
- 3) “there exists a probability that the defendant will commit or continue to commit acts of violence and constitute a continuing threat to society.”

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

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

Defense counsel presented five mitigating circumstances:

2. The IAC claims alleged trial counsel failed to (1) file a motion in limine to exclude the decedent’s alleged hearsay statements; (2) “investigate or present evidence on potential causes for” injuries to Mr. Frederick’s hand; (3) thoroughly cross-examine Ms. Diggs and Tobias Frederick with available impeachment evidence; (4) impeach Ms. Diggs and Tobias

- 1) “[Mr.] Frederick had an accident in [a] truck, ran into a post and hit his head on the windshield, busted the windshield out of the truck and changed from that very moment;”
- 2) “[Mr.] Frederick’s break with his father which led to him leaving home at the age of fourteen had a negative impact on his development;”
- 3) “[Mr.] Frederick has become institutionalized which has caused him to become suspicious of other people and overly aggressive;”
- 4) “[Mr.] Frederick has never learned to live as a free man and is unable to cope with the stress and strain of society;” and
- 5) “[Mr.] Frederick’s father never took an interest in [him] after [he] left home at the age of fourteen.”

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

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

b. *Direct appeal*

Mr. Frederick appealed to the OCCA, raising 22 grounds for reversal. *See Frederick*, 400 P.3d at 833. He challenged the jury selection and the jury instructions, the admission of the decedent’s statement identifying him as her attacker, and the sufficiency of the evidence. *See id.* at 799-814. He also raised nine grounds alleging that he received ineffective assistance of counsel (“IAC”) at trial.² *Id.* at 822-32. The

Frederick with information that the decedent had a history of falling, that decedent had hit one of Ms. Diggs’s aunts in the head with a brick, and that Ms. Diggs had her cell phone that day; (5) adequately challenge the State’s evidence of prior acquitted conduct; (6) call Dr. Art Williams to testify; (7) request additional peremptory challenges during voir dire

OCCA rejected those challenges and affirmed the judgments and sentences. *Id.* at 834.

c. Post-conviction IAC claims

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

2. Federal Court Proceedings

On December 16, 2019, Mr. Frederick filed a § 2254 habeas application, advancing four claims: (1) appellate counsel was ineffective for failing to raise certain IAC claims about trial counsel on direct appeal, (2) the decedent’s statements were improperly admitted in violation of the Sixth Amendment Confrontation Clause, (3) the prosecutor’s statements during closing arguments deprived him of a fair trial and sentencing, and (4) the accumulation of errors violated his constitutional rights. Dist. Ct. Doc. 20; Aplt. Br. Attachment C

and identify unqualified jurors; and (8) object to errors at trial and request admonishments. *See Frederick*, 400 P.3d at 825-32. Mr. Frederick also alleged that trial counsel was ineffec-

at 7, 49, 54, 60. The district court denied relief and denied a COA. Aplt. Br. Attachment C at 2, 63; Dist. Ct. Doc. 35. On February 4, 2021, we granted a COA on Mr. Frederick’s ineffective assistance of counsel and cumulative error claims. Doc. 10805518 at 1.

C. Legal Background

1. Standard of Review and AEDPA

[2, 3] “On appeal from an order denying a writ of habeas corpus, we review the district court’s legal analysis of the state court decision de novo and its factual findings, if any, for clear error.” *Smith v. Sharp*, 935 F.3d 1064, 1071 (10th Cir. 2019) (quotations omitted). In addition, “the Antiterrorism and Effective Death Penalty Act of 1996 (‘AEDPA’) circumscribes our review of federal habeas claims that were adjudicated on the merits in state-court proceedings.” *Id.* (quotations and alterations omitted). AEDPA “erects a formidable barrier to federal habeas relief,” *Burt v. Titlow*, 571 U.S. 12, 19, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013), and “requires federal courts to give significant deference to state court decisions,” *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013).

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

ive for (9) informing the jury that he was a multiple convicted felon who had been institutionalized, was hard to get along with, and refused to cooperate with testing. *Id.* at 828.

er, 562 U.S. 86, 97-98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

[4] “The [habeas] petitioner carries the burden of proof” in satisfying AEDPA’s demanding standards, *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), and “must . . . show[] there was *no* reasonable basis for the state court to deny relief,” *Richter*, 562 U.S. at 98, 131 S.Ct. 770 (emphasis added).

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

[5, 6] In reviewing under § 2254(d)(1), we must first “determine the relevant clearly established law.” *Budder v. Addison*, 851 F.3d 1047, 1051 (10th Cir. 2017) (quotations omitted). “As used in the context of AEDPA, clearly established Federal law means only Supreme Court holdings, not the Court’s dicta.” *Id.* (quotations and alterations omitted).

[7] A decision is “contrary to” the Supreme Court’s clearly established precedent “if the state court applies a rule different from the governing law set forth in [the Supreme Court’s] cases, or if it decides a case differently than [the Court] ha[s] done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

[8, 9] A state court decision is an “unreasonable application” of Supreme Court precedent “if the state court correctly identifies the governing legal principle from [the Court’s] decisions but unreasonably applies it to the facts of the particular case.” *Id.* “Evaluating whether a rule application was unreasonable requires considering the rule’s specificity.” *Richter*, 562 U.S. at 101, 131 S.Ct. 770 (quotations and brackets omitted). “The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Id.* (quotations omitted).

[10, 11] “In order for a state court’s decision to be an unreasonable application of [Supreme Court] law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice.” *Virginia v. LeBlanc*, 582 U.S. 91, 94, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017) (quotations omitted); see *Shinn v. Kayer*, — U.S. —, 141 S. Ct. 517, 523, 208 L.Ed.2d 353 (2020) (per curiam). “For purposes of § 2254(d)(1), ‘an unreasonable application of federal law is different from an incorrect application of federal law.’” *Richter*, 562 U.S. at 101, 131 S.Ct. 770 (emphases omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). The petitioner must show that a state court’s decision is “so obviously wrong” that no reasonable judge could arrive at the same conclusion given the facts of the prisoner’s case. *Shinn*, 141 S. Ct. at 523.

[12, 13] Thus, AEDPA “requires a state prisoner to show that the state court’s ruling . . . was so lacking in justification that there was an error beyond any possibility for fairminded disagreement.” *Burt*, 571 U.S. at 19-20, 134 S.Ct. 10 (quotations and alterations omitted); see also *Richter*, 562 U.S. at 102, 131 S.Ct. 770 (“[AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.”). “[E]ven a strong case for relief does not mean that the state court’s contrary conclusion was unreasonable.” *Richter*, 562 U.S. at 102, 131 S.Ct. 770. Although AEDPA “stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings,” *id.*, “[w]e will not lightly conclude that a State’s criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy,” *Burt*,

571 U.S. at 20, 134 S.Ct. 10 (quotations and alterations omitted).

[14] Under § 2254(d)(1), our review is “limited to the record that was before the state court.” *Cullen v. Pinholster*, 563 U.S. 170, 180-81, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

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

[15, 16] “[A]ny state-court findings of fact that bear upon [a petitioner’s] claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence.” *Simpson v. Carpenter*, 912 F.3d 542, 563 (10th Cir. 2018) (quotations omitted). “The presumption of correctness also applies to factual findings made by a state court of review based on the trial record.” *Sumpter v. Kansas*, 61 F.4th 729, 734 (10th Cir. 2023) (quoting *Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015)). “The burden of showing that the state court’s factual findings are objectively unreasonable falls squarely on the petitioner’s shoulders.” *Meek v. Martin*, 74 F.4th 1223, 1251 (10th Cir. July 25, 2023).

[17–19] The standard for determining whether the state court’s decision was based on an unreasonable determination of the facts “is a restrictive one.” *Grant v. Trammell*, 727 F.3d 1006, 1024 (10th Cir. 2013) (quotations omitted). “We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance.” *Brumfield v. Cain*, 576 U.S. 305, 313-14, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015) (quotations and alterations omitted). “[A]n imperfect or even an incorrect determination of the facts isn’t enough for purposes of § 2254(d)(2).” *Grant*, 727 F.3d at 1024 (citing *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)). And “it is not enough to show that

reasonable minds reviewing the record might disagree about the finding in question.” *Brown v. Davenport*, 596 U.S. 118, 142 S. Ct. 1510, 1525, 212 L.Ed.2d 463 (2022) (quotations omitted). “Instead, § 2254(d)(2) requires that we accord the state . . . court substantial deference.” *Brumfield*, 576 U.S. at 314, 135 S.Ct. 2269. We thus “defer to the state court’s factual determinations so long as reasonable minds reviewing the record might disagree about the finding in question.” *Johnson v. Martin*, 3 F.4th 1210, 1218-19 (10th Cir. 2021), *cert. denied*, — U.S. —, 142 S. Ct. 1189, 212 L.Ed.2d 55 (2022) (quotations omitted).

[20, 21] A petitioner must also show “that the [state court] based its decision on the factual error.” *Harris v. Sharp*, 941 F.3d 962, 1003 (10th Cir. 2019). The state court’s decision is not “based on” a finding if (1) it made the finding in addressing “only subsidiary issues,” *Grant*, 727 F.3d at 1024, or (2) other reasons supported the court’s decision, *Harris*, 941 F.3d at 1003.

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

2. Ineffective Assistance of Counsel

[23] We look to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to review ineffective assistance of counsel claims. Under *Strickland*, a defendant must establish that (1) counsel’s performance “fell below an objective standard of reasonableness,” *id.* at 688, 104 S.Ct. 2052; and (2) “the deficient performance prejudiced the defense,” *id.* at 687, 104 S.Ct. 2052.

a. *Deficient performance*

[24, 25] *Strickland*'s first prong—deficient performance—requires a defendant to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” *Id.* at 687, 104 S.Ct. 2052. Mr. Frederick asserts that his appellate counsel was ineffective for failing to raise certain issues on direct appeal. To succeed on prong one, Mr. Frederick must show “appellate counsel performed deficiently in failing to raise the particular issue on appeal.” *Davis v. Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019).

[26, 27] “[T]he Sixth Amendment does not require [appellate counsel] to raise every nonfrivolous issue,” and “appellate attorneys frequently winnow out weaker claims in order to focus effectively on those more likely to prevail.” *Id.* (quotations omitted). Thus, in evaluating whether appellate counsel performed deficiently, we “typically examine[] the merits of the omitted issue.” *Id.* (quotations omitted). “If the omitted issue is meritless, its omission will not constitute deficient performance.” *Id.* (quotations omitted).

[28] Courts review ineffective assistance claims with “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (quotations omitted). “There are countless ways to provide effective assistance in any given case,” and “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.*

b. *Prejudice*

[29, 30] Under *Strickland*'s second prong—prejudice—a defendant must show “there is a reasonable probability that, but

for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. 2052. “In the context of an ineffective assistance of appellate counsel claim, this means the defendant ‘must show a reasonable probability that, but for his counsel’s unreasonable failure to’ raise a particular nonfrivolous issue, ‘he would have prevailed on his appeal.’” *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014) (quoting *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)).

[31] The court may address the two *Strickland* prongs in either order and need not address both if the defendant has failed to satisfy one. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

3. *Strickland* Review Under AEDPA

As discussed, because the OCCA rejected Mr. Frederick’s IAC claims on the merits, we evaluate them through AEDPA’s deferential lens. “There is no dispute that the clearly established federal law here is *Strickland v. Washington*.” *Cullen*, 563 U.S. at 189, 131 S.Ct. 1388. Thus, we may grant relief under § 2254(d)(1) only if Mr. Frederick shows the OCCA’s decision was “contrary to, or involved an unreasonable application of” *Strickland*. 28 U.S.C. § 2254(d)(1).

[32, 33] “The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.” *Richter*, 562 U.S. at 105, 131 S.Ct. 770 (quotations and citations omitted); *Menzies*, 52 F.4th at 1196 (“When a habeas petitioner alleges ineffective assistance of counsel, courts must engage in doubly deferential judicial review.”). “The *Strickland* standard is a general one, so the range of reasonable applications is substantial.” *Richter*, 562 U.S. at 105, 131 S.Ct. 770. “Given the two layers of deference,” when reviewing un-

der § 2254(d)(1), “a court must consider whether there is *any reasonable argument* that counsel satisfied *Strickland*’s deferential standard.” *Menzies*, 52 F.4th at 1196 (quotations omitted); *see also Richter*, 562 U.S. at 105, 131 S.Ct. 770 (“[T]he question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.”).

[34, 35] A state court’s application of *Strickland* is reasonable at least “so long as ‘fairminded jurists could disagree’ on the correctness of [its] decision.” *Richter*, 562 U.S. at 101, 131 S.Ct. 770 (quotations omitted). Under this test, “if all fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted.” *Frost*, 749 F.3d at 1225. “If, however, some fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied.” *Id.* Thus, to obtain relief under § 2254(d)(1), Mr. Frederick must demonstrate “there is no possibility fairminded jurists could disagree” that Mr. Frederick’s appellate counsel rendered ineffective assistance under *Strickland*. *Richter*, 562 U.S. at 102, 131 S.Ct. 770.

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

4. Courts use two approaches to assess a claim that appellate counsel provided ineffective assistance for failure to raise on direct appeal that trial counsel provided ineffective assistance. First, a court may analyze whether appellate counsel’s performance on direct ap-

II. DISCUSSION

[36] Mr. Frederick argues that appellate counsel was ineffective³ for failing to raise on direct appeal that trial counsel was ineffective

- at the guilt phase, for failure to
 - (1) consult with and present a medical expert;
 - (2) adequately cross-examine Medical Examiner Marc Harrison; and
- at the penalty phase, for failure to
 - (3) investigate and present testimony from family members; and
 - (4) investigate and present evidence of brain damage to Mr. Frederick.⁴

Mr. Frederick also contends that

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

Finally, he seeks habeas relief for

- (6) cumulative error.

peal was deficient, and if so, whether that deficiency caused prejudice on direct appeal. *See Davis*, 943 F.3d at 1299. Second, a court may analyze whether trial counsel’s performance was deficient and if so, whether that deficiency caused prejudice at trial; and if trial counsel’s performance was not deficient, or if any deficiency did not cause prejudice, then appellate counsel could not have been ineffective. *See id.*

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

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

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

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

A. Additional Background

1. Trial

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

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

Dr. Michael Hahn, the neurosurgeon who performed surgery on the decedent following the incident, was asked whether the decedent's injuries were consistent with someone falling. He replied the injuries were "a little bit more than what I would expect. . . . That would take a heck of a fall," like if someone fell off of a 4-to-

5-foot ledge. *Id.* at 1012:24-1013:9; *see also id.* at 1015:11-16, 1024:23-1025:2. Based on the appearance of the left side of the decedent's face, Dr. Hahn said the injuries were more extensive than he would expect from a woman of her height and stature falling over. *Id.* at 1015:3-10. When asked whether the lacerations on her face were "consistent with falling [or] being hit by something," he replied, "[y]eah . . . it looks like it had been something that would've been rough." *Id.* at 1019:12-20. He also testified that he could not open the decedent's left eye due to a "large area" of bruising. *Id.* at 1005:4-18.

2. Direct Appeal

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

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

3. Post-Conviction Evidentiary Hearing

Dr. Bux testified at the post-conviction evidentiary hearing. Evidentiary Hr'g, Vol.

II at 309:22-24. He agreed with Dr. Harrison's assessment that the decedent's cause of death was blunt force trauma to the head. *Id.* at 317:15-20. But he opined the decedent's injuries were consistent with an accidental fall or a fall resulting from a medical event, such as a stroke. *Id.* at 340:10-16; *see also id.* at 323:15-324:7. When asked whether—aside from one picture of the decedent at the scene—he had any “medical evidence that [the decedent] suffered a stroke or a [mini stroke] prior to her fall,” he replied, “[n]o way to know.” Evidentiary Hr'g, Vol. II at 362:8-12; *see also id.* at 281:18-282:2. Dr. Bux said that even if there were witnesses to the assault, he “would be questioning” their account, “particularly if they said it was a brick” that caused the injury. *Id.* at 341:20-24.

Dr. Bux also testified that:

- Based on Dr. Harrison's written findings, he questioned whether the decedent's death had been caused by being hit by a brick because “bricks typically leave a patterned injury” and he would “expect there to be abrasion and bleeding from being hit multiple times,” *id.* at 323:15-24;
- A photograph of the decedent at the scene showed “drawing on the left side of the mouth” that he did not think was “due to swelling of that left cheek area,” and Transient Ischemic Attack (“TIA”) or stroke were “possibilities” of what caused that, *id.* at 334:16-335:1;⁵
- Someone like the decedent whose brain was shrinking due to age was more at risk for suffering a subdural hematoma, *id.* at 338:12-24; and
- If this had been his case, he would have listed the manner of death as

“undetermined” because there were no defensive injuries, no evidence of Mr. Frederick's DNA on the examined bricks, and no evidence of a struggle, *id.* at 341:5-19.

4. OCCA Post-Conviction Opinion

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

B. Analysis

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

First, the evidence overwhelmingly pointed to Mr. Frederick's guilt. *See Richter*, 562 U.S. at 113, 131 S.Ct. 770. Most telling, the decedent communicated that Mr. Frederick attacked her. *Frederick*, 400 P.3d at 799. The evidence from the State's witnesses also showed that Mr. Frederick shoved the decedent against the kitchen counter, yelled at her, chased Ms. Diggs

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

6. Even though the OCCA's decision was “unaccompanied by an explanation,” Mr. Frederick still has the burden to “show[] there was no reasonable basis for the state court to deny relief.” *Richter*, 562 U.S. at 98, 131 S.Ct. 770.

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

Second, Dr. Bux's opinions would have added little to what defense counsel Rowan already elicited during cross-examination of the State's medical witnesses. When cross-examining Dr. Hahn at trial, Mr. Rowan elicited testimony that (1) a person with a heart condition could be more susceptible to falling, Trial Tr., Vol. V at 1020:9-19; (2) a person could generate a lot of force by falling into a hard object, *id.* at 1020:24-1021:4; and (3) the decedent was taking aspirin, *id.* at 1022:22-1023:1, which Dr. Harrison confirmed could make her more susceptible to bleeding, *id.* at 1140:21-25. Mr. Rowan also asked whether lacerations on the decedent's head could be consistent with falling and whether she would have been more susceptible to falling if she had previously wilted⁷ due to chest pains. *Id.* at 1019:12-20, 1027:18-1028:1.

While cross-examining Dr. Harrison at trial, Mr. Rowan elicited testimony that (1)

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

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

Based on the strong evidence of guilt and the cross-examination of the State's medical witnesses, the OCCA reasonably concluded it was unlikely that the result on appeal would have differed if appellate

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

8. Mr. Frederick's challenges to the OCCA's factual findings also fail. He disputes the OCCA's finding on direct appeal that the decedent's "head injuries were so severe that her skull was actually crushed in several places." Aplt. Br. at 16 n.11. But the OCCA

did not mention this fact in its post-conviction opinion, and Mr. Frederick has not "show[n] that the OCCA based its [post-conviction] decision on the factual error." *Harris*, 941 F.3d at 1003; see 28 U.S.C. § 2254(d)(2). He also argues that the OCCA engaged in unreasonable fact finding by "ignor[ing] . . . frailties in the State's case." Aplt. Br. at 16. But that does not amount to an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

counsel had timely raised a claim of ineffective assistance of trial counsel.

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

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

A. Additional Background

1. Trial

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

Trial counsel Rowan cross-examined Dr. Harrison and asked whether it was possible that the decedent's medical conditions caused her to fall, and whether aspirin (which the decedent had taken) would make someone more susceptible to dizziness. *Id.* at 1138:8-1139:20, 1140:21-25. Mr. Rowan also asked Dr. Harrison about the steps he failed to take during the autopsy,

including screening for medications and examining a brick while evaluating the decedent's injuries. *Id.* at 1139-41. Mr. Rowan did not ask Dr. Harrison about his opinion on the cause and manner of the decedent's death or the statement in his autopsy report that Ms. Diggs witnessed the assault. *Aplt. Br.* at 23-24.

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

2. Post-Conviction Evidentiary Hearing

At the evidentiary hearing, post-conviction counsel asked Dr. Harrison about his autopsy report. The report said: "This 85 year old [B]lack female was reported to have been assaulted with an apparent brick by her son (as witnessed by the decedent's granddaughter)." Evidentiary Hr'g State Ex. 4 at 3. That statement was based on the Investigator's Narrative, which said: "Witness stated that the decedent's son had hit the decedent in the head with a brick. . . . Granddaughter witnessed assault." Evidentiary Hr'g Def. Ex. 3 at 1.⁹ A supplemental investigator's report clarified that no one witnessed the assault. Evidentiary Hr'g State Ex. 5.

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

Aplt. Br. Attachment B at 13.

9. An investigator in the Medical Examiner's Office prepared the Investigator's Narrative.

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

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

Based solely on examining the decedent, Dr. Harrison could not rule out a fall as causing the decedent's closed-head injury. *Id.* at 281:10-13, 282:5-8. And it was possible that a fall causing the decedent to hit her head would be consistent with his autopsy findings. *Id.* at 281:14-17. He would probably expect some external bleeding if the decedent was repeatedly hit in the head with a brick. *Id.* at 284:25-285:12.

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

3. OCCA Post-Conviction Opinion

The OCCA concluded that Mr. Frederick was not prejudiced by appellate counsel's failure to raise an IAC claim about

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

B. Analysis

[39] Mr. Frederick argues that appellate counsel provided ineffective assistance by failing to assert trial counsel's ineffectiveness in cross-examining Dr. Harrison. According to Mr. Frederick, trial counsel Rowan should have (1) asked Dr. Harrison about his opinion on the cause and manner of the decedent's death, (2) emphasized Dr. Harrison's reliance on mistaken information, and (3) objected to the State's mischaracterization of Dr. Harrison's testimony during closing argument. Aplt. Br. at 22-24.¹⁰ The OCCA reasonably concluded that Mr. Frederick was not prejudiced by appellate counsel, and its conclusion was not based on an unreasonable determination of the facts. We thus affirm the denial of relief.

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

Mr. Frederick has not shown all fair-minded jurists could disagree with the OCCA's conclusion that he would not have

¹⁰ Mr. Frederick also asserts that trial counsel was ineffective for failing to obtain the Investigator's Narrative, but he does not de-

velop any argument about why this prejudiced him, so we do not consider it. Aplt. Br. at 25.

prevailed on appeal if counsel had raised trial counsel's ineffectiveness in cross-examining Dr. Harrison.

As to trial counsel's failure to cross-examine Dr. Harrison about the manner and cause of death, the OCCA's no-prejudice determination was reasonable. At the evidentiary hearing, Dr. Harrison testified that "based on all of the evidence . . . [he] still [stood] by [his] original findings." Evidentiary Hr'g, Vol. II at 301:22-302:2. Contrary to Mr. Frederick's suggestion, Dr. Harrison's post-conviction testimony does not undermine his conclusions expressed at trial. He acknowledged that "based on [his] examination of [the decedent's] body," he could not rule out a fall as the cause of her head injury. *Id.* at 281:10-17; *see also id.* at 282:5-8. But that testimony was based on his physical examination of the decedent, and Dr. Harrison said police reports and investigators' reports provided additional support for his opinion. *See id.* at 297:20-298:24, 299:20-300:12, 307:12-17.

Moreover, at trial, Mr. Rowan challenged Dr. Harrison's opinion about the manner and cause of death during cross-examination. He asked about the decedent's medical conditions and the possibility they caused her to fall, Trial Tr., Vol. V at 1138:8-1139:20, and whether aspirin (which the decedent had taken) would make someone more susceptible to dizziness, *id.* at 1140:21-25. Mr. Rowan also asked Dr. Harrison to confirm he did not

have a brick during the autopsy, *id.* at 1141:1-12, and that there was no remarkable bruising on the left side of the decedent's face, where she was purportedly hit, *id.* at 1141:13-19. Mr. Frederick presents nothing to suggest that additional questioning would have changed the outcome.

Mr. Frederick argues that the OCCA unreasonably concluded he was not prejudiced by trial counsel's failure to exploit Dr. Harrison's reliance on inaccurate information in the Investigator's Narrative about Ms. Diggs having witnessed the assault. Aplt. Br. at 26.¹¹ But Dr. Harrison said his opinion would be the same regardless of that inaccurate information. Evidentiary Hr'g, Vol. II at 301:14-21.

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

11. Mr. Frederick relies on Dr. Harrison's testimony that the Investigator's Narrative "weigh[ed] very heavily along with other information" in determining that the manner of death was homicide. Evidentiary Hr'g, Vol. II at 303; *see also* Aplt. Br. at 26, 28-29. This testimony does not show the OCCA's no-prejudice conclusion was unreasonable, particularly given its determination that Mr. Frederick could not show prejudice because Dr. Harrison testified that his opinion "would not have changed based on the information in the Investigator's Narrative." Aplt. Br. Attachment B at 15.

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

on trial counsel's failure to correct the misstatement.

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

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

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

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

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

Mr. Frederick asserts that appellate counsel was ineffective for not raising an IAC claim based on trial counsel’s failure to investigate and present testimony from

his family. The OCCA reasonably concluded that appellate counsel was not ineffective because trial counsel was not ineffective. We affirm the denial of relief.

A. Additional Background

1. Family Witnesses

The family members we discuss in this section are:

- 1) Karen Frederick, younger sister;
- 2) Tobias Frederick, younger brother;
- 3) Jerome Frederick, younger brother;
- 4) Judith Frederick-Jones, younger sister;
- 5) Da’Jon Diggs, niece;
- 6) Johnita Cole, aunt;
- 7) Latisha Miller, second cousin;¹³
- 8) LaTrena Sloan, second cousin; and
- 9) Renita Long, second cousin.

2. Pretrial and Trial

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

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

the notice of trial witnesses.

¹³ Ms. Miller was previously known as Ms. Long, which is how her name appeared on

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

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

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

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

3. Post-Conviction Evidentiary Hearing

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

a. Jerome Frederick

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

Their father was a pastor and owned a gas station. *Id.* at 117:7-15. He spanked them with rubber hoses and extension cords as punishment for doing anything against what he viewed as the church’s rules, including playing with friends. *Id.* at 124:9-125:12.¹⁴ Their mother also hit them with extension cords for disobeying her or lying. *Id.* at 126:7-20.¹⁵

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

Mr. Frederick left home when he was 14 or 15 after their father beat him. *Id.* at 143:23-144:9, 128:3-129:15. Mr. Frederick had missed church, and their father accused him of having liquor on his breath and said that he would “whoop him.” *Id.* at 128:1-12. Mr. Frederick “told [their father] he wasn’t gonna take no more whoopins.” *Id.* at 128:12-13. Their father then hit Mr. Frederick with his fist, knocking him out.

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

Id. at 128:12-25. Jerome did not see Mr. Frederick for about 30 years after that. *Id.* at 139:6-15. And after their father died and Jerome left the house, Mr. Frederick was their mother's primary caretaker. *Id.* at 133:18-22.

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

b. *Other family witnesses*

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

Ms. Cole testified that Mr. Frederick was the decedent's primary caretaker—he cooked for and bathed her. *Id.* at 94:15-25. She said she told trial counsel that she would be willing to testify, but no one contacted her. *Id.* at 97:19-98:25. After she learned the trial had started, Ms. Cole attended every day. *Id.* at 99:3-5. Ms. Cole said she felt "[b]ad" that no one testified for Mr. Frederick because "he's a loving person," and she would have asked the jury to spare his life. *Id.* at 100:3-101:4.

LaTrena Sloan, Mr. Frederick's second cousin, testified that Mr. Frederick cared for the decedent and they were loving

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

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

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

c. *Attorney witnesses*

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

Mr. Rowan acknowledged he did not have a strategic reason for failing to interview Mr. Frederick's family members. Evidentiary Hr'g, Vol. I at 206:4-15. When asked why he did not call Ms. Miller or Ms. Cole, Mr. Rowan said he "just blew

it.” *Id.* at 234:17-235:8; *see id.* at 238:21-239:2. Ms. Walker, appellate counsel, testified that if she had known that Mr. Frederick’s brothers had been willing to testify about the childhood abuse, she would have raised trial counsel’s failure to call family members as an IAC claim. Evidentiary Hr’g, Vol. II at 422:6-423:4.

4. OCCA Post-Conviction Opinion

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

As to performance, the OCCA concluded that trial counsel made “reasonable, strategic decisions not to present” Mr. Frederick’s family members. *Id.* at 32. It said there were “[s]erious questions . . . [about] the availability and credibility of family members,” and counsel was not ineffective for failing to call family members who could not be located despite due diligence. *Id.* at 30-31. The OCCA noted that even if Ms. Cole, Ms. Sloan, and Ms. Miller could have been located, much of their testimony was based on hearsay. *Id.* at 31. The OCCA concluded it was “unquestionably sound trial strategy” not to call Jerome Frederick because he would have provided “evidence of [Mr. Frederick’s] violent, criminal past.” *Id.* at 31.

The OCCA next concluded Mr. Frederick was not prejudiced by the omission of testimony from his family members. *Id.* at 32. It explained that even if additional evidence of Mr. Frederick’s troubled childhood had been introduced during the penalty phase of the trial, it was “not clear it

would have been sufficient to mitigate [his] adult criminal conduct.” *Id.* at 33. The OCCA noted that the evidence at trial already showed that Mr. Frederick “did not have a good relationship with his father, left home at an early age[,] and entered the criminal justice system as a juvenile.” *Id.* at 32. It also indicated that “[m]any of the incidents of physical abuse and discord in the household and misdeeds of [Mr. Frederick’s] father occurred after [Mr. Frederick] left home.” *Id.* at 33.

B. Analysis

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

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

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

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

16. The OCCA did not specify a *Strickland* prong in concluding that appellate counsel was not ineffective, so AEDPA deference applies to our review of both prongs. *See Harris*,

941 F.3d at 995 (citing *Premo v. Moore*, 562 U.S. 115, 123, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011)).

family testimony. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

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

a. *Care for the decedent*

Regarding Mr. Frederick's relationship with his mother, only distant relatives said he cared for the decedent. Their testimony mainly consisted of hearsay based on incomplete information,¹⁷ and Tobias disputed their accounts. The OCCA could thus have reasonably determined that Mr. Frederick was not prejudiced by the omission of this testimony. *See Young v. Sirmons*, 551 F.3d 942, 961-63, 969 (10th Cir. 2008) (concluding de novo that petitioner was not prejudiced by the omission of mitigating evidence, including testimony from five immediate family members that he cared for his family).¹⁸

b. *Troubled childhood*

Only Jerome Frederick could provide detailed testimony about Mr. Frederick's troubled upbringing. But calling Jerome as a witness would have revealed additional

harmful information about Mr. Frederick's behavior, and the prosecution easily could have undermined Jerome's credibility. Even looking beyond the likely damaging effect of calling Jerome, his testimony about Mr. Frederick's upbringing had little mitigating value because Mr. Frederick left home over 40 years before the murder and lived a violent life throughout his adulthood. Calling Jerome as a witness thus would have damaged the defense in several ways. We expand on these points below.

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

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

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

present [Mr. Frederick's] family members as witnesses Further, we find [he] was not prejudiced by [trial counsel]'s omission of this evidence." *Id.* at 32.

The OCCA's omission of the particulars of this evidence in its prejudice analysis does not require de novo review, as Mr. Frederick suggests. AEDPA "demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002), and we must "determine what arguments or theories . . . could have supported[] the state court's decision," *Richter*, 562 U.S. at 102, 131 S.Ct. 770. And even under de novo review, there is no reasonable probability that his sentence would have differed if this evidence had been presented. *See Young*, 551 F.3d at 961-63, 969.

Second, at the evidentiary hearing, the State showed it could undermine Jerome Frederick's credibility by asking him about an incident when Jerome grabbed Ms. Diggs by the throat and hit the decedent. *Id.* at 158:6-22. Jerome pled guilty to resulting criminal charges, but testified at the evidentiary hearing that he had not pled guilty to hitting the decedent. *See id.* at 159:7-10. The State then impeached him with his plea agreement, undermining any persuasive value of his testimony. *Id.* at 161:4-163:1; *see also* Evidentiary Hr'g, State's Exs. 1, 2. As the district court noted, "[T]he trial judge who presided at the evidentiary hearing found Jerome Frederick's proposed testimony so fraught with risk that . . . presenting him as a mitigation witness could have given rise to an ineffective assistance of counsel claim." Aplt. Br. Attachment C at 30.

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

Fourth, evidence of Mr. Frederick's violent behavior would have undercut the troubled childhood evidence. *See Wiggins v. Smith*, 539 U.S. 510, 537, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("record of violent conduct" could offset powerful mitigating evidence of childhood abuse). The State presented evidence that Mr. Frederick had (1) robbed a gas station at gunpoint; (2) committed first degree burglary by breaking into a residence in the middle of the night while residents were asleep; (3) brandished a firearm in a hair salon, at-

tempted to shoot two women there, and hit them with his gun; (4) attacked his sister on three occasions; (5) choked and held a knife to the throat of a family member who was approximately 10 years old; (6) attacked a neighbor by beating her face with his fist; and (7) bit a police officer's hand when he tried to collect DNA, which left bruising and a mark. *See* Trial Tr., Vol. VII at 1307:3-6, 1322:1-16, 1346:21-1347:25, 1351:24-1352:10, 1353:1-15, 1379:9-1380:6, 1395:3-4; Trial Tr., Vol. VIII at 1431:9-15, 1433:15-17, 1436:25-1437:1, 1438:11-16, 1444:1-13, 1454:9-1455:17; Court's Exs. 8, 9. The jury thus heard substantial evidence of Mr. Frederick's continued violent behavior over the course of 40 years, weighing against the potential mitigating effect of evidence of childhood abuse.¹⁹

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

19. Mr. Frederick argues that the OCCA's prejudice analysis (1) unreasonably applied *Strickland* in discussing the strength of the State's aggravation case because it "fail[ed] to recognize th[at] mitigation [evidence] need not outweigh the aggravation to find prejudice," Aplt. Br. at 56 (citing *Williams*, 529 U.S. at 398, 120 S.Ct. 1495), and (2) was

contrary to *Williams*. But under *Williams*, the OCCA weighed "the evidence in aggravation" against "the totality of the available mitigation evidence." *Williams*, 529 U.S. at 397, 120 S.Ct. 1495. The OCCA here reasonably applied *Strickland* and its analysis was not contrary to *Williams*.

learned about damaging information. *Id.* at 1214 (quotations omitted). We said the OCCA reasonably concluded that the aggravating evidence at trial weakened the potential mitigating effect of this evidence. *Id.* Similarly here, the OCCA reasonably concluded that evidence of Mr. Frederick's childhood would have opened the door to damaging evidence and that the aggravating evidence at trial undermined any potential mitigating effect.²⁰

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

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

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

Jerome's testimony about Mr. Frederick's childhood. *Aplt. Br.* at 56.

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

* * * *

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

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

Mr. Frederick asserts that appellate counsel was ineffective for not raising an

20. Nor does Mr. Frederick's troubled childhood evidence amount to the type of childhood evidence that the Supreme Court has described as "powerful." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. In *Wiggins*, under de novo review, the Court concluded there was a reasonable probability that the petitioner was prejudiced by the failure to introduce evidence of "severe privation and abuse in the first six years of his life" in the custody of his mother and "physical torment, sexual molestation, and repeated rape during his subse-

quent years in foster care." *Id.* at 535, 123 S.Ct. 2527. The Court has also found prejudice from omission of evidence showing the petitioner had been "severely and repeatedly beaten by his father," his parents had been imprisoned for criminal neglect of him and his siblings, and was returned to his parents' custody after their release from prison. *Williams*, 529 U.S. at 395-98, 120 S.Ct. 1495. The evidence from Mr. Frederick's family members pales in comparison.

IAC claim on direct appeal based on trial counsel's failure to investigate and present evidence of brain damage. On post-conviction review, the OCCA reasonably concluded that appellate counsel was not ineffective because Mr. Frederick was not prejudiced by counsel's omission of this evidence at the penalty phase. We thus affirm the denial of relief on this ground.

A. Additional Legal Background

1. Nature of the Impairment

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

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

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

2. Connection to the Offense

"[E]vidence of mental impairments has substantially more mitigating value when it helps explain the defendant's criminal behavior." *Barrett*, 985 F.3d at 1222-23. For example, in *Wilson v. Trammell*, 706 F.3d 1286 (10th Cir. 2013), we concluded the petitioner was not prejudiced by the omission of mental health evidence at trial in part because his "behavior during the crime" was not "tied to" any disorder. *Id.* at 1310. We explained that although an expert testified that the petitioner's diagnoses "might help a jury understand [his] motivation for committing the crime, there was no credible evidence that [he] acted as a result" of any diagnosis. *Id.* at 1309-10 (citations omitted). We reached a similar conclusion in *Littlejohn v. Royal*, 875 F.3d 548 (10th Cir. 2017), where we explained the petitioner failed to show prejudice because there was no evidence that "brain damage played a substantial role in engendering his life of criminal deviance." *Id.* at 563-64. Similarly, in *Grant v. Royal*, 886 F.3d 874 (10th Cir. 2018), in affirming the denial of relief under AEDPA, we said that the psychologist's testimony "never indicated that [the petitioner's] brain defects caused his behavior . . . in a way that would *meaningfully explain* his involvement" in the underlying crime. *Id.* at 922 (quotations omitted).

3. Additional Factual and Procedural History

a. *Pre-trial*

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

b. *Trial*

In his opening statement at the penalty phase, trial counsel Rowan stated that Mr. Frederick had been in a car accident when he was 13 or 14 that left him unconscious for four days. Trial Tr., Vol. VII at 1296:3-14. Mr. Rowan said Mr. Frederick never went to the hospital even though concussions “are dangerous” and “cause problems.” *Id.* at 1298:25-1299:10. He later presented Nathan Frederick’s testimony from 1982 that Mr. Frederick was in a car accident when he was young and “changed from that very moment.” Trial Tr., Vol. VIII at 1498:15-24. Trial counsel had listed as two mitigating factors that (1) Mr. Frederick had suffered a severe concus-

sion in his early teens that resulted in brain damage and (2) because of the concussion, he lost the ability to control his impulses. *Id.* at 1524:24-1526:2. The State sought modification of those factors at the close of evidence because Mr. Rowan had not presented any evidence of brain damage. *Id.* The court instructed Mr. Rowan to modify the first mitigator to reflect that Mr. Frederick had been in a car accident and “changed from th[at] moment.” *Id.* at 1527:9-12; *see also* State Ct. R., Vol. V at 927.

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

In closing, Mr. Rowan said:

Now we’ve not presented you a neuroscientist. We’ve not presented you a psychiatrist or a clinical psychologist to explain that we have examined Darrell now and he now has that brain damage. He simply wouldn’t let us, resisted that kind of intrusion. So all we have is, you know, anecdotal evidence. You know that a crash that knocks your teeth out, that knocks the windshield out, takes -- the father takes you to get an X-ray. An X-ray can’t show anything about the brain. It can show fractures perhaps, but not damage to the brain. And I can’t prove to you beyond a reasonable doubt that that was the etiology or the beginning of this bad behavior. I can’t prove that. But it’s logical.

...

I can’t prove to you that insults to the brain cause impulsivity. But I think we all have our common sense. We all have

our experiences in life to know intuitively that's true But every one of the incidents . . . they all go from a dead stop to very violent in an instant with no explanation. I think there is an explanation but we're not scientists enough to know precisely what the explanation is. *Id.* at 1585:13-25, 1587:13-23.

c. Post-conviction proceedings

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

Post-conviction counsel then retained Dr. Antoinette McGarrahan to perform neuropsychological testing. Based on that testing, Dr. McGarrahan concluded that Mr. Frederick had "significant indicators of brain damage . . . meaning an overall reduction in his intellect." Evidentiary Hr'g, Vol. IV at 763:2-12. She reported "primary impairment of [Mr. Frederick's] frontal lobes or executive functioning," *id.* at 763:12-16, probably resulting from the car accident and/or boxing, *id.* at 781:5-10. Dr. McGarrahan agreed that Mr. Frederick had antisocial personality disorder and paranoid personality disorder, but she thought his brain damage guided the behaviors leading to those diagnoses. *Id.* at 765:24-767:10, 780:10-781:4, 796:9-18, 798:10-16.

Dr. McGarrahan explained that the frontal lobe has a "cognitive component" related to "planning, problem-solving, abstract reasoning, [and] one's ability to think glob-

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

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

When asked by the State to confirm that she could not "draw any connection between whatever brain damage [Mr. Frederick] may have and any crimes he's ever committed," Dr. McGarrahan replied, "Right. I can't make this direct link. That's correct." *Id.* at 785:18-22; *see also id.* at 786:1-4 ("I cannot make that direct link.").

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

She explained that "aggression [is] at its worst in individuals . . . when they're younger" but that was not "currently the case with [Mr. Frederick's] brain damage." *Id.* at 790:9-14. Dr. McGarrahan then asserted: "You typically don't see unprovoked aggression *even with frontal lobe damage* in individuals who are in their fifth and sixth decade of life." *Id.* at 791:5-

8 (emphasis added). Following “decades of being in prison we tend to see the aggression go down over time, typically in about the fourth decade of life.” *See id.* at 775:6-10.

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

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

Id. at 795:4-19.

d. *OCCA post-conviction opinion*

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

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

“had not been personally interviewed and evaluated.” *Id.* at 38-39.

Second, the OCCA concluded that Mr. Frederick was not prejudiced by trial counsel’s failure to present brain damage evidence. *Id.* at 40. It explained that the introduction of brain damage evidence would have “given the State ample ground to underscore and highlight” Mr. Frederick’s antisocial personality disorder diagnosis, which “tends to present an aggravating . . . circumstance in the sentencing context.” *Id.* at 40 (quoting *Littlejohn*, 875 F.3d at 564). The OCCA said the brain damage evidence could be viewed as mitigating to one person but aggravating to another. *Id.* at 41. It noted that Dr. McGarrahan said Mr. Frederick’s brain damage “would not impair his day-to-day activities” and “that she could not draw any connection between any brain damage and his criminal conduct.” *Id.* at 40. The OCCA also observed that neither Dr. McGarrahan nor Dr. Grundy evaluated Mr. Frederick near the time of trial. *Id.* at 41.

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

B. *Analysis*

Mr. Frederick argues the OCCA’s conclusion that appellate counsel was not ineffective was based on an unreasonable application of *Strickland* and on an unrea-

sonable determination of the facts. We disagree.²¹

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

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

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

a. Lack of connection

The brain damage evidence had limited mitigating value because it could not "*meaningfully explain*" why Mr. Frederick murdered the decedent. *Grant*, 886

F.3d at 922. Although Dr. McGarrahan explained that aggression and minimally provoked violence is often seen in individuals with frontal lobe damage, she testified that "[was] not currently the case with [Mr. Frederick's] brain damage" and that he could inhibit his aggression. Evidentiary Hr'g, Vol. IV at 790:9-14. Dr. McGarrahan then said: "You typically don't see unprovoked aggression even with frontal lobe damage in individuals who are in their fifth and sixth decade of life. At this point [Mr. Frederick]'s becoming more docile and having more difficulties in his thinking than he is in his behavior." *Id.* at 790:15-791:10. Because Mr. Frederick was 55 when he murdered the decedent, under Dr. McGarrahan's explanation of frontal lobe damage and age, brain damage does not provide an explanation the murder.

Dr. McGarrahan also said she could not make a "direct link" between Mr. Frederick's brain damage and the crimes he had committed. *Id.* at 785:18-786:4. At most, without specific reference to any crime, she thought Mr. Frederick's frontal lobe damage was "a contributing factor" to his behavior and that his behavior was "partially explainable" by brain damage. *Id.* at 795:4-19.²²

21. Whether it was unreasonable for the OCCA to decide that trial counsel's failure to present expert testimony on brain damage did not prejudice Mr. Frederick turns on whether all fairminded jurists would disagree with the OCCA's assessment of evidence elicited from Dr. McGarrahan at the state post-conviction evidentiary hearing. *Frost*, 749 F.3d at 1225. As the following discussion shows, the OCCA's understanding of her testimony may not have been the only or even the best interpretation, and it may not even have been correct, but it was not unreasonable. See *Grant*, 727 F.3d at 1024 ("[A]n imperfect or even an incorrect determination of the facts isn't enough for purposes of § 2254(d)(2)."). As such, under AEDPA, this court cannot grant habeas relief.

22. The dissent suggests the majority opinion creates a rule that brain damage evidence

must have a "direct causal link" to the crime for its omission to be prejudicial. Dissent at 1146. It does not. Nor did the OCCA decision. Instead, we follow our precedent explaining that brain damage evidence is more mitigating the stronger its causal connection to the crime. *Grant*, 886 F.3d at 922 (affirming OCCA's no-prejudice determination where brain damage evidence did not "*meaningfully explain*" the defendant's crimes); *Littlejohn*, 875 F.3d at 564 (affirming OCCA's no-prejudice determination where "the evidence . . . did not reveal that [the defendant's] alleged organic brain damage played a substantial role in engendering his life of criminal deviance").

The dissent cites no authority holding otherwise. It relies on *Tennard v. Dretke*, 542 U.S.

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

b. *Aggravating evidence*

Brain damage evidence would have opened the door to introduction of Mr.

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

274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), and *Smith v. Texas*, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (per curiam). Neither is apposite here. Both concerned Texas jury instructions that limited the jury's consideration of mitigation evidence in capital cases. *Tennard*, 542 U.S. at 277, 124 S.Ct. 2562; *Smith*, 543 U.S. at 38, 125 S.Ct. 400. Both held that a capital defendant has a constitutional right for the jury to weigh mitigation evidence as long as "th[e] low threshold for relevance is met," even if there is no "nexus" between the evidence and the crime. *Tennard*, 542 U.S. at 284-85, 124 S.Ct. 2562; see *Smith*, 543 U.S. at 38, 125 S.Ct. 400.

We agree that mitigation evidence need not be directly related to the crime to be admissible, and we do not suggest that Dr. McGarrahan's testimony would have been inadmissible at Mr. Frederick's trial. See Dissent at 1147 n.13. But that is a separate question from whether a defense counsel's failure to present mitigation evidence is prejudicial. Neither *Tennard* nor *Smith* addressed that question—in fact, the word "prejudice" does not appear in either opinion.

In short, contrary to the dissent, the OCCA did not impose a "direct link requirement," we do not "endorse" any such requirement, see Dissent at 1147 n.13, and *Tennard* and *Smith* are not contrary to our position.

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

24. The dissent states that "[t]he risk that any antisocial personality disorder evidence in this case would be received by the jury as more aggravating than mitigating is markedly reduced by Dr. McGarrahan's explanatory testimony about its organic origins." Dissent at 1145 n.12. But our case law explains that antisocial personality disorder is aggravating

c. *Mr. Frederick's cases*

Mr. Frederick cites two Supreme Court cases and three Tenth Circuit cases in support of his prejudice argument. *See* Aplt. Br. at 74-76. These cases are distinguishable and do not establish that the OCCA's no-prejudice determination was "so lacking in justification that there was an error beyond any possibility for fair-minded disagreement." *Burt*, 571 U.S. at 19-20, 134 S.Ct. 10 (quotations and alterations omitted).

In *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the Supreme Court, reviewing ineffective assistance of trial counsel de novo, concluded that counsel's omission of brain damage evidence and evidence of severe childhood abuse from the penalty phase of trial prejudiced the petitioner. *Id.* at 390-93, 125 S.Ct. 2456. The Court explained that experts determined the petitioner "suffer[ed] from organic brain damage, an extreme mental disturbance severely impairing several of his cognitive functions." *Id.* at 392, 125 S.Ct. 2456 (quotations omitted). It noted the brain damage was "likely caused by fetal alcohol syndrome and that [the petitioner]'s capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Id.* (quotations and alterations omitted). Here, by contrast, not only does AEDPA constrain our review, but also Dr. McGarra-

han's testimony does not show that Mr. Frederick's brain damage "substantially impaired" his ability to appreciate the criminality of his conduct "at the time of [the murder]" or that his cognitive functions were "severely impair[ed]." *Id.*

Similarly, in *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), the Supreme Court held the petitioner was prejudiced by counsel's omission of evidence about "(1) [his] heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Id.* at 41, 130 S.Ct. 447. Reviewing under AEDPA, the Court emphasized the petitioner's "extensive combat experience" that took a "mental and emotional toll," noting that "[o]ur Nation has a long tradition of according leniency to veterans." *Id.* at 43-44, 130 S.Ct. 447. The neuropsychologist testified that "[a]t the time of the crime," the petitioner "was substantially impaired in his ability to conform his conduct to the law." *Id.* at 36, 130 S.Ct. 447. Here, again by contrast, Dr. McGarrahan's testimony did not show that brain damage prevented Mr. Frederick from conforming his conduct to the law, and Mr. Frederick had no other substantial mitigating factors like heroic military combat service.

evidence because it shows "a petitioner's potential for continued dangerousness, even if incarcerated" *Littlejohn*, 875 F.3d at 564. And nothing in our case law suggests that this depends on the origin of the disorder. In fact, "the introduction of evidence of organic brain damage" can heighten the aggravating effect of antisocial personality disorder by allowing the State "to frame [the disorder] in terms of [the defendant's] (untreatable) physiological conditions and not just his bad behavior." *Id.* at 565. As we said in *Barrett*, such evidence often has "a double-

edged nature, as jurors may conclude that the defendant is simply beyond rehabilitation." 985 F.3d at 1222 (quotations omitted).

We conclude that Mr. Frederick has not shown that all fairminded jurists could disagree with the OCCA's conclusion that he was not prejudiced at the penalty phase by trial counsel's failure to present brain damage evidence. *See Richter*, 562 U.S. at 102, 131 S.Ct. 770. Contrary to the dissent's characterization, Dissent at 1145 n.12, this conclusion does not rest alone on the double-edged nature of the brain-damage evidence.

Mr. Frederick's reliance on three Tenth Circuit cases is also unavailing. In *Barrett*, reviewing de novo, we concluded the petitioner was prejudiced by counsel's omission of evidence that he "suffer[ed] from organic brain damage, bipolar disorder, and PTSD." 985 F.3d at 1233. We explained that (1) the neuropsychologist testified there was a "deterioration in [the petitioner's] mental state in the weeks and perhaps the days" before the crime and that his criminal act "clearly was an example of misperceiving and not being able to weigh and deliberate," and (2) the brain damage evidence would not "have opened the door to antisocial personality disorder" evidence. *Id.* at 1227, 1232 (quotations and alterations omitted). In addition to the absence of AEDPA review, *Barrett* is distinguishable from this case because the evidence there established a "meaningful" connection between brain damage and the crime at issue, *see Grant*, 886 F.3d at 922, there were other mental health diagnoses in addition to brain damage, and there was no risk of the prosecution introducing antisocial personality disorder evidence, *Barrett*, 985 F.3d at 1232-33.

In *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007), again reviewing de novo, we found that counsel's omission of brain damage evidence prejudiced the petitioner. *Id.* at 1148. We explained that the petitioner was "borderline mentally defective," "function[ed] below the bottom two percent of the general population," suffered "significant damage" to his frontal lobe, and had a "chronic drug addiction" that "exacerbate[d] [his] mental deficits and impairments." *Id.* at 1147 (quotations omitted). The petitioner also "had no history of criminal violence prior to the murders in question." *Id.* *Anderson* is distinguishable from this case because AEDPA applies

here, Mr. Frederick had an extensive history of criminal violence before the murder, Dr. McGarrahan did not testify that he functioned below the general population, and he had no drug addiction.

Finally, Mr. Frederick cites *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004), where we concluded on de novo review that the petitioner was prejudiced by counsel's omission of evidence that he was cognitively impaired, "completely illiterate," had a level of understanding comparable to a 12-year-old child and had brain damage. *Id.* at 941, 944. In finding prejudice, we explained that without the foregoing evidence, "the jury wholly lacked . . . an *explanation* of how [the petitioner's] organic brain damage caused . . . this 'kind hearted' person to commit such a shocking crime." *Id.* at 943. *Smith* is distinguishable because AEDPA review did not apply, the petitioner there had numerous significant impairments that affected his behavior, and the brain damage provided a "compelling explanation for his behavior." *Id.* at 944 (emphasis omitted).

In sum, Mr. Frederick's cases are factually distinguishable because they involved (1) stronger brain damage evidence, (2) evidence of a connection between the brain damage and the crime, (3) other mitigating evidence, and/or (4) weaker aggravating evidence. Also, all but one of these cases were decided under de novo review, whereas AEDPA constrains our review. Under AEDPA, "even a strong case for relief" may be insufficient. *Richter*, 562 U.S. at 102, 131 S.Ct. 770. Here, we cannot say "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.*²⁵

* * * *

25. The dissent states that we improperly "discount[] Mr. Frederick's authorities" because the additional mitigating evidence in those cases compared to this case "seems beside the point." Dissent at 1149. But courts evalu-

ate the prejudicial effect of failing to present certain mitigating evidence by assessing whether "the available mitigating evidence, taken as a whole, might [] have influenced the jury's appraisal of [the defendant's] moral

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

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

Given the strength of the State's aggravation case and the limited mitigating value of the brain damage evidence, the

culpability." *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527 (quotations omitted). The presence of strong mitigating factors other than brain damage in the cases Mr. Frederick cites and the absence of such factors in this case supports our conclusion that the OCCA's no-prejudice determination was not "contrary to" or "an unreasonable application of" Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

26. We cite *Sharp* to illustrate the high bar petitioners face to show that a state court made an unreasonable determination of facts based on its reading of the record. In *Sharp*, a

OCCA reasonably concluded that Mr. Frederick was not prejudiced by trial counsel's failure to introduce that evidence during the penalty phase. The OCCA thus reasonably concluded that appellate counsel did not perform deficiently by failing to assert an IAC claim on this ground.

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

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

[47] As previously noted, under § 2254(d)(2), we may not conclude the OCCA's factual findings were unreasonable "merely because we would have reached a different conclusion in the first instance." *Brumfield*, 576 U.S. at 313-14, 135 S.Ct. 2269 (quotations and alterations omitted). "Instead, § 2254(d)(2) requires that we accord the [OCCA] substantial deference." *Id.* We thus "defer to the state court's factual determinations so long as reasonable minds reviewing the record might disagree about the finding in question." *Johnson*, 3 F.4th at 1218 (quotations omitted). When the state court's factual determination is based on its review of a recorded exchange, the § 2254(d)(2) test requires only that the state court offer a "plausible reading of" the exchange. *Sharp v. Rohling*, 793 F.3d 1216, 1230 (10th Cir. 2015).²⁶ In addition, because the state

detective interviewed the petitioner. He said she was not "going to jail" and that "[y]ou are a witness to this thing so long as you do not do something dumb and jam yourself." 793 F.3d at 1230 (quoting the record). The petitioner then made incriminating statements, was arrested, and later convicted. *Id.* at 1221. The state court found the detective "made no promise of leniency." *Id.* at 1230.

We concluded this was an unreasonable determination of fact under § 2254(d)(2) because it was "not a plausible reading of the interview"—the detective expressly "promised [the petitioner] she would not go to jail

court's determination must be "based on" an unreasonable factual determination, Mr. Frederick must show that the OCCA "plainly misapprehended or misstated the record" and that the "misapprehension goes to a material factual issue that is central to [his] claim." *Johnson*, 3 F.4th at 1219 (quotations and alterations omitted).

First, Mr. Frederick argues that the "OCCA unreasonably found that [Dr.] McGarrahan concluded Frederick's brain damage 'would not impair his day-to-day activities.'" *Aplt. Br.* at 76. But the OCCA did not misstate the record, and reasonable minds at most could disagree whether this finding was inaccurate. *See Brumfield*, 576 U.S. at 314, 135 S.Ct. 2269. Dr. McGarrahan testified that brain damage did not impair day-to-day activities like planning a trip to the grocery store, buying groceries, or holding a job. *Evidentiary Hr'g*, Vol. IV at 782:3-18. And although she said brain damage could impair some day-to-day activities like making complex decisions and abstract reasoning, she ac-

knowledgeed that someone with antisocial personality disorder could also have those difficulties. *Id.* at 782:19-783:10. The OCCA's finding was a "plausible reading of" her testimony, *Sharp*, 793 F.3d at 1230, and thus not unreasonable.²⁷

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

despite her confession." *Id.* Had the state court's reading of the transcript been plausible, its factual determination would not have been "unreasonable" under § 2254(d)(2). The "plausibility" determination in *Sharp* applied the "reasonableness" standard from § 2254(d)(2) to a state court's reading of a transcript.

This understanding of *Sharp* comports with other cases' application of § 2254(d)(2). *See Harrison v. Parris*, No. 16-6750, 2017 WL 6049366, at *2 (6th Cir. Dec. 4, 2017) ("[W]here there are 'a number of plausible ways to interpret the record,' a federal habeas court's disagreement with the inferences the state court drew from the record is not sufficient to reverse its findings if the state court's interpretation is plausible.") (quoting *Renico v. Lett*, 559 U.S. 766, 778, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)); *see also Smith v. Al-dridge*, 904 F.3d 874, 884 (10th Cir. 2018) (citing with approval an Eleventh Circuit case denying habeas relief on a claim that a state court had erred in "credit[ing] one set of affidavits over another" because the court "had plausible reasons" to do so).

27. The dissent says "the OCCA's factual finding that Mr. Frederick's brain damage 'would not impair his day-to-day activities' cannot be reconciled with [Dr. McGarrahan's] actual testimony." Dissent at 1151. But Dr. McGarrahan specifically acknowledged the many day-to-day activities that organic brain damage would "[n]ot typically" impair. *Evidentiary Hr'g*, Vol. IV at 782:12-18. Although Dr. McGarrahan testified that brain damage might impair a person's ability to "mak[e] complex decisions" and interact with others, she said that other factors—such as antisocial personality disorder—can also cause similar impairments. *Id.* at 783:7-10. ("Q: And those four [difficulties] you just listed, they might also be present with anti-social personality disorder and/or other nonmental illness-type disorders; correct? A: That's true."). At most, the OCCA's summary failed to capture the nuance of Dr. McGarrahan's testimony, but this is not enough to show "there is no 'possibility for fairminded disagreement'" on what Dr. McGarrahan said. Dissent at 1141 (quoting *Richter*, 562 U.S. at 102-03, 131 S.Ct. 770).

based on its description of Dr. McGarrahan's testimony. *See Harris*, 941 F.3d at 1003 ("Even if a state court's individualized factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2).") (quotations and alterations omitted)); *Smith v. Duckworth*, 824 F.3d 1233, 1251 (10th Cir. 2016) ("[E]ven if the OCCA mischaracterized the specific contours of the evidence," the petitioner "failed to demonstrate that the OCCA's prejudice decision was based on an unreasonable determination of the facts." (quotations and emphasis omitted)).

Second, Mr. Frederick challenges the OCCA's determination that "[Dr.] McGarrahan concluded that she 'could not draw any connection between any brain damage and [Mr. Frederick's] criminal conduct.'" Aplt. Br. at 77 (quoting Aplt. Br. Attachment B at 40). This determination was not unreasonable. When asked to confirm that she could not "even draw *any connection* between whatever brain damage [Mr. Frederick] may have and any crimes he's ever committed," Dr. McGarrahan said, "Right. I can't make this direct link. That's correct." Evidentiary Hr'g, Vol. IV at

785:18-22 (emphasis added). This supports the OCCA's determination. She also explained, "[y]ou typically don't see unprovoked aggression even with frontal lobe damage in individuals who are in their fifth and sixth decade of life." *Id.* at 791:5-8; *see id.* at 775:6-10 (following "decades of being in prison we tend to see the aggression go down over time, typically in about the fourth decade of life"). Finally, she testified that "at this point [Mr. Frederick] can exercise" the ability to inhibit aggressive responses. *Id.* at 789:18-790:9; *see also id.* at 790:9-14 ("aggression [is] at its worst in individuals . . . when they're younger" but that is not "currently the case with [Mr. Frederick's] brain damage"). The record thus supports that the OCCA's finding was not unreasonable.²⁸

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

28. The dissent would accept Mr. Frederick's argument that the OCCA made an unreasonable determination of fact when it stated that Dr. McGarrahan failed to "draw *any connection* between any brain damage and [Mr. Frederick's] criminal conduct." Dissent at 1151 (quoting Aplt. Br. Attachment B at 40). Yet the dissent concedes that the OCCA drew this language from a statement that Dr. McGarrahan expressly adopted. Evidentiary Hr'g, Vol. IV at 785:18-22 ("Q: And as a matter of fact . . . as a neuropsychologist you really can't even draw any connection between whatever brain damage he may have and any crimes he's ever committed, can you? A: Right. I can't make this direct link. That's correct."). We cannot say that no fairminded jurist would agree with the OCCA's characterization of Dr. McGarrahan's testimony when that characterization quotes directly from the

transcript of her testimony. The dissent relies on "a set of debatable inferences" about what Dr. McGarrahan really meant, which cannot be used "to set aside the conclusion reached by the state court." *Rice v. Collins*, 546 U.S. 333, 342, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006).

29. The dissent states Dr. McGarrahan testified that Mr. Frederick's "frontal lobe damage was 'certainly a contributing factor' to his criminal behavior." Dissent at 1148 (quoting Evidentiary Hr'g, Vol. IV at 795); *see also id.* at 1151. Dr. McGarrahan said the words "contributing factor" in response to a question about explaining "many of [Mr. Frederick's] behaviors," Evidentiary Hr'g, Vol. IV at 795:4-11, not his "criminal behavior."

And as noted above, Mr. Frederick's age when he committed the murder further un-

“[A]ccord[ing] the [OCCA] substantial difference,” as we must, even if “reasonable minds reviewing the record might disagree” about whether Dr. McGarrahan could draw a connection between Mr. Frederick’s brain damage and the murder, that is insufficient to establish that the factual finding was unreasonable. *See Brumfield*, 576 U.S. at 314, 135 S.Ct. 2269 (quotations and alterations omitted). Thus, the OCCA’s finding was not unreasonable. Moreover, Mr. Frederick again does not show that the OCCA’s decision was based on this finding, and for the reasons previously discussed, the OCCA’s prejudice decision was not based on this finding.

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

dermines any inference that brain damage contributed to the crime. Dr. McGarrahan testified, “You typically don’t see unprovoked aggression even with frontal lobe damage in individuals who are in their fifth and sixth decade of life.” *Id.* at 790:15-791:10. Mr. Frederick was 55 when he killed his mother.

30. The dissent bases its contrary conclusion on its interpretation of Dr. McGarrahan’s testimony regarding (1) whether Mr. Frederick’s alleged brain damage would impair his day-to-day activities and (2) whether she could draw a direct link between the brain damage and the crime. The dissent insists that there is no ambiguity in this testimony and that the OCCA’s interpretation was simply wrong. *See* Dissent at 1152 n.15. But as shown above, Dr.

our precedent supports the OCCA’s legal determination that brain damage evidence could open the door to introduction of antisocial personality disorder evidence and that brain damage evidence can be double-edged. *See Grant*, 886 F.3d at 921; *Littlejohn*, 875 F.3d at 564-65.

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

* * * *

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

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

On direct appeal, appellate counsel asserted that trial counsel was ineffective for failing to call Dr. Williams. In his post-conviction petition, Mr. Frederick argued that appellate counsel was ineffective for not providing Dr. Williams’s report in sup-

McGarrahan’s testimony was equivocal on these points. Even if the dissent’s reading of Dr. McGarrahan’s testimony is plausible, this shows only that “reasonable minds reviewing the record might disagree about the finding[s] in question.” *Brown*, 142 S. Ct. at 1525 (quotations omitted). That is not enough under AEDPA. *Id.*; *see also* Brian R. Means, *Federal Habeas Manual* § 3:80 (2022) (“That reasonable minds reviewing the record might disagree about the factual finding does not suffice to super[s]ede the [state] court’s factual finding.”). Instead, Mr. Frederick bore the burden to show that the OCCA’s order did not reflect a “plausible reading of” the testimony, *Sharp*, 793 F.3d at 1230, and he has failed to meet that burden.

port of that claim. The OCCA reasonably concluded that Mr. Frederick was not prejudiced by appellate counsel's failure to submit the report. We thus affirm.

A. Additional Background

1. Trial and Appeal

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

After Mr. Rowan did not call Dr. Williams, the prosecutor challenged that decision based on her planned cross-examination about Mr. Frederick's prior statements during competency evaluations that he did not have a brain injury. Trial Tr., Vol. VIII at 1514-17, 1523-24. Defense counsel responded that he did not call Dr. Williams because (1) Mr. Frederick refused to do any testing and (2) Dr. Williams would have testified that Mr. Frederick was institutionalized,³¹ which was "obvious." *Id.* at 1515-16. Counsel also noted his concern that Dr. Williams's testimony could open the door to discussion of a different murder charge against Mr. Frederick. *Id.* at 1522:13-1523:3.

31. Dr. Williams explained that institutionalization "renders some people so dependent on external constraints that they gradually lose the capacity to rely on internal organization and self-imposed personal limits to guide their actions and restrain their conduct. If and when this external structure is taken away, severely institutionalized persons may find that they no longer know how to do things on their own, or how to refrain from doing those things that are ultimately harmful or self-destructive." APCR, Attachment 32 at 17 ¶ 1.

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

2. Post-Conviction Proceedings

Mr. Frederick attached Dr. Williams's seven-page report to his application for post-conviction relief. In the report, Dr. Williams said that "[g]iven Mr. Frederick's life history of impaired judgment and lack of insight, brain damage . . . [could not] be ruled out," but he could only raise it as a "concern" because Mr. Frederick refused evaluation. APCR, Attachment 32 at 17.³² The report also said that Mr. Frederick was "institutionalized to such a degree that prison is where he functions best, as it is a controlled, structured environment." *Id.* at 20.

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

- Dr. Williams was a sociologist and thus was not qualified to diagnose brain damage;
- Mr. Frederick did not spend much time talking to Dr. Williams;
- The prosecutor "would've torn him up on the stand;" and
- The jury had not heard anything about Mr. Frederick's prior homicide charge, and if Dr. Williams had testi-

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

fied “he would’ve had to admit that he knew that [Mr. Frederick] had been charged with a prior murder.” Evidentiary Hr’g, Vol. I at 200:25-201:20, 204:8-16. He emphasized that the last factor was most important. *See id.* at 231:21-232:2.

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

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

In his application for post-conviction relief, Mr. Frederick asserted that appellate counsel was ineffective for not providing Dr. Williams’s report to the OCCA to support the claim on direct appeal that trial counsel was ineffective for failing to call Dr. Williams. APCR at 40. The OCCA denied relief, concluding that appellate counsel was not ineffective because she had sufficiently raised an IAC claim on direct appeal based on trial counsel’s failure to call Dr. Williams. Aplt. Br., Attachment B at 33.

B. Analysis

[48] Mr. Frederick is not entitled to relief. On direct appeal, the OCCA reject-

ed his claim that trial counsel was ineffective for failing to call Dr. Williams. There was no reasonable probability that Dr. Williams’s report would have changed that result. The OCCA thus reasonably determined that Mr. Frederick was not prejudiced on direct appeal.³³

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

[49] “[A]bsent a showing to the contrary, an attorney’s conduct is [presumed] objectively reasonable because it could be considered part of a legitimate trial strategy.” *United States v. Babcock*, 40 F.4th 1172, 1177 (10th Cir. 2022) (quotations and alterations omitted). In concluding on direct appeal that trial counsel Rowan’s decision not to call Dr. Williams was reasonable trial strategy, the OCCA explained that Dr. Williams would have been under “intense scrutiny” during cross-examination and that the prosecutor planned to call a rebuttal witness. *Frederick*, 400 P.3d at 831. It also noted Mr. Rowan’s concern that calling Dr. Williams would open the door to evidence that Mr. Frederick had been acquitted of murder. *Id.* The OCCA thus focused on the damaging information about Mr. Frederick that would have been elicited on cross-examination. Mr. Frederick has not shown a reasonable probability that Dr. Williams’s report would have altered the OCCA’s conclusion on direct appeal that trial counsel did not perform deficiently.

Nor would Dr. Williams’s report have altered the OCCA’s conclusion that Mr. Frederick was not prejudiced by trial

33. Because the OCCA did not specify a *Strickland* prong in rejecting this claim, AEDPA

review applies to both prongs. *See Harris*, 941 F.3d at 995.

counsel's failure to call Dr. Williams. The OCCA explained that "[n]ot calling Dr. Williams to testify appears to have forced the prosecution in part to alter its course at trial" and that the decision not to call Dr. Williams "was easily explained in closing argument." *Id.* Inclusion of his report would not have altered this analysis. The OCCA also noted that "much of what Dr. Williams would have testified to was already before the jury." *Id.* Although the report may have provided additional information, it largely mirrors what Mr. Rowan had represented to the jury. Mr. Frederick has not shown a reasonable probability that the report would have altered the result on direct appeal.

Mr. Frederick argues that because appellate counsel did not provide Dr. Williams's report to the OCCA, "she was left to argue vaguely" about what Dr. Williams would have told the jury. *Aplt. Br.* at 59. But Mr. Frederick does not specify the information in the report that was not already before the jury. At most, the report indicates that Dr. Williams would have testified to "evidence of Frederick's educational struggles; dysfunctional childhood; or time in the Helena Boys' Home." *Aplt. Br.* at 62. But the jury had heard testimony that Mr. Frederick left home at 14, stopped attending school around that age, and was charged with robbery shortly after. *Trial Tr.*, Vol. VIII at 1497, 1502, 1509-10. It is thus unlikely that Dr. Williams's report would have altered the OCCA's conclusion.³⁴

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

Williams's report. We thus affirm the denial of relief on this ground.

ISSUE SIX: Cumulative Error

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

A. Legal Background

[50] "A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Hooks*, 689 F.3d at 1194 (quotations omitted). This analysis applies only when "there are two or more actual errors," *id.* at 1194-95 (quotations omitted), and we only cumulate errors on claims on which we granted a COA, *Johnson*, 3 F.4th at 1235.

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

B. Analysis

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

34. Mr. Frederick also challenges the OCCA's factual findings on direct appeal under 28 U.S.C. § 2254(d)(2). But the OCCA's post-

conviction adjudication of Mr. Frederick's claim was not "based on" findings on direct appeal. *See* 28 U.S.C. § 2254(d)(2).

Although Mr. Frederick raised ineffective assistance of counsel claims based on appellate counsel's performance, he makes no argument as to the cumulative effect of appellate counsel's errors on direct appeal. Instead, his arguments focus on the cumulative effect of trial counsel's alleged errors.³⁵ For certain claims, we limited our analysis to whether Mr. Frederick was prejudiced by appellate counsel and did not assess deficient performance. We thus effectively presumed that appellate counsel performed deficiently for (1) not raising claims about trial counsel's failure to consult and present a medical expert, (2) not raising a claim about trial counsel's cross-examination of Dr. Harrison, and (3) not providing Dr. Williams's report in support of an IAC claim. Taken together, those errors did not have a substantial and injurious effect on direct appeal.³⁶

35. Our precedent is not entirely clear on how to apply the cumulative error analysis when a petitioner's claims are based solely on appellate counsel's conduct. Some of our cases suggest that we do not cumulate alleged errors by appellate counsel if those errors relate to conduct that occurred at trial. *See Harmon v. Sharp*, 936 F.3d 1044, 1083 (10th Cir. 2019) ("On cumulative error review in this case, we do not aggregate any prejudice from Petitioner's ineffective assistance of appellate counsel claims because no *trial* prejudice can stem from ineffective assistance of appellate counsel."); *cf. Tolbert v. Ulibarri*, 325 F. App'x 662, 665 (10th Cir. 2009) ("Because the alleged ineffective assistance of trial and appellate counsel occurred in separate proceedings . . . reasonable jurists would agree that there is nothing to cumulate.") (quotations omitted) (although not precedential, we find the reasoning of this unpublished decision instructive under 10th Cir. R. 32.1 and Fed. R. App. P. 32.1).

But other cases have applied a cumulative error analysis to ineffective assistance claims directed at appellate counsel when there were also separate claims directed at trial counsel—there are no IAC claims against trial counsel here. *See Johnson*, 918 F.3d at 909 ("We . . . look to whether the state court would have reversed on cumulative-error

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

III. CONCLUSION

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

ROSSMAN, J., dissenting

I cannot affirm Darrell Wayne Frederick's death sentence because the failure to investigate and present evidence of his organic brain damage at the penalty phase constitutes objectively unreasonable assistance of counsel.¹ Counsel's deficient performance prejudiced Mr. Frederick because the jury charged with sentencing him was denied complete information about his circumstances.² Mr. Frederick

grounds on direct appeal if [the petitioner's] appellate counsel had brought each of the claims we denied for insufficient prejudice.") (quotations omitted); *Bush v. Carpenter*, 926 F.3d 644, 686-87 (10th Cir. 2019) (considering ineffectiveness of appellate counsel for failing to raise IAC claim in cumulative error analysis).

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

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

1. The evidence at the heart of Mr. Frederick's fourth IAC claim has been described as mental health evidence, evidence of organic brain damage, brain damage evidence, and the like. I adopt the majority's formulation: "brain damage evidence." Maj. Op. at 1119.

2. The majority opinion asserts Mr. Frederick's ineffectiveness of appellate counsel claim comprises five arguments. I focus—and would reverse—only on the fourth: the failure to investigate and present evidence of brain

first litigated his brain damage evidence claim in state postconviction proceedings before the OCCA, where he lost on the merits of both *Strickland* prongs. Today, the court declines to disturb the OCCA's determination, insisting the state's case was so strong, the fact that Mr. Frederick suffered from organic brain damage would not have mattered to a single member of his jury. On the record before us, I cannot agree.

The Eighth and Fourteenth Amendments give capital defendants the right to present mitigating evidence regarding "any aspect of a defendant's character . . . and any of the circumstances of the offense," "proffer[ed] as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)); see generally U.S. Const. amends. VIII, XIV. The Sixth Amendment effects that right by guaranteeing legal representation with the "skill and knowledge . . . necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed. 268 (1942)); see generally U.S. Const. amend. VI. The right to the effective assistance of counsel is "a bedrock principle in our justice system" and indeed, the very "foundation for our adversary system." *Martinez v. Ryan*, 566 U.S. 1, 12, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

A defendant's constitutional rights—and his counsel's constitutional obligations—are especially heightened at the penalty phase of a capital case. "What is essential," at that stage, "is that the jury have before it *all possible relevant information* about

the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added). Our own court has confirmed "[t]he sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." *Anderson v. Sirmons*, 476 F.3d 1131, 1142 (10th Cir. 2007) (quoting *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001)).

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

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

damage at the penalty phase. Maj. Op. at

1106-07.

Mr. Frederick's jury knew none of this. Significant mitigating evidence—evidence that might have explained or contextualized the conduct for which Mr. Frederick was convicted—was not presented during the penalty phase. Instead, defense counsel advanced an uninvestigated defense. Under the circumstances, Mr. Rowan's approach to the capital defense function was not merely wrong, it was objectively unreasonable. And because imposition of the death sentence under Oklahoma law requires a unanimous jury, *Malone v. State*, 168 P.3d 185, 215 n.138 (Okla. Crim. App. 2007), “the question is whether there is a reasonable probability that, absent the errors, [at least one juror] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. The state presented a powerful case, but defense counsel offered the jury effectively nothing against which to weigh it. Had the defense put actual evidence of Mr. Frederick's organic brain damage “on the mitigating side of the scale”—and not just a defense lawyer's unsubstantiated personal conjecture—“there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins v. Smith*, 539 U.S. 510, 537, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

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

3. The record shows Ms. Hammarsten was concerned Mr. Frederick might not be competent to stand trial. Ms. Hammarsten never sought a competency evaluation, however, and Mr. Frederick's competency was never evaluated in this case.
4. Apparently, Mr. Frederick believed Dr. Williams was hired to convince him to plead

I

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

A

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

Mr. Frederick harbored paranoid beliefs about Ms. Hammarsten. He thought she was “sharing information with the prosecutors” and accused her of bringing school children into the jail. *Id.* at 615, 619. In her opinion, Mr. Frederick was exhibiting behaviors beyond simply being “a difficult client.” *Id.* at 615.³ She consulted Dr. Art Williams—an expert “in the areas of social work, psychotherapy, substance abuse, mitigation and criminal justice.” APCR Attachment 32, Affidavit at ¶ 1. Before trial in 2014, Dr. Williams met with Mr. Frederick for a single three-hour “interview” and found him “very circumspect and suspicious about providing information and [he] refused to cooperate in testing.” *Id.*, Exhibit 2 at 1.⁴

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

Ms. Hammarsten testified that, after consulting with Dr. Williams about Mr. Frederick, “our speculation was that there was some brain damage.” Evidentiary Hr’g, Vol. III at 615. Dr. Williams prepared a report⁵ detailing what he knew about Mr. Frederick’s upbringing, his institutionalization and its effects,⁶ and his behavior. He observed Mr. Frederick had competed on a prison boxing team and “brain damage from chronic insult cannot be ruled out.” APCR Attachment 32, Exhibit 2 at 4, 7. Based on “lengthy conversations” with Mr. Frederick’s sister and legal team, Dr. Williams concluded Mr. Frederick “likely suffers from long-standing mental illness(es) and/or traumatic brain injury.” *Id.*, Affidavit at ¶ 6. Though he was “trained to recognize mental illness and brain injury,” Dr. Williams admitted he was “not qualified to actually diagnose these conditions.” *Id.* Dr. Williams was prepared to testify at Mr. Frederick’s trial only “regarding [his] reservations about [Mr. Frederick’s] mental and cognitive health” and thus “recommended that a qualified neuropsychologist and/or psychiatrist examine Mr. Frederick to explore formal diagnoses of mental disease and/or traumatic brain injury.” *Id.*

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

B

About a year before trial, Mr. Rowan replaced Ms. Hammarsten as defense

counsel. Mr. Rowan was “an experienced capital litigator” and well known to the Oklahoma bench. Appt. Br. Attachment B at 30. The state court judge who presided over the substitution told Mr. Frederick his new lawyer would likely bring experts in to speak with him. Mr. Frederick expressed no concern about this possibility. Evidentiary Hr’g, Vol. III at 621. Mr. Frederick “was so happy to be getting rid of me,” Ms. Hammarsten testified, “yes, he would’ve cooperated with somebody else.” *Id.*

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

Based on Ms. Hammarsten’s experience, Mr. Rowan did not “think Mr. Frederick was particularly interested in being examined by a neuropsych.” *Id.* at 203. According to Mr. Rowan, Ms. Hammarsten told him “she had some difficulty getting experts in. And so that clouded my judgment

5. I agree with the majority opinion that, contrary to the state’s position, Dr. Williams’s report and affidavit are properly before us. Both documents were attached to Mr. Frederick’s application for postconviction relief and, therefore, are part of the “record that was before the state court.” Maj. Op. at 1132 n.32 (quoting *Grant v. Trammell*, 727 F.3d 1006, 1019 n.5 (10th Cir. 2013)).

6. As Dr. Williams explained,

Mr. Frederick is institutionalized. He has grown up in and adapted himself to a world where it is dangerous to show fear or weakness; where it is safest to be hypervigilant and mistrustful, and where he has become so dependent on the internal constraints of a prison system that he does not know how to function in a healthy way with those in the outside world.

APCR Attachment 32, Exhibit 2 at 5.

in trying to talk [Mr. Frederick] into having somebody examine him.” *Id.* at 245-46.

No investigation into Mr. Frederick’s brain damage occurred until the postconviction phase. At that point, Mr. Rowan admitted he “[a]bsolutely” would have presented evidence of organic brain damage to the jury if he had it. *Id.* at 204-05.

C

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

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

[T]he very first thing that they want to submit to this jury is that Darrell Frederick suffered a severe concussion in his early teen years which resulted in damage to the brain. The second mitigator

that they want to submit is the concussion Darrell Frederick suffered in his early teen years caused [him to] lose the ability to control his impulses. So they’re—they’re putting this issue front and center.

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

D

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

suffered a severe concussion in his early teen years which resulted in damage to the brain,” and, second, that “the concussion Darrell Frederick suffered in his early teen years caused Darrell Frederick [to] lose the ability to control his impulses.” Trial Tr., Vol. VIII at 1524-25.

Mr. Frederick’s defense presented other mitigators which did not rely on the brain damage evidence. *See* Maj. Op. at 1100-01.

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

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

The two initially proffered brain damage mitigators were, first, that “Darrell Frederick

Now we've not presented you a neuroscientist. We've not presented you a psychiatrist or a clinical psychologist to explain that we have examined Darrell now and he now has that brain damage. He simply wouldn't let us, resisted that kind of intrusion. So all we have is, you know, anecdotal evidence. You know that a crash that knocks your teeth out, that knocks the windshield out, takes—the father takes you to get an X-ray. An X-ray can't show anything about the brain. It can show fractures perhaps, but not damage to the brain.

And I can't prove to you beyond a reasonable doubt that that was the etiology or the beginning of his bad behavior. I can't prove that. But it's logical. We're learning more and more about concussions now. I mean, don't football players go out and spend several weeks in—under observation when they get a concussion? You know, we've learned more about concussions and how dangerous they are and how they can affect the brain. And there's an executive function in the brain that governs impulses. . . . I can't prove to you that insults to the brain cause impulsivity. But I think we all have our common sense. We all have our experiences in life to know intuitively that's true, that that—you protect the brain. You wear a helmet when you play football. But every one of the incidents—and go through them in your own mind. . . . [T]hey all go from a dead stop to very violent in an instant with no explanation. *I think there is an explanation but we're not scientists enough to know precisely what that explanation is.* Trial Tr., Vol. VIII at 1585-87 (emphasis added).

The perfunctory nature of Mr. Frederick's "halfhearted mitigation case," *Wiggins*, 539 U.S. at 526, 123 S.Ct. 2527, was brought into relief by the state's ample aggravation case: three aggravators sup-

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

E

At the postconviction evidentiary hearing, Mr. Frederick's lawyer on direct appeal, Gina Walker, testified that after reading the trial transcripts, she became concerned about the disconnect between Mr. Rowan's mitigation theory and the evidence presented to support it. "[A] large part of Mr. Rowan's case," she explained, "was that Darrell had had some sort of brain injury, had a traumatic brain injury or brain damage which propelled him to not have really good control over his emotions." Evidentiary Hr'g, Vol. II at 424. But in her view, there was "hardly any evidence" presented to the jury on the issue. *Id.* "I'm not a psychologist or a psychiatrist," Ms. Walker added, but "I felt like Darrell Frederick probably had a mental illness." *Id.* She formed this opinion after meeting with her client one time. *Id.* at 425.

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

II

The Sixth Amendment guarantees “the right to the effective assistance of counsel.” *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052 (citation omitted). *Strickland* requires a defendant who claims ineffective assistance to show (1) “that counsel’s representation fell below an objective standard of reasonableness,” and (2) that any deficiency was “prejudicial to the defense.” *Id.* at 688, 692, 104 S.Ct. 2052. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686, 104 S.Ct. 2052. The OCCA rejected Mr. Frederick’s claim that trial counsel’s failure to investigate and present mitigating evidence of organic brain damage constituted ineffective assistance.⁹

Because the OCCA adjudicated the merits, we must apply AEDPA’s limitations on federal habeas relief. *See Harrington v. Richter*, 562 U.S. 86, 92, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (explaining “the availability of habeas relief is limited with respect to claims”—like Mr. Frederick’s—“‘adjudicated on the merits’ in state-court proceedings”). Specifically, 28 U.S.C. § 2254(d) governs our resolution

of Mr. Frederick’s IAC claim based on the brain damage evidence. He can prevail only if he shows the OCCA’s resolution of his brain damage evidence claim either, under § 2254(d)(1), “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or under § 2254(d)(2), “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹⁰ Section 2254(d) imposes a “difficult” burden on a habeas petitioner; relief is available only where there is no “possibility for fairminded disagreement” with the state court’s decision. *Richter*, 562 U.S. at 102–03, 131 S.Ct. 770. In my view, Mr. Frederick has cleared this hurdle.

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

Not only did Mr. Rowan believe Mr. Frederick suffered from organic brain damage but *he chose to make Mr. Frederick’s brain damage the central theory of*

9. I analyze Mr. Frederick’s appellate IAC claim—as did the OCCA and the district court, and as does the majority opinion—by considering whether trial counsel provided ineffective assistance. When the basis of an ineffective-assistance claim is the failure by appellate counsel to raise an issue on appeal, “we must look to the merits of the omitted issue.” *United States v. Orange*, 447 F.3d 792, 797 (10th Cir. 2006). “If the omitted issue is without merit, counsel’s failure to raise it

‘does not constitute constitutionally ineffective assistance of counsel.’” *United States v. Cook*, 45 F.3d 388, 393 (10th Cir. 1995) (citation omitted), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001).

10. I agree with much of the majority’s recitation of the applicable legal principles prescribing our review, so I do not repeat them here. *See* Maj. Op. at 1102–05.

the penalty-stage defense without conducting any investigation to establish it. Under *Strickland*, no attorney who suspected their client sustained brain damage in a car accident and then centered their defense on that fact could reasonably conclude investigating and presenting that mitigation evidence would be a waste. Mr. Rowan's choice left the jury—freighted with the enormous weight of deciding whether to sentence Mr. Frederick to death—alone with their common sense and the state's case in aggravation. Mr. Rowan's performance falls well below any objectively reasonable understanding of the defense function in a capital case. Under the circumstances, the OCCA's deficient-performance ruling is "contrary to" and an "unreasonable application of" *Strickland*'s first prong.

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

Mindful of the constraints AEDPA deference imposes on our review, I conclude Mr. Frederick has satisfied § 2254(d) as to

his brain damage evidence claim and is therefore entitled to habeas relief.

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

III

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

To assess deficient performance under *Strickland*, we consider whether counsel's performance "fell below an objective standard of reasonableness" under "prevailing professional norms." 466 U.S. at 688, 104 S.Ct. 2052. This inquiry requires us to analyze "the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. 2052. True, our review of counsel's performance under *Strickland*'s first prong is "highly deferential," *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (quoting *Hooks v. Workman*, 606 F.3d 715, 723 (10th Cir. 2010)), but we must be "'particularly vigilant' in ensuring the right to effective assistance of counsel when a defendant is subject to a sentence of death," *Anderson*, 476 F.3d at

1141 (quoting *Smith v. Mullin*, 379 F.3d 919, 938 (10th Cir. 2004)).

“An IAC claim premised on a lack of investigation is governed by the same *Strickland* standards as all other IAC claims.” *Davis v. Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019) (citing *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)). “Counsel’s duty to investigate and present mitigating evidence is now well established.” ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 cmt. (rev. ed. 2003); *see also id.* (gathering cases).¹¹ “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690-91, 104 S.Ct. 2052. To be sure, “the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” *Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456.

To assess whether defense counsel exercised reasonable professional judgment, we do not ask “whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence . . . *was itself reasonable*.” *Wiggins*, 539 U.S. at 523, 123 S.Ct.

2527 (citing *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). “To be deficient, the performance must be outside the wide range of professionally competent assistance. In other words, it must have been completely unreasonable, not merely wrong.” *Byrd*, 645 F.3d at 1168 (quoting *Hooks*, 606 F.3d at 723). “[E]very effort [must] be made to eliminate the distorting effect of hindsight . . . and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

As Mr. Frederick persuasively points out, the district court correctly understood “Mr. Rowan was aware that [Mr. Frederick] potentially suffered from brain damage,” Aplt. Br. Attachment C at 42, and thus defense counsel’s duty to investigate was implicated. Mr. Rowan had reviewed Ms. Hammarsten’s files, including Dr. Williams’s pretrial report, which squarely acknowledged the possibility of brain damage. APCR Attachment 32, Exhibit 2 at 4, 7. Mr. Rowan met with Dr. Williams before trial and determined he would not be an appropriate witness, in part because he was not qualified to diagnose organic brain damage. Cognizant of these deficiencies, Mr. Rowan conducted no further investigation *yet still* “embrac[ed] Petitioner’s head injury as the reason for his violent actions.” Aplt. Br. Attachment C at 42.

This is precisely what *Strickland* forbids. Mr. Rowan reasonably could decline to investigate a theory he chose not to rely upon. What he could not do—but did here—is refuse, without basis, to investigate a theory on which he would then base his life-or-death pitch to Mr. Frederick’s jury. At issue here is not just the absence of a constitutionally sufficient investigation—it is the presentation of, and reliance

11. “The Supreme Court has, time and again, cited ‘the standards for capital defense work articulated by the American Bar Association (ABA) . . . as “guides to determining what is

reasonable’ ” performance.” *Smith*, 379 F.3d at 942 (quoting *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527).

on, an *uninvestigated defense*. Our deference to an attorney's choice must run out in such circumstances.

The OCCA essentially attributed the lack of expert mental health evidence to Mr. Frederick's failure to cooperate. The OCCA reasoned "[i]t would be questionable to put any sort of mental health evidence before the jury where [Mr. Frederick] has not been personally interviewed and evaluated." Aplt. Br. Attachment B at 39. Mr. Frederick may not have cooperated fully with Ms. Hammarsten. But that is why counsel was substituted. Mr. Rowan "was specifically brought into the case to restore the attorney/client relationship." Aplt. Br. Attachment C at 43.

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

Even if Mr. Frederick had been uncooperative with Mr. Rowan, that still would not excuse the total failure to investigate a mitigation theory counsel intends to present to the jury. The district court acknowledged as much: "The fact that [Mr. Frederick] may have been uncooperative

or obstinate does not relieve counsel of the duty to perform a reasonable mitigation investigation." *Id.* (citing *Porter v. McCollum*, 558 U.S. 30, 40, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) ("Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation.")).

In assessing the reasonableness of Mr. Rowan's decision not to investigate, the OCCA should have considered "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527. An effective attorney in Mr. Rowan's position would at least "attempt to have his client evaluated by a qualified mental health expert, even if he anticipated that the client may not actively participate in the evaluation," especially "[w]here counsel is aware of possible brain damage and chooses to make it a central theme in his mitigation case." Aplt. Br. Attachment C at 43. But Mr. Rowan failed to investigate the "facts relevant to plausible options" in his mitigation case because he never consulted any mental health expert. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

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

IV

The majority opinion focuses only on *Strickland's* prejudice prong, endorsing

the OCCA's conclusion that Mr. Frederick was not prejudiced at the penalty phase by trial counsel's failure to investigate and present brain damage evidence. According to the majority, the OCCA's "no-prejudice determination was not unreasonable" for three reasons: "[B]ecause the proffered evidence (a) failed to adequately link brain damage to the murder and (b) would have opened the door to evidence harmful to the defense. Also, (c) Mr. Frederick's reliance on certain cases is misplaced." Maj. Op. at 1124.¹² Having investigated these reasons, I do not see how affirmance is warranted under § 2254(d)(1) or (2).

A

1

Recall, capital habeas defense counsel first retained Dr. Curtis Grundy, an expert in clinical and forensic psychology. *See* Maj. Op. at 1121–22. He determined Mr. Frederick had "indicators of possible traumatic brain injury" and referred him for

neuropsychological testing. APCR Attachment 39, Exhibit 2 at 10, 12; *see also* Evidentiary Hr'g, Vol. IV at 692–93. Dr. Antoinette McGarrahan, a psychologist "specializ[ing] in forensic psychology and neuropsychology," was then retained to administer the testing. Evidentiary Hr'g, Vol. IV at 738, 743–44. After meeting with Mr. Frederick for 8 hours, Dr. McGarrahan concluded he had "significant indicators of brain damage," *id.* at 763, and his brain damage was "certainly a contributing factor" to his criminal behavior, *id.* at 795.

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

12. I respond at length to reasons (a) and (c) discussed in the majority opinion but not (b), which asserts the brain damage evidence was essentially double-edged, so its omission at the penalty phase was not prejudicial. I recognize we have held antisocial personality disorder "tends to present an aggravating, rather than mitigating, circumstance in the sentencing context." *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017). And, we have held it is possible for brain damage evidence to heighten the aggravating effect of antisocial personality disorder evidence. *See* Maj. Op. at 1125–26 n.24 (citing *Littlejohn*, 875 F.3d at 565).

I am not certain treating the most powerful form of mitigating evidence as essentially aggravating so as to foreclose a showing of prejudice accords with Supreme Court precedent. *See Williams*, 529 U.S. at 397–98, 120 S.Ct. 1495; *Wiggins*, 539 U.S. at 534–38, 123 S.Ct. 2527; *Rompilla*, 545 U.S. at 390–93, 125 S.Ct. 2456; *Sears v. Upton*, 561 U.S. 945, 955–56, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam). Regardless, the general principles relied on in the majority opinion do not counsel in favor of denying habeas relief here.

The risk that any antisocial personality disorder evidence in this case would be received by the jury as more aggravating than mitigating is markedly reduced by Dr. McGarrahan's explanatory testimony about its organic origins. *See, e.g.*, Evidentiary Hr'g, Vol. IV at 795–96 (describing how the "etiology of [Mr. Frederick's] antisocial personality disorder" behaviors . . . is at least in part due to brain damage"). "[Mr. Frederick's] brain damage," Dr. McGarrahan testified, "is guiding those behaviors of anti-social personality disorder." *Id.* at 798. Only by misunderstanding the precise nature of Mr. Frederick's brain damage, as presented at the postconviction evidentiary hearing, would it be reasonable to conclude such mitigating evidence would have opened the door to evidence harmful to the defense. The point I make does not depend on the "origin of the disorder," Maj. Op. at 1126 n.24, but on the well-settled understanding that a court assessing prejudice based on the failure to investigate and present mitigating evidence must consider the precise nature of the mitigating evidence and assess its value in the context of the whole record. *See, e.g.*, *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527.

quately link brain damage to the murder.” Maj. Op. at 1124. I respectfully disagree.

It is worth restating the critical purpose of mitigating evidence in a death penalty case. The breadth of mitigation evidence a defendant may proffer in his defense is well established. In *Lockett v. Ohio*, the Supreme Court held the “Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, *any aspect* of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion) (emphasis added and alteration omitted). This is because “the imposition of death by public authority is . . . profoundly different from all other penalties,” so the sentencer “must be free to give ‘independent mitigating weight’ ” to any reason a defendant gives to spare his life. *Eddings*, 455 U.S. at 110, 102 S.Ct. 869 (quoting *Lockett*, 438 U.S. at 605, 98 S.Ct. 2954). Mitigating circumstances are intended to impart “compassion[]” and a “fundamental respect for humanity” into the sentencing proceedings. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Thus, “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard v. Dretke*, 542 U.S. 274, 285, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (alteration omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 822, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)).

“Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available.” *Littlejohn v. Trammell*, 704 F.3d 817, 864 (10th Cir. 2013). “And for good reason—the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, alter-

ing the causal relationship between impulse and action.” *Hooks v. Workman (Hooks II)*, 689 F.3d 1148, 1205 (10th Cir. 2012); *see also Smith*, 379 F.3d at 942 (describing how evidence of this type is “exactly the sort . . . that garners the most sympathy from jurors”). Despite acknowledging this, Maj. Op. at 1120, the majority opinion concludes evidence of brain damage is not valuable mitigation unless “link[ed] . . . to the murder,” *id.* at 1124.

Neither the OCCA nor the majority opinion goes so far as to say Mr. Frederick’s organic brain damage had no mitigating value. But the OCCA “discount[ed] entirely the effect [the] testimony might have had on the jury,” *Porter*, 558 U.S. at 43, 130 S.Ct. 447, because Dr. McGarrahan did not directly connect—or as the majority opinion says “failed to adequately link”—the brain damage to the crime. The majority opinion approves of the OCCA’s approach, requiring mitigating evidence to “play[] a substantial role” in the murder before its omission can be deemed prejudicial. Maj. Op. at 1125 (quoting *Littlejohn*, 875 F.3d at 564).

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

In *Tennard v. Dretke*, 542 U.S. 274, 289, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), the Supreme Court explicitly rejected the Fifth Circuit’s requirement that mitigating evidence must have some “nexus” to a capital defendant’s crime for the jury’s failure to consider that evidence to be deemed prejudicial. The Court reaffirmed *Tennard* in *Smith v. Texas*, 543 U.S. 37, 45, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004), when it characterized the “nexus” require-

ment as a “test we never countenanced and now have unequivocally rejected.”¹³

Citing *Grant*, the majority opinion says the brain damage evidence “had limited mitigating value because it could not ‘meaningfully explain’ why Mr. Frederick murdered the decedent.” Maj. Op. at 1124 (quoting *Grant v. Royal*, 886 F.3d 874, 922 (10th Cir. 2018)). But *Grant* is not so definitive. There we held the OCCA reasonably concluded organic brain damage evidence would have minimal mitigating value because an expert’s testimony “never indicated that [petitioner’s] brain defects caused his behavior to be ‘impulsive’ or ‘aggressive’ in a way that would meaningfully explain his involvement in the” crimes. 886 F.3d at 922 (emphases added). Here, Dr. McGarrahan testified Mr. Frederick’s brain damage was “certainly a contributing factor.” Evidentiary Hr’g, Vol. IV at 795. That is a meaningful explanation.

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

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

Contrary to what the majority opinion suggests, mitigating evidence need not draw a straight line directly to the criminal conduct to have real value under applicable law. Indeed, if only evidence with an explanatory nexus was deemed mitigating, it is hard to imagine how the capital sentencing process could give effect to “the fundamental respect for humanity underlying the Eighth Amendment.” *Eddings*, 455 U.S. at 112, 102 S.Ct. 869 (citation omit-

13. The majority opinion resists the relevance of *Tennard* and *Smith*, suggesting those cases, unlike the matter before us, simply “concerned Texas jury instructions that limited the jury’s consideration of mitigation evidence in capital cases.” Maj. Op. at 1125 n.22 (citing *Tennard*, 542 U.S. at 277, 124 S.Ct. 2562, and *Smith*, 543 U.S. at 38, 125 S.Ct. 400). To be sure, those cases explain a state cannot prevent a sentencer from considering relevant mitigating evidence, *i.e.*, evidence with any tendency to mitigate the defendant’s culpability. See, *e.g.*, *Tennard*, 542 U.S. at 286, 124 S.Ct. 2562. But in so holding, the Court said “the Fifth Circuit’s screening test ha[d] no

basis in [the Court’s] precedents and, indeed, [wa]s inconsistent with the standard [the Court] ha[s] adopted for relevance in the capital sentencing context.” *Id.* at 287, 124 S.Ct. 2562. That is, mitigating evidence need not “relate specifically to [a] petitioner’s culpability for the crime he committed.” *Id.* at 287, 124 S.Ct. 2562 (citing *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). For this reason, the Court held the “nexus” test underlying the Texas jury instructions was “incorrect.” *Id.* at 289, 124 S.Ct. 2562. And so too is the direct link requirement imposed by the OCCA and endorsed today by the majority opinion.

ted). Though Dr. McGarrahan testified she “cannot make that direct link,” Evidentiary Hr’g, Vol. IV at 786, she explained Mr. Frederick’s frontal lobe damage was “certainly a contributing factor” to his criminal behavior, *id.* at 795. Typically, “the frontal lobes are what hits the brakes on things when we want to do something but we know we shouldn’t do it. So being able to inhibit or not engage in those behaviors.” *Id.* at 764. The frontal lobe, she explained, involves three “broad areas,” one of which “controls certain aspects of behavior,” including “aggression, violence, acting out, impulsivity.” *Id.* Dr. McGarrahan could not “say with a hundred percent certainty,” but she believed “[Mr. Frederick’s] aggression and unprovoked and minimally provoked violence, you typically see that in traumatic brain injury affecting the frontal lobe.” *Id.* at 789.

For example, “in talking with somebody on a porch about everyday things going on, the weather or what’s going on in the neighborhood,” if somebody were to “start[] beating somebody, that’s unprovoked.” *Id.* at 792. “[W]hen you see this minimally provoked [violence] or somebody making a benign comment that results in such severe aggression for no reason”—like the “reports that [Mr. Frederick] beat his sister while she was on crutches”—“then you have to question it.” *Id.* Dr. McGarrahan acknowledged Mr. Frederick was becoming more docile with age, but she opined his “out of the blue” violent acts—including attacks on family members—were a “red flag for frontal lobe damage.” *Id.* at 791. Bringing everything together, Dr. McGarrahan testified Mr. Frederick’s behavior “is at least partially explainable by damage to the brain.” *Id.* at 795.

Under applicable law, Dr. McGarrahan’s testimony was valuable mitigating evidence because it gave the jury a reason to spare Mr. Frederick’s life. It served an

explanatory purpose and had a humanizing function, allowing the jury to understand why Mr. Frederick was paranoid, aggressive, impulsive, short-tempered, and struggled to regulate his emotions in everyday social interactions. *Id.* at 764-65. In the penalty-stage closing argument, Mr. Rowan told the jury:

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

Trial Tr., Vol. VIII at 1582. But an explanation existed, as Dr. McGarrahan confirmed. That Mr. Frederick was a person who suffered from organic brain damage “‘might well have influenced the jury’s appraisal’ of [Mr. Frederick’s] moral culpability, *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527, and could have served as “a basis for a sentence less than death,” *Lockett*, 438 U.S. at 604, 98 S.Ct. 2954. Under *Strickland*, its absence was “prejudicial to the defense.” 466 U.S. at 692, 104 S.Ct. 2052.

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

2

The majority opinion also rejects Mr. Frederick’s challenge to the OCCA’s no-prejudice determination by distinguishing the Tenth Circuit and Supreme Court

cases he relies on, including *Rompilla*, *Porter*, *Barrett*, *Anderson*, and *Smith*. I do not find this reasoning to be supportive of affirmance.

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

As the majority opinion correctly explains, AEDPA “erects a formidable barrier to federal habeas relief,” and “requires federal courts to give significant deference to state court decisions.” Maj. Op. at 1102 (first quoting *Burt v. Titlow*, 571 U.S. 12, 19, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013); then quoting *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013)). But deference does not tie our hands, as I fear the majority opinion has concluded. AEDPA's standards are “demanding but not insatiable” and “[d]eference does not by definition preclude relief.” *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). We must undertake our review “cognizant that our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.” *Fairchild v. Workman*, 579 F.3d 1134, 1140 (10th Cir. 2009) (internal quotation marks and citation omitted). When the question before the court of appeals concerns the ultimate punishment, the principled application of deference must animate our obligations.

Most problematic, however, the majority opinion discounts Mr. Frederick's authorities because those cases involved supposedly more “substantial mitigating factors” than the brain damage evidence kept from

Mr. Frederick's jury. Maj. Op. at 1126–27. That Mr. Frederick was not a Korean War veteran, *Porter*, 558 U.S. at 41, 130 S.Ct. 447, or did not suffer from fetal alcohol syndrome, *Rompilla*, 545 U.S. at 392, 125 S.Ct. 2456, or bipolar disorder, *United States v. Barrett*, 985 F.3d 1203, 1233 (10th Cir. 2021), seems beside the point. There is no absolute hierarchy of mitigation evidence because “[n]o two capital defendants will ever be the same.” *Canales v. Lumpkin*, — U.S. —, 142 S. Ct. 2563, 2569, 213 L.Ed.2d 1115 (2022) (Sotomayor, J., dissenting from the denial of certiorari). Even if the cases Mr. Frederick marshals involved “weaker aggravating evidence” and “stronger brain damage evidence,” Maj. Op. at 1127, for Mr. Frederick's jury, there was effectively no mitigating evidence.

It is “possible that [some jurors] could have heard” all the mitigating evidence about [Mr. Frederick's] organic brain damage “and still have decided on the death penalty.” *Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456. But “that is not the test.” *Id.* As Mr. Frederick correctly observes, the mitigating evidence need not outweigh the aggravating evidence to demonstrate prejudice. Aplt. Br. at 56 (citing *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (“Mitigating evidence unrelated to dangerousness may alter the jury's selection of [a] penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.”)).

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

B

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

“[A] state court’s determination of the facts is unreasonable” if “the court plainly and materially misstated the record or the petitioner shows that reasonable minds could not disagree that the finding was in error.” . . . And if the petitioner shows “the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.” 935 F.3d 1064, 1072 (10th Cir. 2019) (internal citations omitted). Under § 2254(d)(2), “an unreasonable determination of the facts does not, itself, necessitate relief.” *Byrd*, 645 F.3d at 1172 (internal quotation marks omitted). “Rather, a habeas petitioner must demonstrate that the state court’s decision is ‘based on’—i.e., ‘rests upon’—that unreasonable determination of the facts.” *Smith v. Duckworth*, 824 F.3d 1233, 1251 (10th Cir. 2016).¹⁴

Again, I begin with the understanding that review under § 2254(d)(2) is deferential. *See* 28 U.S.C. § 2254(e)(1) (“[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”). We cannot conclude a state court’s factual findings are unreasonable “merely because we would have reached a different conclusion in the first instance.” *Brumfield v. Cain*, 576 U.S. 305, 313-14, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015) (alteration omitted)

(quoting *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). Rather, we must defer to the state court’s factual determinations if “reasonable minds reviewing the record might disagree about the finding in question.” *Duckworth*, 824 F.3d at 1241.

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

1

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

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

14. The majority opinion relies on one of our prior cases to explain the deference we must give to a “state court’s factual determination [] based on its review of a recorded exchange.” *Maj. Op.* at 1128 (citing *Sharp v. Rohling*, 793 F.3d 1216, 1230 (10th Cir. 2015)). Because the majority opinion’s phrase—“plausible reading”—does not feature in the statute we are applying, it must

refer simply to the deference AEDPA requires we give to “[r]easonable determination[s] of the facts.” *Sharp*, 793 F.3d at 1229 (citing 28 U.S.C. § 2254(d)(2)). As a statement of AEDPA review’s first principle, I agree Mr. Frederick faces a “high bar.” *Maj. Op.* at 1128 n.26. But where the OCCA’s factual determination misrepresented the record before it, I would find Mr. Frederick clears this hurdle.

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

Under these circumstances, the OCCA's factual finding that Mr. Frederick's brain damage "would not impair his day-to-day activities" cannot be reconciled with her actual testimony. Aplt. Br. Attachment B at 40 (emphasis added). The majority opinion discerns no error under § 2254(d)(2) because Dr. McGarrahan "acknowledged that someone with antisocial personality disorder could also have those difficulties." Maj. Op. at 1129. I struggle to see how this relates to our analysis, especially where Dr. McGarrahan explained that Mr. Frederick manifested symptoms of antisocial personality disorder *because of* his organic brain damage. See Evidentiary Hr'g, Vol. IV at 796 ("I agree that the criteria are met that [Mr. Frederick] is engaged in the behaviors that are required for anti-social personality disorder. I think where we [i.e., Dr. McGarrahan and the state] may not agree is the etiology as to why he's engaging in those behaviors. And I believe it's attributable to his brain damage.").

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

Q: And you're not here to testify for the Judge that this is any sort of excuse for the crime he's been convicted of, are you?

A: No, none whatsoever. That's up to the Judge himself to make that determination.

Q: And as a matter of fact, . . . as a neuropsychologist you really can't even draw any connection between whatever brain damage he may have and any crimes he's ever committed, can you?

A: Right. I can't make this direct link. That's correct. . . . We can talk about the – the history of aggression and the history of violence and the difficulties he's having in his thinking and his emotion and his behavior, but I cannot make that direct link. That is correct.

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

The OCCA found Dr. McGarrahan could not "draw *any connection* between any brain damage and [Mr. Frederick's] criminal conduct." Aplt. Br. Attachment B at 40 (emphasis added). Though an accurate quote from the transcript, this is an inaccurate recitation of Dr. McGarrahan's actual testimony. She confirmed Mr. Frederick's frontal lobe damage was "certainly a contributing factor" to his criminal behavior. Evidentiary Hr'g, Vol. IV at 795. The judge at the evidentiary hearing clarified with Dr. McGarrahan that "[o]n this frontal lobe traumatic brain damage[,] you said one of the indicators of that is aggression. . . . Was it in his case or do you know?" *Id.* at 789. Dr. McGarrahan responded: "You can't say with a hundred percent certainty. When you look at all the factors taken together, yes, I believe his aggression and unprovoked and minimally provoked vio-

lence, you typically see that in traumatic brain injury affecting the frontal lobes.” *Id.* Under these circumstances, the OCCA’s finding that Dr. McGarrahan did not make “any connection” belies her testimony as a whole.¹⁵

2

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

The OCCA’s erroneous factual findings—misapprehending and misstating Dr. McGarrahan’s testimony about the precise nature of Mr. Frederick’s frontal lobe damage and the connection between his brain damage and criminal behavior—“had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture.” *Strickland*, 466 U.S. at 695-96, 104 S.Ct. 2052. In evaluating whether prejudice resulted from the omission of mitigation evidence, the OCCA had to consider the “totality of the available mitigation evidence” before it—“both that adduced at trial” and that adduced in the postconviction proceeding—and to reweigh the combined mitigation evidence against the aggravation evidence presented by the state. *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495. The “totality of the available mitigation evidence,” therefore, is a key input in the reasonable probability calculus.

The OCCA’s factual mistakes affected that court’s understanding of what constituted the “totality of the available mitigation evidence” and how it weighed against the aggravating evidence. The input was wrong, so the outcome was distorted. Hav-

ing misapprehended the evidence, the OCCA concluded: “The introduction of evidence of organic brain damage *of the kind testified to by Dr. McGarrahan* would have given the State ample ground to underscore and highlight this antisocial personality evidence before the jury.” Aplt. Br. Attachment B at 40 (emphasis added). Because the OCCA mistakenly believed “the kind” of organic brain damage evidence Mr. Frederick had “would not impair his day-to-day activities” and had no “connection . . . [to] his criminal conduct,” *id.*, the prejudice determination necessarily rested on an incorrect understanding of the totality of the mitigation evidence. Under these circumstances, even viewed through AEDPA’s deferential lens, I believe Mr. Frederick has satisfied the requirements of § 2254(d)(2).

V

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

“As capital punishment has traveled its long and tortuous path, we have kept faith in the outcome of its attending adversarial process of trial by jury.” *Canales v. Davis*, 966 F.3d 409, 428 (5th Cir. 2020) (Higginbotham, J., dissenting). “Our adversarial system,” however, “works only

15. Contrary to the majority opinion’s conclusion, the OCCA’s finding was not just “[a]n imperfect or even an incorrect determination of the facts,” Maj. Op. at 1124 n.21 (quoting *Grant*, 727 F.3d at 1024), or a mere “fail[ure] to capture the nuance,” *id.* at 1129 n.27. The

OCCA found Mr. Frederick’s brain damage “would not impair his day-to-day activities”—when it would—and that Dr. McGarrahan “could not draw any connection between any brain damage and his criminal conduct”—when she did. Aplt. Br. Attachment B at 40.

when it is adversarial.” *Id.* It “is essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.” *Strickland*, 466 U.S. at 705, 104 S.Ct. 2052 (Brennan, J., concurring in part) (quoting *Jurek*, 428 U.S. at 276, 96 S.Ct. 2950). “[A]n individualized decision is essential in capital cases.” *Lockett*, 438 U.S. at 605, 98 S.Ct. 2954.

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

No jury appraised the significant mitigating evidence about Mr. Frederick’s brain damage that competent counsel would have discovered. Despite the “enormous stakes confronted in [his] capital case,” Mr. Frederick’s jury was denied the opportunity to make a principled, individualized sentencing decision because trial counsel did not “equip[them] with the ‘fullest information possible concerning [Mr. Frederick’s] life and characteristics.’” *Hanson v. Sherrod*, 797 F.3d 810, 830 (10th Cir. 2015) (citation omitted). Under

these circumstances, I have no faith in the sentencing outcome and cannot affirm the ultimate punishment of death for Mr. Frederick.

I respectfully dissent.



**Carl ANDERSEN, Jr., Plaintiff -
Appellee,**

v.

**Vito DELCORE, in his individual and
official capacity, Defendant -
Appellant,
and**

**The City of Colorado Springs; Teller
County Colorado; Todd Eckert, in his
individual and official capacity; Car-
los Sandoval, in his official and indi-
vidual capacity; Anthony Matarazzo,
in his individual and official capacity,
Defendants.**

No. 22-1130

United States Court of Appeals,
Tenth Circuit.

FILED August 18, 2023

Background: Arrestee brought § 1983 action against police officer, alleging that officer used excessive force against him while securing cell phone that officer believed would contain incriminating evidence that arrestee or his fiancée had abused their child. Officer moved for summary judgment, asserting qualified immunity. The United States District Court for the District of Colorado, R. Brooke Jackson, Senior District Judge, 2022 WL 910952, denied motion. Officer filed interlocutory appeal.

2020 WL 4352749

Only the Westlaw citation is currently available.
United States District Court, W.D. Oklahoma.

Darrell Wayne FREDERICK, Petitioner,
v.
Tommy SHARP, Warden, Oklahoma
State Penitentiary Respondent.

Case No. CIV-19-37-SLP

Signed 07/29/2020

Attorneys and Law Firms

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MEMORANDUM OPINION

SCOTT L. PALK, UNITED STATES DISTRICT JUDGE

*1 Petitioner, a state court prisoner, has filed a petition for writ of habeas corpus seeking relief pursuant to  28 U.S.C. § 2254. [Doc. No. 20]. Petitioner challenges the conviction entered against him in Oklahoma County District Court Case No. CF-2011-1946. Tried by a jury in 2014, Petitioner was found guilty of first-degree murder, assault with a dangerous weapon after former conviction of a felony, and domestic abuse – assault and battery. Petitioner was sentenced to death for the murder, 25 years imprisonment for the assault with a dangerous weapon, and one-year imprisonment for the domestic abuse charge. In support of the death sentence, the jury found three aggravating circumstances: (1) Petitioner had a prior violent felony conviction, (2) the murders were especially heinous, atrocious, or cruel, and (3) there is a probability that Petitioner poses a continuing threat to society. Criminal Appeal Original Record (“O.R.”) vol. V, 928.

Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals (“OCCA”). The OCCA affirmed in a published opinion.  *Frederick v. Oklahoma*, 400 P.3d 786 (Okla. Crim. App. 2017), cert. denied, 138 S. Ct. 997 (2018). Petitioner also filed

an application for post-conviction relief and sought an evidentiary hearing regarding certain ineffective assistance of counsel and prosecutorial misconduct claims. The OCCA remanded the case for an evidentiary hearing regarding these issues. *See* Order Remanding for Evidentiary and Order Denying the Motion for Discovery on Post-Conviction Claims and the Motion to Reserve the Right to Supplement Original Application on Post-Conviction Relief, *Frederick v. Oklahoma*, PCD-2015-47 (Okla. Crim. App. Dec. 20, 2018).

The trial court held the evidentiary hearing over the course of four days. In its written findings of fact and conclusions of law, the trial court found that the prosecutorial misconduct claim lacked merit and appellate counsel was not ineffective because the underlying claims of trial counsel ineffectiveness lacked merit. *See* Order of February 9, 2018, *Frederick*, PCD-2015-47. After supplemental briefing from the parties, the OCCA denied Petitioner's application for post-conviction relief in an unpublished opinion. *Frederick v. Oklahoma*, No. PCD-2015-47 (Okla. Crim. App. Dec. 20, 2018).

Petitioner now seeks habeas relief and presents four grounds for relief. Respondent has responded to the petition [Doc. No. 27] and Petitioner has replied [Doc. No. 32]. Petitioner also filed motions for discovery and an evidentiary hearing to which responses were filed [Doc. Nos. 21, 24, 26, 28]. After a thorough review of the entire state court record (which Respondent has provided), the pleadings and materials submitted in this case, and the applicable law, the Court finds that, for the reasons set forth below, Petitioner is not entitled to the requested relief.

I. Facts.

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

*2 On March 26, 2011, between 5:30 and 6:30 p.m., Da'Jon Diggs arrived at the home of her grandmother, Connie Frederick (hereinafter referred to as the deceased). The deceased was 85 years old and had been deaf and mute

her entire life. She lived in the same house in northeast Oklahoma City in which she had raised six children. Ms. Diggs attended college in another city but frequently stopped by to check on the deceased. Ms. Diggs, like much of her family, communicated with the deceased through sign language. Also living at the deceased's home at the time was [Petitioner], her fifty-five (55) year old son. He had been living with the deceased since his release from prison in 2009.

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

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

While out of the house, Ms. Diggs phoned both her mother, who lived out of state, and her uncle, Tobias Frederick, to discuss her frustrations with [Petitioner]. Both were the deceased's children and Tobias Frederick was an Oklahoma City Police Officer. Ms. Diggs told both her mother and her uncle that she was afraid [Petitioner] would seriously hurt her or the deceased. When Ms. Diggs returned to the house, she heard [Petitioner] answer the phone. Ms. Diggs was able to determine that it was her uncle Tobias that had called. He told [Petitioner] that he had to leave the deceased's home and find another place to live. [Petitioner] replied angrily, “man, I ain't got time for this” and hung up the phone. Ms. Diggs could hear [Petitioner] yelling into the phone. Ms. Diggs headed for the deceased's bedroom and told her to stay in the bedroom no matter what happened. Ms. Diggs then shut the bedroom door.

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

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

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

[Petitioner] was located a day after the deceased's beating. He was found walking along the street approximately three blocks from the deceased's home. When approached by police, he initially gave a false name but soon admitted his identity. His right hand was significantly swollen and his right finger was cut and bleeding. There was blood on his clothes. Bloodstains were also found in his bedroom at the decedent's home. Further facts will be set forth as necessary.

 [Frederick, 400 P.3d at 798-799.](#)

II. Standard of Review.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) circumscribes the Court’s review of claims that were adjudicated on the merits in state court proceedings.

28 U.S.C. § 2254; see also *Byrd v. Workman*, 645 F.3d 1159, 1165 (10th Cir. 2011). Where the state court adjudicated a claim on the merits, this Court may reach the merits of the claim only if the petitioner can establish that the decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1), or was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

Id. at § 2254(d)(2).

Clearly established federal law under § 2254(d)(1) refers to the “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is “contrary to” clearly established federal law if the “state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is an “unreasonable application” of clearly established federal law if “the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.*

Under § 2254(d)(2), relief is only permitted where the state court’s decision is “based on” the unreasonable factual determination. *Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011). An unreasonable factual determination is one that is “objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, (2003).

Importantly, the “question under AEDPA 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). Habeas relief is warranted only

where there is no “possibility for fairminded disagreement” with the state court’s decision. *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011); see also *Brumfield v. Cain*, 576 U.S. 305, 135 S.Ct. 2269, 2277 (2015). This standard was meant to be difficult to meet and “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 102-103 (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.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

III. Analysis

*4 Petitioner raises four grounds for relief: (1) trial and appellate counsel were ineffective; (2) statements made by the victim, Ms. Frederick, were improperly admitted in violation of the Confrontation Clause, (3) statements made by the prosecutors during closing argument rendered the proceedings fundamentally unfair, and (4) the accumulation of errors resulted in a violation of his constitutional rights.

A. Ground One: Ineffective Assistance of Counsel

Petitioner’s first ground for relief raises several ineffective assistance of counsel claims, all of which are premised on appellate counsel’s failure to include specific trial counsel ineffectiveness claims on direct appeal.¹ Regarding the guilt stage, Petitioner argues that appellate counsel should have challenged trial counsel’s failure to retain an independent medical expert and failure to adequately cross-examine the state medical examiner. Regarding the sentencing stage, Petitioner argues that appellate counsel should have challenged trial counsel’s failure to investigate and present testimony from family members, failure to present testimony from sociologist Dr. Art Williams, and failure to present evidence of brain damage. After setting out the clearly established federal law, the Court will address each of these subclaims in turn.

1. Clearly Established Law

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must show that “counsel’s performance

was deficient” and “the deficient performance prejudiced the defense.”  *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On habeas review, courts must apply the highly deferential standards of *Strickland* and AEDPA to the facts of the case and decide whether “there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.”

 *Harrington*, 562 U.S. at 105. A state court's ruling cannot be disturbed unless the petitioner demonstrates that the state court applied the highly deferential *Strickland* test in a way that every fair-minded jurist would agree was incorrect. *Id.*

Regarding deficient performance, the Supreme Court has held that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”  *Strickland*, 466 U.S. at 688. Of course, whether an attorney's conduct is reasonable will depend on the facts of the particular case.  *Id.* at 688. To avoid the “distorting effects of hindsight,” an attorney's conduct should be judged “from counsel's perspective at the time.”  *Id.* at 689-90. Review of an attorney's performance is highly deferential and there is a strong presumption that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”  *Id.* at 690.

In addition to deficient performance, a petitioner must also show that his counsel's errors were prejudicial to the defense.

 *Id.* at 692. Prejudice exists where there is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”

 *Id.* at 694. “If the alleged ineffective assistance occurred during the guilt stage, the question is whether there is a reasonable probability the jury would have had reasonable doubt regarding guilt.”  *Moore v. Gibson*, 195 F.3d 1152, 1178 (10th Cir. 1999). If the alleged ineffective assistance occurred during the sentencing stage, the court must consider “whether there is a ‘reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’ ” *Id.* (quoting  *Strickland*, 466 U.S. at 695). In evaluating prejudice, courts must look “at the totality of the evidence, not just the evidence helpful to the petitioner.” *Id.*

*5 *Strickland's* standard also governs claims of ineffective assistance of appellate counsel.  *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001). When analyzing a claim of

ineffective assistance of appellate counsel for failure to raise an issue, courts “look to the merits of the omitted issue.”

 *Hooks v. Ward*, 184 F.3d 1206, 1221 (10th Cir. 1999). Deficient performance may be established if appellate counsel omitted an issue that is “so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal.”  *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003). If appellate counsel fails to raise a claim that has some merit, but is not compelling, courts must view the issue in light of the rest of the appeal and give deference to counsel's professional judgment. *Id.* Of course, if an “issue is meritless, its omission will not constitute deficient performance.” *Id.* Even if a petitioner succeeds in the difficult task of identifying a meritorious claim that appellate counsel neglected, he must still demonstrate that, absent the appellate counsel's deficient performance, there is a reasonable probability that the petitioner would have prevailed on appeal.  *Smith*, 528 U.S. at 285.

2. Analysis of Guilt-Stage Ineffectiveness Claims

a. Failure to present an independent medical expert.

Petitioner's first ineffectiveness claim relates to appellate and trial counsel's failure to consult with and present an independent medical expert. At trial, the State argued that Petitioner killed Ms. Frederick by hitting her in the head with an object, such as a brick or rock. Trial Tr. vol. IV at 786, 795. In support of this theory, the State offered, *inter alia*, the testimony of Dr. Harrison, the state medical examiner, and Dr. Hahn, the neurosurgeon that treated Ms. Frederick in the hospital. Petitioner's trial counsel, James Rowan, cross-examined these witnesses but did not present an independent medical expert. Petitioner claims that trial counsel's failure to retain an independent medical expert to rebut the State's theory regarding the manner of death rendered him ineffective and appellate counsel's failure to raise this claim on appeal rendered her ineffective.

During the direct appeal, Petitioner's appellate counsel, Gina Walker, contacted Dr. Robert Bux, (the same medical expert presented by Petitioner at the post-conviction evidentiary hearing), for the purpose of reviewing the Oklahoma Medical Examiner's conclusion that Ms. Frederick's death was a homicide. Evidentiary Hr'g Tr. vol. II, 392. Ms. Walker requested additional time in which to file her direct appeal

brief in order to develop this information, but she did not receive a report from Dr. Bux by the deadline and, not knowing if his opinion would be helpful in any way, filed the direct appeal brief without reference to his opinion. *Id.* at 394-396, *see also* Mot. for Extension of Time, *Frederick*, No. D-15-15. Ms. Walker later filed a motion seeking to supplement her brief with a claim of ineffective assistance of trial counsel which was supported by a letter that Dr. Bux provided to her. *See* Mot. to Stay Proceedings to Allow Supplementation of Appellant's Ineffective Assistance of Counsel Claim in his Brief-in-Chief as well as Supplementation of Appellant's 3.11B Motion,  *Frederick*, No. D-2015-15. The OCCA refused to consider the claim because its rules do not permit supplementation of a brief in this manner. *See* Order Denying Motion to Supplement Appeal Record,  *Frederick*, No. D-2015-15.

On post-conviction, Petitioner argued that the failure to timely present a trial counsel ineffectiveness claim based on the information from Dr. Bux rendered appellate counsel ineffective. Original Appl. for Post-Conviction Relief at 22-25, *Frederick*, No. PCD-15-47. After setting out the *Strickland* standard, the OCCA concluded that Petitioner was not prejudiced by appellate counsel's omission.² *Frederick*, No. PCD-2015-47, slip op. at 11. Like the OCCA, this Court elects to dispose of Petitioner's claim by reviewing the prejudice prong of  *Strickland*. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”). Viewing the claim through AEDPA's deferential lens, the OCCA's conclusion that Petitioner was not prejudiced by appellate counsel's actions is not unreasonable.

*6 At the post-conviction evidentiary hearing, Dr. Bux disagreed with the medical examiner's conclusion that the manner of death was homicide. Evidentiary H'rg Tr. vol. II, 317, 341. Dr. Bux testified that he would have listed the manner of death as undetermined and pointed to the fact that there was no evidence of a struggle at the scene, no evidence of defensive injuries, no physical evidence on any potential weapons, and no external abrasions or bleeding.³ *Id.* at 323, 341, 353, 366-367. He testified that Ms. Frederick's injuries were consistent with an accidental fall or a fall that could have resulted from a medical event, such as a [stroke](#). *Id.* at 340.

In  *Harrington v. Richter*, 562 U.S. at 112, the Supreme Court held that the state court reasonably concluded the defendant was not prejudiced by trial counsel's failure to call a blood evidence expert because the expert testimony “established nothing more than a theoretical possibility” that was consistent with the defense theory and counsel was able to “extract[] a concession along these lines from the prosecution's expert” at trial. Similarly, here, Petitioner's expert offers nothing more than the possibility that Ms. Frederick's injuries were the result of a fall, a theory which was explored by defense counsel at trial.

During the cross-examination of Dr. Harrison, the state medical examiner, trial counsel inquired about Ms. Frederick's pre-existing medical conditions and elicited testimony that pre-existing medical conditions can make a person more susceptible to a subdural [hematoma](#). Trial Tr. vol. 5, 1138-1140. Trial counsel also elicited testimony that individuals taking [aspirin](#), which the jury had previously been told was the case for Ms. Frederick, were more susceptible to [bleeding in the brain](#). *Id.* at 1140. Dr. Harrison further testified that he did not see any remarkable bruising on the left side of Ms. Frederick's face and that he was not provided with a potential weapon to help him determine what caused the injuries. *Id.* at 1141. This line of questioning by Petitioner's trial counsel was clearly meant to undermine Dr. Harrison's conclusion as to the manner of death and demonstrate that it was possible for Ms. Frederick to experience a severe brain bleed from an accidental fall. Additionally, during his cross-examination of Ms. Diggs, trial counsel was able to impeach her with prior testimony showing that Ms. Frederick had previously suffered an accidental fall. *Id.* at 860-863.

There was also sufficient evidence presented at trial apart from the medical testimony presented to establish Petitioner's guilt. This was not, as Petitioner argues, a case that hinged entirely on expert medical testimony. In addition to the testimony of Dr. Harrison and Dr. Hahn, the prosecution presented testimony from thirteen other witnesses. Testimony from these witnesses showed that immediately preceding the incident, Petitioner shoved Ms. Frederick, engaged in a heated phone conversation where his older brother told him he had to move out of the house, physically fought with Ms. Diggs, and chased Ms. Diggs with a brick or rock. Trial Tr. vol. VI, 823-824, 830-832, 833-835, 898, 923. Ms. Diggs testified that when the police asked Ms. Frederick who injured her, Ms. Frederick responded by making the sign for Petitioner's name.⁴ *Id.* at 840. Thus, even if counsel had presented an expert to testify that Ms. Frederick's injuries were consistent

with a fall or that the manner of death could not be determined, there was still significant circumstantial evidence establishing Petitioner's guilt. See  *Harrington*, 562 U.S. at 113 (holding that defendant was not prejudiced by failure to introduce expert testimony because there was “sufficient conventional circumstantial evidence pointing to [his] guilt.”). Given this evidence, and the concessions trial counsel elicited from the State's witnesses, it was not unreasonable for the OCCA to conclude that appellate counsel's omission of an ineffectiveness claim based on the failure to present an independent medical expert did not prejudice Petitioner.

*7 In attempting to overcome AEDPA, Petitioner argues that the OCCA engaged in unreasonable factfinding to the extent that it ignored certain “frailties in the State's case.”⁵ The Court doubts that “ignoring evidence can be considered a factual determination.” *Wood v. Carpenter*, 907 F.3d 1279, 1298 (10th Cir. 2018). But in any event, Petitioner fails to show that OCCA did not consider any alleged weaknesses in the State's case in assessing whether counsel was ineffective. Rather, the OCCA reasonably concluded that that any weaknesses were eclipsed by the other evidence pointing to guilt.

Petitioner also argues that the OCCA's decision is an unreasonable application of *Strickland* and its progeny, specifically  *Hinton v. Alabama*, 571 U.S. 263 (2014). In  *Hinton*, 571 U.S. at 274-275, the Supreme Court held that trial counsel performed deficiently when he presented an expert that he himself believed was inadequate because he mistakenly thought he could not acquire additional funds to hire a competent expert. The Supreme Court did not, however, make a determination as to prejudice.  *Id.* at 275-276. Thus, the OCCA's prejudice determination cannot be contrary to or an unreasonable application of *Hinton*. See  *Williams*, 529 U.S. at 365 (explaining that clearly established federal law “refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions.”)

In order to establish prejudice, the “likelihood of a different result must be substantial, not just conceivable.”  *Harrington*, 562 U.S. at 112. Given the concessions trial counsel extracted through cross-examination and the circumstantial evidence of Petitioner's guilt, it was reasonable for the OCCA to conclude that Petitioner would not have prevailed on appeal had appellate counsel presented an

ineffectiveness claim incorporating Dr. Bux's testimony. Because the OCCA's finding that appellate counsel's omission did not prejudice the defense is reasonable, Petitioner is not entitled to relief on this claim.

b. Failure to adequately cross-examine Dr. Harrison.

Petitioner next argues that appellate counsel was ineffective for failing to raise an ineffectiveness claim regarding trial counsel's inadequate cross-examination of Dr. Harrison. Dr. Harrison testified that at the conclusion of his autopsy, he determined Ms. Frederick's cause of death to be blunt force trauma and the manner of death to be homicide. Trial Tr. vol. V, 1134-1135. Prior to completing his autopsy report, an “Investigator's Narrative,” completed by an Investigator from the medical examiner's officer, was made available to Dr. Harrison. Evidentiary Hr'g. Tr. vol. II, 276-278. The Investigator's Narrative inaccurately states that the victim's “[g]randdaughter witnessed the assault.”⁶ *Id.* at 276. Dr. Harrison incorporated this information into his autopsy report when he stated “[decedent] was reported to have been assaulted with an apparent brick by her son (as witnessed by the decedent's granddaughter).” See Evidentiary Hr'g Def. Ex. 3.

*8 Petitioner complains that defense counsel did not ask Dr. Harrison whether he had an opinion regarding the cause of Ms. Frederick's injury and failed to exploit his reliance on the incorrect information contained in the Investigator's Narrative. Petitioner also complains that the prosecutor misstated Dr. Harrison's testimony during closing argument but trial counsel failed to object to or correct this misstatement.⁷ Addressing only the prejudice prong of *Strickland*, the OCCA concluded that “Petitioner cannot show any prejudice resulting from counsel's omissions as he has failed to show a substantial likelihood of a different result on appeal.” *Frederick*, PCD-15-47, slip op. at 15-16. This conclusion is not unreasonable.

Petitioner first argues the OCCA unreasonably found that Dr. Harrison's opinion on the manner of death was not dependent on the inaccurate information in the Investigator's Narrative. In support of his argument, Petitioner points to the fact that Dr. Harrison incorporated some of the inaccurate information into the comments section of his autopsy report and testified that the Investigator's Narrative “did weigh very heavily along with the other information I received.” Evidentiary Hr'g. Tr. vol. II, 303. The problem for Petitioner, however, is that

Dr. Harrison also unequivocally testified that he stands by his original finding and his opinion about the manner of death would not change even if he had never reviewed the erroneous information in the Investigator's Narrative. *Id.* at 301-302. If Dr. Harrison's opinion would have been the same even without the inaccurate information, it is certainly not unreasonable for the OCCA to conclude that his opinion was not dependent on the information.

Petitioner next argues that the OCCA unreasonably ignored portions of the record in finding that Dr. Harrison did not take the Investigator's Narrative "to mean that the granddaughter actually witnessed Petitioner hit the decedent in the head with a brick but that she witnessed the assault in general terms." *Frederick*, PCD-15-47, slip op. at 14-15. However, Dr. Harrison specifically testified that his interpretation of the Investigator's Narrative was not that the granddaughter actually saw Petitioner strike Ms. Frederick with an object but instead that she witnessed the assault in general terms. Evidentiary Hr'g Tr. vol. II, 301. The fact that he included the mistaken information in his autopsy report does not undercut his testimony about how he interpreted the information or render the OCCA's finding unreasonable.

Petitioner also challenges the OCCA's finding that "regardless of any incorrect information in the Investigator's Narrative, [Dr. Harrison's] opinion that the death was a homicide would not have changed." *Frederick*, PCD-15-47, slip op. at 15. Petitioner claims this finding is unreasonable because Dr. Harrison testified that he could not rule out a fall as the cause of Ms. Frederick's injury based on an examination of the body alone. *Id.* at 282. While Dr. Harrison did testify that he could not rule out an accidental fall based on a physical examination alone, *id.* at 282, he also testified that the physical examination was not the only information he considered in reaching his conclusion. *Id.* at 273-274; 297-300. In addition to the Investigator's Narrative and his autopsy results, Dr. Harrison reviewed law enforcement and hospital records where witnesses described an altercation that preceded Ms. Frederick's injury which included Petitioner chasing Ms. Frederick's granddaughter out of the house with a rock or brick. *Id.* at 297-300. Dr. Harrison also testified that his opinion would not change even if he had never reviewed the misstatement in the Investigator's Narrative. *Id.* at 301-302. The OCCA's finding that Dr. Harrison's opinion on the manner of death would not have changed even without the erroneous information is therefore clearly supported by the record.

*9 Petitioner also claims the OCCA's decision is an unreasonable application of *Strickland* because undermining the medical examiner's opinion as to the manner of death was crucial to the defense theory that Ms. Frederick was injured by a fall. While undermining the medical examiner's conclusion would have been helpful to the defense, a more thorough cross-examination would not necessarily have achieved that goal. At the evidentiary hearing, Dr. Harrison agreed that Ms. Frederick's injuries "at least could have been caused by a rock or brick" and he denied that his opinion on the manner of death would have changed had he never seen the erroneous information in the Investigator's Narrative. Evidentiary Hr'g Tr. vol. II, 300-301. Accordingly, if trial counsel had more thoroughly cross-examined Dr. Harrison on these issues, as post-conviction counsel did at the evidentiary hearing, Dr. Harrison would likely have provided testimony that was consistent with the State's theory.

Further, trial counsel's failure to correct or object to the prosecutor's misstatement of Dr. Harrison's testimony does not undermine confidence in the outcome of the proceeding. During closing argument, the prosecutor stated that "[i]n their opinion [referring to Dr. Hahn and Dr. Harrison] this was not consistent with a fall." Trial Tr. vol. VI, 1228. Dr. Hahn did indeed state, numerous times, that Ms. Frederick's injuries were more severe than he would expect from a person falling. Trial Tr. vol. V, 1012-1013, 1015, 1023, 1024-1025, 1027-1028. Although Dr. Harrison did not testify at trial that the injuries were not consistent with a fall, his opinion was clearly that the injuries were not caused by a fall, as evidenced by the fact that he classified the manner of death as a homicide. Dr. Harrison reiterated and stood behind this opinion at the evidentiary hearing. In any event, the jury was instructed that closing argument is not evidence, O.R. vol. 5, 875, and the Court must presume the jury followed these instructions.  *Hooper v. Mullin*, 314 F.3d 1162, 1173 (10th Cir. 2002).

Under  *Strickland*, 466 U.S. at 695, Petitioner bears the burden of showing that "the decision reached would reasonably likely have been different absent the errors." And under AEDPA, he must show that the OCCA "applied *Strickland* to the facts of his case in an objectively unreasonable manner."  *Bell v. Cone*, 535 U.S. 685, 699 (2002). Given the evidence at trial and the additional evidence presented at the evidentiary hearing, the Court cannot conclude that the OCCA applied *Strickland* in an objectively unreasonable manner when it concluded that

Petitioner did not suffer prejudice from appellate counsel's omission of an ineffectiveness claim related to trial counsel's cross-examination of Dr. Harrison. Petitioner is not entitled to relief on this claim.

3. Analysis of Sentencing Stage Ineffectiveness Claims

Petitioner's sentencing stage claims focus on appellate counsel's failure to raise ineffectiveness claims related to trial counsel's failure to reasonably investigate and present compelling mitigation evidence. During the sentencing stage, the State incorporated the evidence introduced during the guilt stage and presented fifteen witnesses, including some of Petitioner's family members. The witnesses testified about Petitioner's prior criminal history, including a 1981 burglary, Trial Tr. vol. VII, 1302 - 1330, a 2003 incident where Petitioner allegedly assaulted patrons at a hair salon, *id.* at 1339 - 1388, and several incidents where Petitioner was violent towards family members or neighbors. *Id.* at 1390 - 1457.

The defense presented no live witnesses during the sentencing stage. The only evidence presented by defense counsel was a portion of a 1982 post-conviction hearing transcript containing the testimony of Petitioner's deceased father. *Id.* at 1496-1514. The post-conviction hearing related to Petitioner's 1972 robbery prosecution. *Id.* at 1497. Via the transcript, Petitioner's father testified that Petitioner was in a car accident where he "hit his head on the windshield" and was a "changed child from that very moment." *Id.* at 1498. He described Petitioner as being "quiet" and "very easygoing," but that he changed after the car accident. *Id.* at 1499. He further testified that Petitioner "led a pretty sheltered life," that he "ran away from home" at the age of fourteen, and that his criminal conviction resulted in "a harsh judgment that he wasn't physically and mentally able to cope with." *Id.* at 1497-1501, 1506-1507. The testimony also indicated that Petitioner's father did not know where Petitioner was living at the time, did not attend Petitioner's criminal trial, and did not visit Petitioner in jail. *Id.* at 1501-1505.

*10 Based on this evidence, the defense offered five mitigators: (1) Petitioner had an accident in a truck and hit his on the windshield and was a changed child from that very moment, (2) Petitioner's break with his father which led to him leaving home at age fourteen had a negative impact on his development, (3) Petitioner has become institutionalized which has caused him to become suspicious of other people

and overly aggressive, (4) Petitioner has never learned to live as a free man and is unable to cope with the stress and strain of society, and (5) Petitioner's father never took an interest in Petitioner after he left home at the age of fourteen.⁸ O.R. vol. V, 927. During closing argument, defense counsel argued that Petitioner "never had a chance" because he was in an adult prison by the age of sixteen and that his violent actions may be attributable to the [head injury](#) he suffered as a child. Trial Tr. vol. VIII, 1580-1581, 1585-1587.

In challenging the effectiveness of his trial and appellate counsel, Petitioner points to three specific areas of mitigation evidence that he claims counsel failed to adequately investigate and present: testimony from family members, testimony from sociologist Dr. Art Williams, and evidence of organic brain damage.

a. Testimony from Family Members.

Petitioner contends that trial counsel was ineffective for failing to identify and call certain family members to the stand who could have provided information about Petitioner's troubled background and testified about his positive attributes, including the care he provided to Ms. Frederick. Four of these family members testified at the post-conviction evidentiary hearing: Petitioner's younger brother, Jerome Frederick; Petitioner's second cousin, Latisha Long Miller; Petitioner's second cousin, Latrena Sloan; and Petitioner's aunt, Johnita Cole.

Jerome Frederick testified that he and Petitioner grew up in a strict, religious household where they would get "spanked with a rubber hose" or an extension cord if they were being "disobedient." Evidentiary Hr'g Tr. vol. I, 124-125. He further testified that his father had extra-marital affairs, was accused of having relationships with female members of his church, was accused of inappropriate sexual behavior by a young relative, and that Ms. Frederick eventually sought a protective order and a divorce. *Id.* at 121-123. Jerome also testified that Petitioner left home at age fourteen after his father hit him in the face. *Id.* at 128.

Ms. Sloan, Ms. Long Miller, and Ms. Cole testified regarding the care Petitioner provided to Ms. Frederick, such as buying her groceries and cooking. *Id.* at 65, 81, 94. They admitted that at least some of their knowledge regarding Petitioner's relationship with Ms. Frederick was not based on personal observations but was instead relayed by Petitioner or other

family members. *Id.* at 75, 87, 101. They each stated that they would have asked the jury to spare Petitioner's life if they had been called to testify during the trial. *Id.* at 68-69, 82, 100-101.

Trial counsel and appellate counsel also testified at the evidentiary hearing. Their testimony indicates that Petitioner was originally represented by Catherine Hammarsten of the Oklahoma County Public Defender's Office. Evidentiary Hr'g Tr. vol. III, 566. Ms. Hammarsten testified that during the course of her representation she tried to locate records related to Petitioner and that she "looked for every family member we could." *Id.* at 591, 609-610. Her investigation revealed that some family members could not be located, some were not viable witnesses, and some were not willing to assist the defense. *Id.* at 591-592, 595-596. Ms. Hammarsten did, however, locate two family members that she believed were viable witnesses: Johnita Cole and Latisha Long Miller. *Id.* at 592. Ms. Hammarsten interviewed Ms. Cole and Ms. Long Miller and believed they "were good witnesses." *Id.* at 630. She subsequently included them on the witness list she filed in the case. *Id.* at 592; O.R. vol. IV, 604-505.

*11 Following a break down in the attorney-client relationship, James Rowan replaced Ms. Hammarsten as lead trial counsel. Evidentiary Hr'g Tr. vol. I, 188. Mr. Rowan believed the case had been "thoroughly investigated" by the time he took it over and that Ms. Hammarsten "left no stone unturned." *Id.* at 189, 213. He had access to Ms. Hammarsten's entire file, including notes from meetings and information about which family members the defense team was still trying to locate. *Id.* at 606. Mr. Rowan did not interview either of the witnesses listed by Ms. Hammarsten but did read their witnesses summaries. *Id.* at 206, 234-235. He further testified that he "had no strategic reason" for not interviewing family witnesses, that he "blew them off completely," and that he simply did not put in the work and effort necessary to incorporate them into the mitigation case. *Id.* at 206, 239.

In resolving this claim, the OCCA focused on the merits of the underlying trial counsel ineffectiveness claim. Noting that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," the OCCA determined that trial counsel's performance was not deficient because his choice to not present family witnesses was a "reasonable, strategic decision." *Frederick*, PCD-15-47, slip op. at 29-32. Petitioner challenges the OCCA's decision as unreasonable, arguing that the OCCA improperly deferred to counsel's choice even

though it was not strategic and was not the product of an adequate investigation.

Before analyzing Plaintiff's sentencing stage ineffectiveness claims, it bears repeating that the Court's role under AEDPA is not to evaluate "whether defense counsel's performance feel below *Strickland's* standards."  *Harrington*, 562 U.S. at 101. Rather, "the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable."

Id. This is a "substantially higher threshold."  *Schriro*, 550 U.S. at 473. Moreover, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard."  *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). To succeed under this doubly deferential review, Petitioner must show that the OCCA's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."  *Harrington*, 562 U.S. at 103.

Petitioner challenges the OCCA's deference to Mr. Rowan's decision not to put on family members, arguing that he could not have made a fully informed strategic choice because the underlying investigation was insufficient. In reaching its decision, the OCCA noted that Ms. Hammarsten testified to an "extensive investigation she and her staff conducted to locate family members."⁹ *Frederick*, PCD-15-74, slip op. at 23. Indeed, Ms. Hammarsten testified that she knocked on a number of doors, acquired available records, and did all she could to locate family members. Evidentiary Hr'g Tr. vol. I, 189; vol. III, 591, 597, 610. Despite her efforts, Ms. Hammarsten was not able to locate certain family witnesses, including Jerome Frederick. *Id.* at 595-597. In making tactical judgments about how to proceed in the case, Mr. Rowan was entitled to rely on the investigative work performed by prior counsel. See  *Wilson v. Sirmons*, 536 F.3d 1064, 1136 (10th Cir. 2008) (Hartz, J., concurring) ("It is well-settled counsel may rely on the efforts of co-counsel, investigators, and experts in preparing for trial.").

*12 Viewing the case from counsel's perspective at the time, it would have been reasonable for Mr. Rowan to decide that spending additional time and resources tracking down the missing family members would not have been productive.  *Harrington*, 562 U.S. at 107 ("Counsel was entitled to formulate a strategy that was reasonable at the

time and to balance limited resources in accord with effective trial tactics and strategies.”). *Strickland* permits an attorney to “make a reasonable decision that makes a particular investigation unnecessary.”  *Strickland*, 466 U.S. at 691. Mr. Rowan knew that prior counsel's attempts to locate Petitioner's additional family members were unsuccessful. He also knew that many of Petitioner's siblings did not have a close relationship with him. Evidentiary Hr'g Tr. vol. I, 205. Given this knowledge, “it was at least arguable that a reasonable attorney could forego further inquiry” into locating the missing family members.  *Harrington*, 562 U.S. at 106. Accordingly, the OCCA's conclusion that trial counsel was not ineffective for failing to locate additional family members is not unreasonable.

As for Ms. Cole and Ms. Long Miller, whom prior counsel listed on her preliminary witness list, a reasonable jurist could also conclude that Mr. Rowan's decision not to pursue their testimony or present them at trial was a legitimate tactical choice. Although Ms. Hammarsten thought “they were good witnesses,” it would not have been unreasonable for Mr. Rowan to decide, based on the witness summaries filed by Ms. Hammarsten, that their testimony would not be helpful or credible.¹⁰ See  *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (“[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.”). The witness summaries provided by Ms. Hammarsten indicate that Ms. Cole and Ms. Long Miller would testify that Ms. Frederick did not fear Petitioner, Petitioner felt the family left most of the responsibility for caring for Ms. Frederick to him, and Petitioner loves his family. O.R. vol. IV, 604-605. When contrasted with the compelling testimony that was to be provided by more immediate family members, including some of Ms. Frederick's adult children, a reasonable attorney could conclude that presenting testimony from these extended family members would not be persuasive.

Further, Mr. Rowan's sentencing stage argument mainly focused on the fact that Petitioner was on his own from a young age and suffered a [head injury](#) during a childhood car accident. Trial. Tr. vol. VII, 1292-1300; vol. VIII, 1577-1590. Neither of the family members listed on Ms. Hammarsten's witness list appeared to have any direct knowledge of these circumstance apart from “family stories.” O.R. vol. IV, 604-605. Therefore, the OCCA's conclusion that defense counsel reasonably investigated family witnesses and

strategically chose not to present them has support in the record.

***13** The dilemma here is that Mr. Rowan's own testimony regarding his trial strategy directly conflicts with the OCCA's conclusion that his decision was a strategic one. At the evidentiary hearing, Mr. Rowan testified that “he had no strategic reason” for not calling family members. Evidentiary Hr'g Tr. vol. I, 206. He further testified he would have “started talking to [family members] when he first got on the case if I knew they were supportive” and that he “blew them off completely.” *Id.* at 206, 239. When asked if he knew Ms. Hammarsten had spoken to two family witnesses, he testified “I am now more than I was then.” *Id.* at 234. This testimony, Petitioner argues, makes it clear that Mr. Rowan did not have a strategic reason for not calling Petitioner's family members and renders the OCCA's decision unreasonable.

This Court does not dispute that Mr. Rowan's statements are troubling. Without context, Mr. Rowan's testimony appears to be a bald admission that there was no reasoned strategy behind his actions and that he was possibly not even aware that prior counsel had interviewed two cooperative family witnesses. Certainly, at minimum, any competent attorney would make themselves aware of the witnesses identified by prior counsel and perform their own independent assessment of whether their proposed testimony merited further exploration. But *Strickland* “calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.”  *Harrington*, 562 U.S. at 109. And while courts “may not indulge ‘post hoc rationalization’ for counsel's decisionmaking that contradicts the available evidence of counsel's actions... neither may they insist counsel confirm every aspect of the strategic basis for his or her actions.” *Id.* (internal citation omitted). Although Mr. Rowan may subjectively believe, viewing the case with the “distorting effects of hindsight,”  *Strickland*, 466 U.S. at 689, and perhaps “magnify[ing] [his] own responsibility for an unfavorable outcome,”  *Harrington*, 562 U.S. at 109, that that he “blew it,” the OCCA's conclusion that other testimony at the evidentiary hearing showed he did have strategic reasons for not calling family members to the stand is not so unreasonable that there is no room for fairminded disagreement.

Mr. Rowan testified that in a capital trial the sentencing stage is the “be all end all” and is “all I care about most of the time in a capital murder.” Evidentiary Hr'g Tr. vol.

I, 235. Given the import Mr. Rowan rightly places on the sentencing stage, the OCCA's skepticism of Mr. Rowan's self-deprecating statements is not without justification. Mr. Rowan also testified that he did not think a mitigation case focused on Petitioner's father's extra-marital affairs and the dysfunctional family dynamic "would fly" and that it "was very dangerous." *Id.* at 237. Thus, he had clearly put some thought into whether presenting family members to testify regarding Petitioner's upbringing was an appropriate mitigation strategy, which undercuts his claim that he had no strategic reason for not interviewing family members. He further testified that although he had a difficult time communicating with his client, he "continued to try to, you know, work the case up and prepare myself." *Id.* at 211. Given this testimony, it was reasonable for the OCCA to conclude that Mr. Rowan's decision to not present family witnesses was the product of a tactical judgment rather than sheer neglect.

See  *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.").

Petitioner also challenges the OCCA's conclusion that electing not to call Jerome Frederick as a witness would have been sound trial strategy.¹¹ Although Jerome Fredrick was able to provide some insightful testimony about Petitioner's dysfunctional upbringing and childhood [head injury](#), he also had information concerning Petitioner's violent past, including allegations that Petitioner sexually assaulted two women in his own family. Evidentiary Hr'g Tr. vol. I, 120-126, 152-155. Further, Jerome Frederick's credibility was at least questionable given his own criminal background.¹² *Id.* at 158-161, 181-182. Notably, the trial judge who presided at the evidentiary hearing found Jerome Frederick's proposed testimony so fraught with risk that he believed presenting him as a mitigation witness could have given rise to an ineffective assistance of counsel claim. Order of Feb. 9, 2018 at 31, *Frederick*, PCD-15-47. Given the risks related to introducing further testimony about Petitioner's violence towards his own family, the OCCA's conclusion that declining to call Jerome Frederick as a witness was a sound strategic decision was reasonable.

*14 Petitioner also takes issue with the OCCA's statement that "there is no indication [Petitioner's family] did anything to make themselves available to testify at trial." *Frederick*, PCD-15-47, slip op. at 30-31. Petitioner argues that this statement shows the OCCA unreasonably blamed Petitioner's

family for the lack of mitigation witnesses. But the very next sentence of the OCCA's opinion states that "[c]ounsel will not be found ineffective for failing to call family members who could not, despite due diligence, be located." *Id.* Thus, the OCCA appears to be remarking on the difficulties counsel faced in locating witnesses, not blaming Petitioner's family.

Petitioner also argues that the OCCA unreasonably placed the burden on Petitioner to prepare a mitigation case when it stated that "[Mr. Rowan] testified that Petitioner was not helpful in preparing a mitigation case as he felt he was innocent and that mitigation evidence was unnecessary." *Id.* at 25. But again, when read in full, it appears this portion of the OCCA's opinion is simply highlighting the challenges counsel faced in developing mitigation evidence, not placing the burden on Petitioner to prepare his own mitigation case.

At the evidentiary hearing, Mr. Rowan testified that he had "blown it" before and that "perfection is something I strive for but rarely achieve." Evidentiary Hr'g Tr. vol. I, 235. But "*Strickland* does not guarantee perfect representation, only a

'reasonably competent attorney.'"  *Harrington*, 562 U.S. at 110 (internal citations omitted). Given *Strickland*'s deferential standard, and the additional deference required by AEDPA, the Court cannot conclude that the OCCA's conclusion that trial counsel did not perform deficiently is so unreasonable that there is no possibility for fairminded disagreement.

The OCCA also concluded that Petitioner was not prejudiced by the omission of family witnesses. Petitioner challenges this conclusion by arguing that the OCCA utilized the wrong standard in determining prejudice when it stated that "even if further evidence of Petitioner's troubled childhood was introduced, it is not clear it would have been sufficient to mitigate Petitioner's adult criminal conduct." *Frederick*, PCD-15-47, slip op. at 33. The OCCA correctly recited the *Strickland* standard at the outset of its discussion of the ineffectiveness claims and the Court must presume the state court knew and followed the law. *Wood v. Carpenter*, 907 F.3d 1279, 1303 (10th Cir. 2018). Thus, rather than "dissecting every sentence of a state court's ruling to ensure all is in good order," the Court will properly focus on "the reasonableness of the state court's decision."  *Grant v. Royal*, 886 F.3d 874, 906 (10th Cir. 2018).

To show prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable."  *Harrington*, 562 U.S. at 112. Here, the State put on a strong case in

aggravation, showing that Petitioner had a history of violent confrontations. In contrast, the testimony of Ms. Cole, Ms. Sloan, and Ms. Long Miller was far from compelling and their credibility was undermined by the testimony of Tobias Frederick, who disputed some of the statements made by these witnesses. Evidentiary Hr'g Tr. vol. III, 526-529, 533-537. While Jerome Frederick was able to provide some mitigating testimony regarding abuse and dysfunction during Petitioner's upbringing,¹³ "evidence of childhood abuse or neglect isn't always severe enough to earn a jury's sympathies." *Grant v. Trammell*, 727 F.3d 1006, 1021 (10th Cir. 2013); see also *Foster v. Ward*, 182 F.3d 1177, 1189 (10th Cir. 1999) (explaining that "[w]e have on numerous occasions determined that evidence of a troubled childhood involving physical, emotional, sexual and/or substance abuse does not outweigh evidence supporting the conviction and evidence supporting multiple aggravating circumstances; nor does evidence of low I.Q. and/or organic brain damage."). Further, evidence of childhood abuse "is generally less persuasive when a defendant commits the capital offense later in life," which is the case here. *Grant*, 727 F.3d at 1021.

*15 In short, a reasonable jurist could conclude that Jerome Frederick's testimony regarding Petitioner's strict upbringing, spankings with a hose, Petitioner being punched by his father, and his father's extra-marital affairs is not equivalent to the "severe privation and abuse" that the Supreme Court has described when finding prejudice. See *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (finding prejudice where counsel failed to introduce evidence of severe childhood abuse and neglect by alcoholic mother and repeated sexual abuse in multiple foster homes); *Williams v. Taylor*, 529 U.S. 362, 395 and n. 19 (2000) (finding prejudice where counsel failed to introduce evidence that defendant's parents were imprisoned for child neglect, defendant was severely and repeatedly beaten by his father, and defendant spent time in an abusive foster home). Additionally, even conceding that Petitioner's evidence of childhood abuse and dysfunction is mitigating, the OCCA could reasonably conclude that it was outweighed by the aggravating evidence, including Petitioner's history of violent confrontations.¹⁴ See *Grant*, 727 F.3d at 1021 (noting that a "record of violent felonies" may outweigh mitigating evidence of childhood abuse or neglect.)

The OCCA's conclusion that trial counsel was not ineffective, and therefore appellate counsel was not ineffective for failing to raise this claim, is not unreasonable. Petitioner is therefore not entitled to relief on this claim.

b. Failure to call Dr. Art Williams.

Petitioner's next argument concerns appellate counsel's failure to include a written report by sociologist Dr. Art Williams as part of her claim that trial counsel was ineffective for failing to present this witness.¹⁵ During his sentencing stage opening statement, trial counsel told the jury that they would hear testimony from Dr. Williams regarding Petitioner's upbringing, learning disabilities, and time in prison, but he rested his mitigation case without calling this witness. Trial Tr. vol. VII, 1292-1300. At the close of evidence, Mr. Rowan explained that he decided not to call Dr. Williams because Petitioner "never interacted with Dr. Williams" and "he would have been eminently cross-examinable." *Id.* at 1515-1516. At the evidentiary hearing, Mr. Rowan further explained that he chose not to call Dr. Williams because he believed the prosecutor would have "torn him up on the stand" and he did not want the jury to hear any information about Petitioner's prior acquittal for capital murder. Evidentiary Hr'g Tr. vol. I, 201, 230.

On direct appeal, appellate counsel argued that Mr. Rowan's failure to call Dr. Williams after telling the jury they would hear from him resulted in ineffective assistance and that Mr. Rowan's decision was not a reasonable trial strategy because any concerns he had with Dr. William's testimony would have been known to him prior to making opening statements. Brief for Appellant at 96-97, *Frederick*, D-15-15. Appellate counsel did not include Dr. Williams' pretrial report with her direct appeal brief. The OCCA ruled that "counsel's decision not to call the witness, despite his comment in opening statements, was reasonable trial strategy." *Frederick*, 400 P.3d at 831. The OCCA further ruled that Petitioner failed to show prejudice, noting that, "[a]s defense counsel told the trial court, much of what Dr. Williams would have testified to was already before the jury in the form of testimony from other witnesses." *Id.*

*16 On post-conviction, Petitioner argued that Dr. Williams' report was necessary to show prejudice and appellate counsel performed deficiently by failing to include it. *Frederick*, PCD-15-47, slip op. at 33. In denying the claim, the OCCA

restated its direct appeal finding that trial counsel did not perform deficiently and then concluded that “[a]ppellate counsel will not be found ineffective as the claim was sufficiently raised in the direct appeal.” *Id.*

Petitioner now argues the OCCA's finding that the claim was sufficiently raised on direct appeal is unreasonable because, by omitting Dr. Williams' report, appellate counsel failed in her duty to show that trial counsel's actions prejudiced the defense. Petitioner asserts that he was prejudiced by appellate counsel's omission because there is a reasonable probability the OCCA would have found trial counsel ineffective if the report had been included on direct appeal.

In evaluating an ineffective assistance of counsel claim, a court “may address the performance and prejudice components in any order, but need not address both if [petitioner] fails to make a sufficient showing of one.”

 *Cooks v. Ward*, 165 F.3d 1283, 1292–93 (10th Cir. 1998). Here, it was reasonable for the OCCA to conclude that appellate counsel was not ineffective because, even assuming appellate counsel performed deficiently by failing to include Dr. Williams' report, it is not likely the OCCA would have reached a different conclusion on direct appeal regarding the reasonableness of trial counsel's performance.¹⁶ In other words, Petitioner cannot show he was prejudiced by appellate counsel's omission because the OCCA would still have found that trial counsel did not perform deficiently even if it had the benefit of Dr. Williams' report.

The OCCA's finding that trial counsel's decision not to call Dr. Williams as a mitigation witness was reasonable trial strategy is itself a reasonable conclusion. Mr. Rowan's statements at trial and his testimony at the evidentiary hearing indicate that multiple factors contributed to his decision not to present Dr. Williams. Petitioner argues that Mr. Rowan's belated decision to not present Dr. Williams cannot be attributed to reasonable trial strategy because at least some of these factors were known to him well before the trial started. Multiple factors often inform a lawyer's decision as to which witnesses to present and the mere fact that the lawyer may be weighing these factors well in advance of making a final decision does not render the ultimate decision any less strategic. Further, it is not uncommon for a lawyer to adjust his trial strategy based on how the trial actually proceeds. That appears to be just what happened in this case.

At trial, Mr. Rowan stated that when he made his sentencing stage opening statement, he believed Dr. Williams was going

to testify. Trial Tr. vol. VIII, 1515-1516. The next day, he made the decision not to call him. *Id.*; Evidentiary Hr'g Tr. vol. I, 232. Mr. Rowan explained that he was concerned with how Dr. Williams' testimony would stand up to cross-examination given that Petitioner did not interact with Dr. Williams during their meeting and Dr. Williams performed no testing on Petitioner.¹⁷ Trial Tr. vol. VIII, 1516. Mr. Rowan also explained that the prosecution had not introduced any evidence of Petitioner's prior murder acquittal and he did not want to give the prosecution an opportunity to elicit this information through Dr. Williams or a rebuttal expert. *Id.* at 1522, Evidentiary Hr'g Tr. vol. I, 201. In fact, the decision not to call Dr. Williams prevented the prosecution from introducing testimony that Petitioner had previously made statements denying a [brain injury](#). Trial Tr. vol. VIII, 1517. To be sure, Dr. Williams would have been able to provide helpful mitigating testimony about Petitioner's background and institutionalized mindset.¹⁸ But preventing the jury from hearing testimony about Petitioner's prior capital murder charge and statements undermining his alleged [brain injury](#) were valid tactical objectives. As trial counsel had Dr. Williams on call for the mitigation stage, his decision appears to be the product of a reasoned tactical judgment based on how the trial progressed rather than neglect or incompetence.

*17 Perhaps in hindsight a different decision would have been better, particularly given the lack of other mitigating evidence Mr. Rowan had available. But *Strickland* requires the Court to “evaluate conduct from counsel's perspective at the time” and “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.”  *Strickland*, 466 U.S. at 689. Calling Dr. Williams to the stand risked introducing evidence of Petitioner's prior capital murder charge whereas not calling him risked losing the opportunity to present evidence of Petitioner's institutionalized mindset. “Faced with these two alternatives,...neither option...so clearly outweighs the other that it was objectively unreasonable for the [OCCA] to deem counsel's choice...a tactical decision about which competent lawyers might disagree.”  *Bell*, 535 U.S. 685, 701–02 (2002).

Having reasonably concluded that trial counsel did not perform deficiently, the OCCA was not likely to reach a different result on appeal even if appellate counsel had included Dr. Williams' report for the purpose of establishing prejudice. While the report would have given the OCCA additional information regarding the scope of Dr. Williams

testimony, it does not undermine the OCCA's conclusion that trial counsel's decision was within the wide range of competent professional advice permitted by *Strickland*. Because it is reasonably likely the OCCA would have found trial counsel did not perform deficiently regardless of whether Dr. Williams' report was included with the appeal, Petitioner cannot show that he suffered any prejudice from appellate counsel's omission. The OCCA's conclusion that trial counsel's decision not to call Dr. Williams was reasonable trial strategy and their conclusion that appellate counsel was not ineffective because she sufficiently raised the claim on appeal is therefore reasonable. Petitioner is not entitled to relief on this claim.

c. Failure to introduce evidence of brain damage.

For his final ineffectiveness claim, Petitioner contends that his trial counsel performed deficiently by failing to present expert testimony regarding brain damage and appellate counsel performed deficiently by failing to raise a claim based on trial counsel's error. He argues that trial and appellate counsel were aware of numerous "red flags" indicating that Petitioner suffered from brain damage but they failed to reasonably investigate this avenue of mitigation evidence.

At the evidentiary hearing, Petitioner presented testimony from two medical experts: Dr. Curtis Grundy, a clinical psychologist, and Dr. Antoinette McGarrahan, a neuropsychologist. Dr. Grundy testified that he met with Petitioner and administered several psychological tests. Evidentiary Hr'g Tr. vol. IV, 679-684. Based on his evaluation, Dr. Grundy diagnosed Petitioner with **paranoid personality disorder** and anti-social personality disorder. *Id.* at 687, 729. A personality disorder is not a mental illness and Dr. Grundy testified that he did not diagnose Petitioner with a mental illness. *Id.* at 705-706; 729. He further testified that long term treatment for personality disorders is difficult but that it tends to improve with age. *Id.* at 706. Dr. Grundy was also concerned that Petitioner's childhood car accident and participation in a prison boxing team may have resulted in brain damage and recommended he be evaluated by a neuropsychologist. *Id.* at 693-694, 721-722.

Petitioner was subsequently evaluated by Dr. McGarrahan. Dr. McGarrahan administered a battery of neuropsychological tests and concluded that Petitioner has "significant indicators of brain damage," including "an overall reduction in his intellect" and impairment to his frontal

lobes. *Id.* at 763. Like Dr. Grundy, Dr. McGarrahan did not diagnose Petitioner with a traditional mental illness. *Id.* at 796.

***18** The OCCA held that that Mr. Rowan did not perform deficiently in failing to present any mental health evidence and that Petitioner was not prejudiced by its absence at trial. Regarding deficient performance, the OCCA concluded:

As the trial court stated in its order, it is apparent Mr. Rowan wants to convince us that he took no action to prepare mental health evidence for trial. However, the reliability of this testimony is questionable in light of his experience as a capital litigator and his testimony regarding the crucial importance of the mitigation stage of a capital trial. His testimony showed he did speak to Dr. Williams and did try to get Petitioner evaluated by mental health experts. However, Petitioner would not cooperate. Testimony shows Petitioner also did not cooperate with Ms. Hammarsten's efforts to have him evaluated. It would be questionable to put any sort of mental health evidence before the jury where the Petitioner had not been personally interviewed and evaluated. The record before us shows that Petitioner only cooperated with the mental health experts after he had been convicted and given the death sentence. We agree with the trial court's findings that the mental health information provided by the defense at the Evidentiary Hearing was not available to trial counsel due to Petitioner's refusal to cooperate and participate in any testing or evaluation. "[I]t is the competent client's case, not the lawyers. While, counsel has the responsibility to advise, inform, and consult with the client, the defendant has the right be involved in the decision process that will affect his or her life."  *Lott v. State*, 2004 OK CR 27, 1 164,  98 P.3d 318, 357 citing  *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Here, no question was raised to Petitioner's competency to stand trial. There is no indication he disagreed with counsel's decision not to present additional mitigating evidence. In fact it was Petitioner who prevented the further presentation of just such evidence. Contrary to Mr. Rowan's protestations, the record shows his decision not to present any mental health evidence was a strategic choice made after reasonable investigation and within the exercise of reasonable professional judgment.

Frederick, PCD-15-47, slip op. at 38-40.

Petitioner argues that the OCCA's decision is an unreasonable application of *Strickland* because trial counsel did not perform a reasonable mental health investigation. He further argues that the OCCA unreasonably considered Mr. Rowan's experience as a capital litigator, unreasonably used Petitioner's alleged lack of cooperation to justify the failure to investigate, and unreasonably suggested that the decision as to what mitigating evidence to present lay with the client. Petitioner also objects to nearly every line quoted above as an unreasonable factual determination.

To begin, there can be no disputing that Mr. Rowan was aware that Petitioner potentially suffered from brain damage. Not only was he alerted to it by Dr. Williams' pretrial report, but he made the effects of Petitioner's childhood [head injury](#) the central theme of his mitigation case. Despite embracing Petitioner's [head injury](#) as the reason for his violent actions, Mr. Rowan never consulted with an expert trained to diagnosis or evaluate brain damage. Evidentiary Hr'g Tr. vol. I, 204.

*19 The OCCA attributes the lack of expert mental health testimony in this case to Petitioner's failure to cooperate with evaluation or testing. *Frederick*, PCD-15-47, slip op. at 38-40. True, Petitioner was not cooperative with Dr. Williams and Ms. Hammarsten testified that Petitioner "was adamant he would not take testing from anyone" and "wouldn't meet with psychologists." Evidentiary Hr'g Tr. vol. III, 610. But Mr. Rowan replaced Ms. Hammarsten as Petitioner's counsel precisely *because* Petitioner was not cooperating with her. *See* App. to Appl. for Post-Conviction Relief at Attach. 18-19. Ms. Hammarsten testified that Petitioner "was so happy to be getting rid of me, yes, he would've cooperated with somebody else." Evidentiary Hr'g Tr. vol. III, 621. Further, the state court judge who presided over the replacement of Ms. Hammarsten advised Petitioner that a new lawyer would bring experts in to speak with him, but these actions were not taken by Mr. Rowan. App. to Appl. for Post-Conviction Relief at Attach. 18. Because Mr. Rowan was specifically brought into the case in order to restore the attorney/client relationship, using Petitioner's lack of cooperation with Ms. Hammarsten as justification for Mr. Rowan's failure to consult with a mental health expert is problematic.

While Mr. Rowan testified that he did not think Petitioner "was particularly interested in being examined by a neuropsych," he also testified that his conversations with Ms. Hammarsten "clouded [his] judgment in trying to talk [Petitioner] into having somebody examine [Petitioner]," and

that he made an assumption regarding Petitioner's cooperation with experts. Evidentiary Hr'g Tr. vol. I, 203, 245-246. While an attorney is not unreasonable for not pursuing investigations he determines would be fruitless based on conversations with his client,  *Strickland*, 466 U.S. at 691, Mr. Rowan testified that Petitioner never told him that he would not cooperate with a mental health expert. *Id.* at 204. Given this testimony, and Mr. Rowan's concession that he did not consult with a mental health expert or try to have Petitioner evaluated by a mental health expert, *id.* at 204, it is difficult to see how the OCCA could reasonably conclude that Mr. Rowan "did try to get Petitioner evaluated by mental health experts." *Frederick*, PCD-15-47, slip op. at 38.

Further, the fact that Petitioner may have been uncooperative or obstinate does not relieve counsel of the duty to perform a reasonable mitigation investigation.  *Porter v. McCollum*, 558 U.S. 30, 40 (2009). Where counsel is aware of possible brain damage and chooses to make it a central theme in his mitigation case, one would expect counsel to at least attempt to have his client evaluated by a qualified mental health expert, even if he anticipated that the client may not actively participate in the evaluation. Ultimately, however, the Court need not resolve whether the OCCA reasonably found that counsel's investigation into mental health evidence was sufficient, because Petitioner cannot carry his burden of showing that the OCCA's finding as to prejudice is unreasonable.

In regards to prejudice, the OCCA found that "there is no reasonable probability that the omitted mental health evidence would have altered the outcome of the sentencing stage of trial." *Frederick*, PCD-15-47, slip op. at 41. Petitioner presents several challenges to this decision. First, he challenges the OCCA's factual finding that Dr. McGarrahan concluded Petitioner's brain damage "would not impair his day to day activities, and that she could not draw any connection between any brain damage and his criminal conduct."  *Id.* at 40. Although Dr. McGarrahan testified that organic brain damage was "certainly a contributing factor" to his behaviors, she also testified that she could not make a "direct link" between brain damage and any crime committed. Evidentiary Hr'g Tr. vol. IV, 785-786, 79. She further testified that while brain damage could cause difficulties with "making complex decisions," "abstract reasoning," and "interacting with people," she did not presently see any diminution in Petitioner's day to day to

activities. *Id.* at 781-782. Thus, the OCCA's factual finding has clear support in the record.

Petitioner next challenges the OCCA's finding that “[i]nformation from the mental health experts in this case could reasonably be viewed as mitigating to one person and aggravating to another.” *Frederick*, PCD-15-47, slip op. at 41. He points to the following testimony by Dr. McGarrahan in arguing that evidence of his brain damage would not have indicated future dangerousness:

***20** I think early on when you couple the damage to the frontal lobes with his young age and hormones that are going on at a young age, you get the unprovoked aggression. You typically don't see unprovoked aggression even with frontal lobe damage in individuals who are in their fifth and sixth decade of life. At this point he's becoming more docile and having more difficulties in his thinking than he is in his behavior.

Evidentiary Hr'g Tr. vol. IV, 791. While this testimony may be useful in rebutting the State's future dangerousness aggravator, it also undercuts Petitioner's argument that his brain damage somehow explains his violent acts. Petitioner was in his fifties when he committed this crime, which, according to his own expert, is a time when “[y]ou typically don't see unprovoked aggression even with frontal lobe damage.” *Id.* Thus, while Petitioner may wish to portray this testimony as mitigating, it can also reasonably be interpreted as showing that Petitioner's brain damage is not the cause of his violent outbursts and he is instead just a violent person. Further, presenting evidence of Petitioner's brain damage would have involved testimony regarding Petitioner's anti-social personality disorder, a diagnosis that “tends to present an aggravating, rather than mitigating, circumstance in the sentencing context.” *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017). Accordingly, the OCCA's conclusion that the evidence presented at the evidentiary hearing could be viewed as mitigating to one person and aggravating to another is reasonable.

Petitioner's third challenge takes issue with the OCCA's determination that “the introduction of organic brain damage...would have given the State ample ground to underscore and highlight [Petitioner's] antisocial personality evidence before the jury.” *Frederick*, PCD-15-47, slip op. at 40. He argues that the OCCA unreasonably failed to take into account testimony from Dr. McGarrahan that would have blunted the negative impact of Petitioner's anti-social personality disorder diagnosis, including her testimony that “the etiology [of Petitioner's anti-social personality disorder] is at least part due to brain damage.” Evidentiary Hr'g Tr. vol. IV, 795. There is nothing to suggest that the OCCA failed to consider Dr. McGarrahan's complete testimony. Further, even if some of Dr. McGarrahan's testimony would have potentially blunted the negative impact of Petitioner's diagnosis, this does not change the fact that the State would be able to highlight this typically aggravating condition.

Last, Petitioner argues that that OCCA's decision unreasonably applied *Strickland* by discounting the potential value of the testimony provided by Dr. Grundy and Dr. McGarrahan. To be sure, evidence of organic brain damage can have a “powerful mitigating effect.” See *Hooks*, 689

F.3d at 1205; see also *Wilson*, 706 F.3d at 1310; *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). But the strength and persuasiveness of mental health evidence in the sentencing phase is often dependent upon showing that it contributed to a defendant's criminal actions. *Hooks*, 689 F.3d at 1204 (“[c]ounsel in capital cases must explain to the jury why a defendant may have acted as he did—must connect the dots between, on the one hand, a defendant's mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question”); see also *Smith*, 379 F.3d at 943 (noting that expert testimony could have provided the jury with “an explanation of how [the defendant's] organic brain damage caused these outbursts of violence”); *Anderson v. Sirmons*, 476 F.3d 1131, 1147 (10th Cir. 2007) (noting that readily available mitigating evidence, including evidence of organic brain damage, “could have both explained to the jury the reasons [defendant] was predisposed to act in concert with [his co-defendants] on the night of the murders and demonstrated [he] was less morally culpable than the average defendant for committing the murders.”).

***21** Here, the strength and persuasiveness of Petitioner's organic brain damage as mitigating is significantly reduced

because he cannot “connect the dots” between his brain damage and his commission of the crime. *Hooks*, 689 F.3d at 1204. As previously explained, Petitioner’s expert, Dr. McGarahan, testified that “[y]ou typically don’t see unprovoked aggression even with individuals with frontal lobe damage in their fifth or sixth decade of life.” Evidentiary Hr’g Tr. vol. IV, 791. Petitioner was in his fifties when he committed this crime, and many of the other violent acts alleged by the State also occurred later in his life. As he committed these violent acts during a time period when unprovoked violence is not typically exhibited, his brain damage does not provide a compelling explanation for his behavior.

The difficulty Petitioner faces in connecting his brain damage to his violent behavior, combined with the aggravating evidence of [antisocial personality disorder](#) and the strength of the State’s aggravation case, provide a reasonable basis for the OCCA to conclude that there is no reasonable probability that evidence of Petitioner’s brain damage would have altered the sentencing outcome. See *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017) (finding no prejudice where evidence “did not reveal that [defendant’s] alleged organic brain damage played a substantial role in engendering his life of criminal deviance.”). As the OCCA’s decision that Petitioner was not prejudiced by trial counsel’s performance is reasonable, their conclusion that appellate counsel was not ineffective is also reasonable. Petitioner is not entitled to relief on this claim.

4. Conclusion

In order for the Court to find for Petitioner on his claims related to trial and appellate counsel ineffectiveness, Petitioner must show that the OCCA’s decision is “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103. In other words, he must show that all fairminded jurists would agree that the OCCA got it wrong. *Lockett v. Trammell*, 711 F.3d 1218, 1231 (10th Cir. 2013). He cannot make this showing.

As the OCCA acknowledged, “[a]t first blush, Mr. Rowan’s presentation of a single second stage witness, presented only through the reading of a transcript from a prior proceeding,

and the omission of any mental health experts, seems to be an obvious case for a finding of ineffectiveness.” *Frederick*, PCD-15-47, slip op. at 41. However, the OCCA ultimately concluded that Petitioner “failed to overcome the strong presumption that trial counsel rendered adequate assistance.” *Frederick*, PCD-15-47, slip op. at 43. AEDPA restricts the Court’s review to a determination of whether the OCCA’s conclusion is an unreasonable application of Supreme Court precedent or based on an unreasonable factual determination.

Harrington, 562 U.S. at 100. Under this standard, “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* at 102. Whatever the Court may have decided were it reviewing Petitioner’s claims with a clean slate, it cannot conclude that all fairminded jurists would agree that the OCCA’s decision regarding Petitioner’s ineffectiveness claims was wrong. Accordingly, Petitioner is not entitled to relief on Ground 1.

B. Ground Two: Confrontation Clause Claim

Petitioner’s second ground for relief asserts that the admission of out of court statements by Ms. Frederick violated his Sixth Amendment right to confront the witnesses against him. At trial, Ms. Diggs testified that after contacting 911 and entering the house with law enforcement, a male police officer asked her to ask Ms. Frederick whether she was in pain and “who did it?” Trial Tr. vol. IV, 840. Ms. Frederick communicated through sign language and Ms. Diggs acted as an interpreter. *Id.* at 810-811. Ms. Diggs testified that Ms. Frederick responded to the question by making the sign for Petitioner’s name. *Id.* at 840. In addition to Ms. Diggs’ testimony, paramedic Adam Simmons testified that he asked Ms. Diggs to elicit information from Ms. Frederick in order to assess her medical situation. *Id.* at vol. V, 989-992. Mr. Simmons testified that, as relayed by Ms. Diggs, Ms. Frederick communicated that “her son” was responsible for her injuries and that she was hit an unknown number of times with an object. *Id.* at 991-992.

*22 On direct appeal, Petitioner argued that the admission of Ms. Frederick’s out-of-court hearsay statements violated the Sixth Amendment’s Confrontation Clause. *Frederick*, 400 P.3d at 805. The OCCA found that the statements were nontestimonial and therefore did not implicate the Confrontation Clause. *Id.* at 807. Applying the deference required by AEDPA, the Court finds that the OCCA’s decision was reasonable.

1. Clearly Established Law

The Sixth Amendment's Confrontation Clause provides that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 53–54, (2004), the Supreme Court limited the Confrontation Clause's reach to "testimonial statements." The Court held that in order for testimonial statements to be admissible, the out-of-court witness must be unavailable and the defendant must have had a prior opportunity to cross examine the witness. *Id.* In *Davis v. Washington*, 547 U.S. 813 (2006), and *Hammon v. Indiana*, 547 U.S. 813 (2006), which were decided together, the Supreme Court defined more precisely the distinction between testimonial statements and nontestimonial statements. The Supreme Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.

In *Michigan v. Bryant*, 562 U.S. 344, 358 (2011), the Supreme Court affirmed that when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." To determine the primary purpose of an interrogation, courts must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 359. In making this determination, the "existence of an emergency

or the parties' perception that an emergency is ongoing is among the most important circumstances." *Id.* at 370. However, "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.'" *Id.* at 374.

2. Analysis

The OCCA determined that when Ms. Frederick identified Petitioner as her assailant, the primary purpose of the questioning was to render medical aid and allow the police to respond to an ongoing emergency. *Frederick*, 400 P.3d at 807. In reaching this conclusion, the OCCA found that "[a]t the time the victim identified [Petitioner] as her attacker, police did not know if [Petitioner] was still in the house, if he was armed, if he had left the house or if he was likely to return." *Id.* Petitioner challenges this factual finding as unreasonable because the State's opening statement indicated that a witness saw Petitioner leave the house before law enforcement arrived. Trial. Tr. vol IV at 793. Neither the State's opening statement nor the witness' testimony undermines the OCCA's finding that *law enforcement* did not know whether the Petitioner was still in the house. The police arrived at the residence in response to a 911 call placed by Ms. Diggs. *Id.* at 793. Ms. Diggs saw Petitioner enter the house but did not see him leave prior to the police arriving. *Id.* at 847. When the police arrived, Ms. Diggs told them what happened and that she feared for her grandmother's life. *Id.* at 949. There was no testimony that anyone told the first responders that Petitioner had left the premises. The OCCA's factual finding is therefore reasonable.

*23 Petitioner additionally contends that the OCCA's decision is an unreasonable application of *Crawford*, *Davis*, and *Bryant*. Petitioner argues that because Ms. Frederick's statements were not made simultaneous with the assault, as was the case in *Davis*, 547 U.S. at 827, and did not include the use of a gun in a public place, as was the case in *Bryant*, 562 U.S. at 359, the OCCA's reliance on these cases is unreasonable. Petitioner's interpretation of these cases is too restrictive. *Davis*, 547 U.S. at 827-831, and *Bryant*, 562 U.S. at 363, make clear that determining the primary purpose of an interrogation is a

context specific inquiry that requires an objective analysis of all the relevant circumstances. Here, the OCCA reasonably concluded that the relevant circumstances objectively indicate that the primary purpose of the interrogation was to render medical aid and respond to an ongoing emergency.

The police arrived at the scene shortly after Ms. Diggs placed the 911 call. Trial Tr. vol. IV, 837. When the police entered the home, the location of Petitioner, and whether he posed a continuing threat to the officers, the victim, or anyone else, was not clear. *Id.* at 838, 847. Police officers entered the house in order to assist injured people and detain any threats. *Id.* at 950, 959-960. They located Ms. Frederick in her bedroom. *Id.* at 950-951. Ms. Frederick was startled, bruised, and not able to get up on her own. *Id.* at 950-951, 960. While some officers attended to Ms. Frederick, other officers cleared the house. *Id.* Ms. Diggs, who entered the home behind law enforcement, testified that the police instructed her to ask Ms.

Frederick whether she was in pain and “who did it?” *Id.* at 840. These inquiries were rendered at the scene, shortly after the assault took place, while the victim was still struggling on the ground and the perpetrator’s location was unknown. These circumstances and the general “informality of the situation,” “suggest that the interrogators’ primary purpose was simply to address what they perceived to be an ongoing emergency.” *Bryant*, 562 U.S. 377. Further, given Ms. Frederick’s startled and injured condition, it is unlikely that “a person in [Ms. Frederick’s] situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution.’ ” *Id.* at 375 (quoting *Davis*, 547 U.S. at 822).

In *Davis*, the Supreme Court observed that law enforcement’s “initial inquiries” when responding to a call will “often...produce nontestimonial statements” because they “‘need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.’ ” 547 U.S. at 832 (quoting *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 186 (2004)). Here, the circumstances of the encounter and the statements by Ms. Frederick and the police objectively indicate that the interrogation’s primary purpose was to respond to the exigency of the moment, not “simply to learn...what had happened in the past.” *Davis*, 547 U.S. at 827. At the very least, the OCCA’s conclusion in that regard is not unreasonable.

As for the statements elicited by Mr. Simmons, the paramedic, Petitioner identifies no Supreme Court case law clearly establishing that statements made to medical personnel, as opposed to law enforcement, are testimonial. See *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173, 2181 (2015)) (explaining that statements to individuals who are not law enforcement officers “are much less likely to be testimonial than statements to law enforcement officers”); *Giles v. California*, 554 U.S. 353, 376, (2008) (explaining that “[s]tatements to friends and neighbors...and statements to physicians in the course of receiving treatment” would not be excluded by the Confrontation Clause.) The absence of clearly established federal law prohibiting the admission of Mr. Simmons’ testimony is fatal to this aspect of Petitioner’s claim. *Grant v. Royal*, 886 F.3d 874, 888 (10th Cir. 2018).

*24 Even assuming that statements to medical personnel could implicate the Confrontation Clause, the circumstances involved here indicate that the primary purpose of Mr. Simmons’ questioning was to respond to a medical emergency. Mr. Simmons testified that it was important to get information from Ms. Frederick about what caused her injuries in order to provide her with the medical treatment. Trial Tr. vol. V, 990. Thus, Mr. Simmons’ questions were designed to assess the victim’s medical situation, not to “create a record for trial,” and are therefore outside the scope of the Confrontation Clause. *Bryant*, 562 U.S. 344 at 358.

The OCCA’s determination that Ms. Frederick’s elicited statements were nontestimonial, and their admission at trial therefore did not violate the Confrontation Clause, is reasonable. Accordingly, Petitioner is not entitled to relief on Ground Two.

C. Ground Three: Prosecutorial Misconduct

In his third ground for relief, Petitioner argues that he was deprived a fair trial and reliable sentencing proceeding as a result of certain comments made by the prosecutor during guilt and penalty stage closing arguments. Petitioner raised these claims on direct appeal and the OCCA denied relief. Applying AEDPA’s deferential standard, the Court concludes that the OCCA’s decision was not unreasonable.¹⁹

1. Clearly Established Law

Prosecutors can litigate with “earnestness and vigor” and are allowed to “strike hard blows.”  *Berger v. United States*, 295 U.S. 78, 88 (1935). But prosecutors may not strike foul blows. *Id.* The line between hard and foul is an uncertain one, and even the Supreme Court has admitted that “there is often a gray zone.”  *United States v. Young*, 470 U.S. 1, 7 (1985). To resolve prosecutorial misconduct claims, courts must first determine whether misconduct even occurred.

If a prosecutor engaged in misconduct that deprived the petitioner of a specific constitutional right, habeas relief is only warranted if the error had a substantial and injurious effect in determining the jury's verdict.  *Matthews v. Workman*, 577 F.3d 1175, 1186 (10th Cir. 2009) (citing  *Fry v. Pliler*, 551 U.S. 112, 121, 127 S. Ct. 2321, 2327, 168 L. Ed. 2d 16 (2007)). Alternatively, if the misconduct does not implicate a specific constitutional right, it ordinarily warrants relief only when the misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”  *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (quoting  *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). This analysis considers the trial as a whole, and factors in the strength of the evidence, cautionary steps to counteract improper remarks, and defense counsel's failure to object.  *Le*, 311 F.3d at 1013. “[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned.”  *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (internal quotation marks omitted). Rather, the question is whether the petitioner was deprived of a fair trial or sentencing. *Id.*

2. Analysis

Petitioner first challenges the following statement made by the prosecutor during her guilt-stage closing argument:

*25 And the question was asked, would you expect to see some other fractures if she just did a header, like, maybe some broken bones in her arms or someplace. And [Dr. Hahn] said yes.

Trial Tr. vol. VI, 1224-1225. Petitioner contends that the prosecutor misstated Dr. Hahn's testimony and misled the jury regarding the cause of Ms. Frederick's injuries. Dr. Hahn testified that the type of injuries he observed on Ms. Frederick were more than he would expect from a fall. *Id.* at vol. V, 1023-1025. When asked if he would expect to see some other injuries, such as fractures, if the person fell from a standing position, he responded that he “would expect to see some bruising.” *Id.* at 1026. In denying relief on this claim, the OCCA held that “[t]he prosecutor's argument contained reasonable inferences from Dr. Hahn's testimony” and “[w]hile there was a misstatement or two of the testimony, these were minor misstatements which did not mislead the jury and could not have affected the outcome of the trial.” Petitioner contends that the OCCA's characterization of the prosecutor's misstatement as “minor” is unreasonable because the statement directly undermined Petitioner's first-stage defense.

The prosecutor did misstate the record when she said Dr. Hahn testified that he would expect to see some fractures if Ms. Frederick had done a “header.” A prosecutor's misstatement of the record raises concerns because “jurors usually have no access to the testimonial record during deliberation” and the “risk that the prosecution's characterization would be remembered in lieu of the correct statement...is increased.”  *Le v. Mullin*, 311 F.3d 1002, 1020 (10th Cir. 2002). However, in light of Dr. Hahn's testimony that the injuries were more than he would expect from a fall, the OCCA's conclusion that the prosecutor's misstatement was “minor” and did not affect the outcome of the trial is reasonable.

Petitioner next contends that the following comment made by the prosecutor during sentencing stage closing arguments improperly sought sympathy for the victim:

We're not here to do justice for [Petitioner]. He is not why we're here.
We're here to do justice for Connie Frederick. That's why we're here.”

Trial Tr. vol. VIII, 1590. The OCCA found that the comment was inappropriate, but “[g]iven the strength of the State's evidence against [Petitioner],” it “did not deprive [Petitioner] of a fair trial or affect the jury's assessment of punishment.”

 *Frederick*, 400 P.3d at 825. Petitioner argues that the OCCA's erroneous statement that the victim's skull was crushed in several places demonstrates a misunderstanding of the evidence that renders their reliance on the "strength of the State's evidence" unreasonable.

Certainly, "[a]rguments that improperly encourage the jury to impose a sentence of death based on considerations of sympathy for the victims may constitute due process error."

 *Le*, 311 F.3d 1002, 1015 (10th Cir. 2002). However, an inappropriate prosecutorial comment does not warrant reversal of a criminal conviction so long as the defendant received a fair trial.  *Matthews v. Workman*, 577 F.3d 1175, 1186 (10th Cir. 2009). This inquiry requires the reviewing court to examine "the entire proceedings, including the strength of the evidence against the petitioner."  *Le*, 311 F.3d at 1013.

*26 After reviewing the entire record, the Court cannot agree with Petitioner's characterization of State's case as "extremely weak." Even crediting Petitioner's argument that counsel should have presented additional evidence to rebut the medical examiner's classification of the death as a homicide, the State still had strong circumstantial evidence of Petitioner's guilt. Further, the OCCA's incorrect statement regarding the victim's skull being crushed, which was made while addressing a challenge to the evidence supporting the heinous, atrocious, and cruel aggravator, does not undermine the OCCA's conclusion as to this claim because the OCCA outlined a strong aggravation case even without the erroneous statement.  *Frederick*, 400 P.3d at 817-818. Under federal law, it was certainly appropriate for the OCCA to address the strength of the State's case in assessing whether the prosecutor's remark rendered Petitioner's sentencing fundamentally unfair.  *Le*, 311 F.3d at 1013. Considering the evidence presented by the State during the entire proceeding, the OCCA's conclusion that the prosecutor's isolated remark did not deprive Petitioner of a reliable sentencing is reasonable.

Last, Petitioner contends that the following statements made by the prosecutor during sentencing stage closing arguments improperly denigrated Petitioner's mitigation evidence:

I've heard mitigation evidence. Oh, boy, here we go with this. He was in a car wreck. How many people know – you know have been in a car wreck? His dad wasn't there.

Whose dad was? He became institutionalized. That's it. Says, he became institutionalized because he was in prison. Okay. Let's reward him and put him where he wants to be.

I say no more excuses, that's what I say. There aren't any excuses. You've heard nothing in this courtroom that says bumping his head in a car wreck caused him to live a life of violence and kill people, rob people, burglarize people. Absolutely not. He is mean. That's why he does these things, because he wants to. We try to make excuses. Oh, there's got to be something wrong. No, he's done this by choice because he's mean. And that's how he gets his way. Period.

Trial Tr. vol. VIII, 1591-1593. In denying relief on this claim, the OCCA concluded:

...the prosecutor did not denigrate the mitigating evidence or tell the jury to ignore the evidence offered in mitigation. The prosecutor's argument merely attempted to minimize the effect of the evidence presented by the defense. Several of the comments were invited by defense counsel's closing argument...Further, the jury was appropriately instructed as to the mitigating evidence and was not in any way precluded from considering any and all mitigating evidence.

 *Frederick*, 400 P.3d at 825 (internal citation omitted).

Petitioner contends this decision is unreasonable because the prosecutor's comments encouraged the jury to completely disregard the mitigation evidence. But the prosecutor did not prevent any mitigating evidence from being presented or considered by the jury. Instead, as the OCCA recognized, the prosecutor merely attempted to minimize the weight to be accorded to the mitigation evidence presented by Petitioner. See  *Bland v. Sirmons*, 459 F.3d 999, 1026 (10th Cir. 2006) (rejecting prosecutorial misconduct claim because "[t]he prosecutors, while critical of [Petitioner's] mitigating evidence, never told the jury it could not consider [Petitioner's] mitigating evidence."). Further, the jury in

this case was properly instructed regarding the mitigation evidence. O.R. vol. 5, 875;  *Le*, 311 F.3d at 1013 (explaining that “[a]ny cautionary steps—such as instructions to the jury—offered by the court to counteract improper remarks may also be considered.”). Looking at the remarks in context, it was not unreasonable for the OCCA to conclude that the prosecutor's remarks were proper.

3. Conclusion

The OCCA's ruling that the prosecutor's misstatement during her guilt stage closing argument did not render the proceeding fundamentally unfair is reasonable. The OCCA's ruling that the mitigation evidence comment was proper and the inappropriate sentencing stage comment was harmless is also reasonable. Accordingly, Petitioner is not entitled to relief on Ground Three.

D. Ground Four: Cumulative Error

*27 In his final ground for relief, Petitioner argues that the accumulation of errors violated his rights under the Sixth, Eighth, and Fourteenth Amendments. The OCCA found no cumulative error on direct appeal and found no constitutional errors on post-conviction review.  *Frederick*, 400 P.3d at 832-833; *Frederick*, PCD-15-47, slip op. at 45.

The cumulative error analysis addresses the possibility that two or more individually harmless errors might have a “cumulative effect on the outcome of the trial such that collectively they can no longer be determined to be harmless.” *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir.2003). This analysis “aggregates all the errors that individually have found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.” *Id.* To obtain habeas relief, the court must find that “the cumulative effect of the errors determined to be harmless had a ‘substantial and injurious effect or influence in determining the jury's verdict.’ ” *Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015) (quoting  *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Instances where courts find deficient performance by counsel must also be aggregated, even if the ineffectiveness claim was ultimately denied for insufficient prejudice.  *Cargle v. Mullin*, 317 F.3d 1196, 120 (10th Cir. 2003).

The OCCA found, at most, two errors: the prosecution's misstatement of Dr. Hahn's testimony during the guilt stage closing argument and the prosecution's comment about seeking justice for the victim during the penalty stage closing arguments. Even in the aggregate, and incorporating any ineffectiveness claims where deficient performance was assumed, the Court cannot conclude that these errors collectively had a substantial and injurious effect on Petitioner's conviction or sentence. As already discussed, the State's case as to guilt and aggravation was strong, and even if Petitioner's defense or mitigation case were more thoroughly prepared, the Court is not persuaded the jury would have accepted that defense. Accordingly, Petitioner is not entitled to relief on Ground Four.

IV. Motions for Discovery and Evidentiary Hearing.

Petitioner has filed a motion for discovery [Doc. 21] seeking all district attorney files, documents that impeach certain witnesses, documents related to a redacted crime report, and documents related to the parents of Petitioner. He also seeks information as to whether employees of the Oklahoma County District Attorney's Office discussed Mr. Rowan's performance in capital cases. Petitioner fails to provide any argument as to why discovery on these topics is necessary or what grounds for relief the requested discovery may support. Petitioner appears to be seeking information to supplement his ineffective assistance of counsel claims and/or to support a possible *Brady* claim that prosecutor's wrongfully withheld exculpatory information. Petitioner has not raised a *Brady* claim with this Court and has failed to present “specific allegations” showing that he may, if permitted to discover this information, be entitled to relief.  *Bracy v. Gramley*, 520 U.S. 899, 909 (1997). Therefore, Petitioner has not shown good cause for discovery. See Rule 6(a) of the Rules Governing  Section 2254 Cases in the United States District Courts (requiring good cause to obtain discovery authorization).

*28 In addition to his discovery request, Petitioner has also filed a motion for evidentiary hearing [Doc. 24] seeking a hearing “on all of the grounds and on all related factual contentions contained in the Petition.” “The purpose of an evidentiary hearing is to resolve conflicting evidence.” *Anderson v. Attorney Gen. of Kan.*, 425 F.3d 853, 860 (10th Cir. 2005). If there is no conflict, or if the claim can be resolved on the record before the Court, then an

evidentiary hearing is unnecessary. *Id.* at 859. An evidentiary hearing is unwarranted to resolve the legal issues presented by Petitioner's Petition for Writ of Habeas Corpus. No information gained from an evidentiary hearing would affect the legal findings on those grounds. Therefore, the requests for discovery and evidentiary hearing are 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 the requested relief. Accordingly, Petitioner's Petition [Doc. 20], motion for discovery [Doc. 21], and motion for an evidentiary hearing [Doc. 24] are hereby **DENIED**. A judgment will be entered accordingly.

IT IS SO ORDERED this 29th day of July, 2020.

All Citations

Not Reported in Fed. Supp., 2020 WL 4352749

Footnotes

- 1 In connection with his ineffective assistance of counsel claims, Petitioner refers to new evidence he has offered for the first time in this federal court proceeding. However, the Court's review under  § 2254(d) is limited to the same record that was before the state court.  *Pinholster*, 563 U.S. at 181
- 2 Specifically, the OCCA ruled that "Petitioner has failed to show any prejudice by appellate counsel's alleged shortcomings as this Court has sufficient record to thoroughly review his claims for post-conviction relief." *Frederick*, No. PCD-2015-47, slip op. at 11. The OCCA did not provide any further reasoning in support of its denial of this claim. Nevertheless, the claim is considered adjudicated on the merits for purposes of AEDPA.  *Harrington*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.") Thus, AEDPA applies and, even though the "state court's decision is unaccompanied by an explanation," Petitioner still carries the burden of "showing there was no reasonable basis for the state court to deny relief."  *Id.* at 98. Notably, the parties agree that AEDPA applies to the OCCA's decision with respect to the prejudice prong of *Strickland*.
- 3 In concluding there were no abrasions or bleeding on Ms. Frederick, Dr. Bux questioned the accuracy of an emergency room record noting that the victim appeared with "abrasion and contusion." *Id.* 344-345. Additionally, at trial, Dr. Hahn, Ms. Frederick's neurosurgeon, testified that she had lacerations on her face. Trial Tr. vol. 5, 1019.
- 4 The admissibility of Ms. Frederick's statement is addressed in part III(B).
- 5 Petitioner also points out that the OCCA's direct appeal opinion erroneously states that the victim's skull was crushed.  *Frederick*, 400 P.3d at 798-799. This finding is indeed inaccurate – the victim's skull was not crushed. See Evid. Hr'g Tr. vol. II, 284. The OCCA made this statement while addressing Petitioner's claim regarding the sufficiency of the evidence in support of the heinous, atrocious, or cruel aggravator.  *Frederick*, 400 P.3d at 798-799. The OCCA did not include this statement in its recitation of the facts,  *id.* at 817, and the isolated statement was not referenced in the OCCA's post-conviction decision. There is no indication that the OCCA relied on this misstatement in reaching its decision as to this subclaim.

- 6 Petitioner does not contest the accuracy of the other information contained in the Investigator's Narrative.
- 7 The parties dispute whether the failure to object to the prosecutor's misstatement of the evidence has been exhausted, and if so, whether it has been adjudicated on the merits. It is not necessary to resolve this dispute because, even under *de novo* review, this particular subclaim would not merit relief. See  28 U.S.C. § 2254(b)(2) ("An 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.").
- 8 The defense revised its mitigators to conform to the evidence after the State argued there was no evidence presented in support of certain proposed mitigators. Trial Tr. vol. VIII, 1525-1528.
- 9 Petitioner takes issue with the OCCA's characterization of Ms. Hammarsten's investigation as "extensive" because she did not describe or could not remember certain details about the investigation. Of course, it is not at all surprising that Ms. Hammarsten could not remember every detail of an investigation that occurred several years prior. Ms. Hammarsten testified she and her investigator did "all that [they] could" to locate potential witnesses and Mr. Rowan agreed that the case looked "thoroughly investigated" by the time he took it over. Evid. Hr'g Tr. vol. I, 189, vol. III, 591.
- 10 Petitioner challenges the OCCA's finding that the majority of Ms. Cole's and Ms. Long Miller's testimony was based on hearsay as both factually and legally unreasonable, but the Court is not persuaded. First, while the witnesses testified to some first-hand observations, much of their testimony was indeed based on information relayed to them by Petitioner or others. Evid. Hr'g Tr. vol. I, 75, 105. Second, while it is true that mitigation evidence is not necessarily inadmissible or less valuable when it is based on reliable hearsay, see  *Sears v. Upton*, 561 U.S. 945, 950 (2010), the OCCA's determination that the testimony was less compelling because it was based on statements by the Petitioner or others was not unreasonable. Third, while it may be reasonable to conclude, as the Petitioner suggests, that Mr. Rowan could not have harbored concerns about the testimony being based on hearsay at the time he made his decision not to present family witnesses, it is also reasonable to conclude, based on the witnesses summaries filed in the case, that Mr. Rowan was aware that at least some of the testimony was based on statements by Petitioner and that the remainder was either not helpful to his mitigation strategy or not credible.
- 11 Petitioner asserts that Mr. Rowan could not have been in a position to make a strategic decision not to call Jerome Frederick because he failed to conduct a reasonable investigation into locating him. As explained *supra* at 25-26, Mr. Rowan's decision not to continue to search for Jerome Frederick was reasonable.
- 12 While summarizing Jerome Frederick's testimony, the OCCA stated: "Jerome also knew of Petitioner's 2009 guilty pleas to assaulting DaJon Diggs and the decedent." *Frederick*, PCD-15-47, slip op. at 28. But it was Jerome, not Petitioner, who pled guilty to assaulting Ms. Diggs and Ms. Frederick in 2009. Nonetheless, this error does not fatally corrupt the OCCA's analysis of this claim because, in addition to the misstatement regarding the 2009 assault, the OCCA correctly noted that Jerome testified about several other violent acts involving Petitioner. The OCCA's decision does not rest upon this misstatement and is therefore not a basis for relief. See  *Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011).
- 13 Petitioner also challenges the OCCA's finding that "[m]any of the incidents of physical abuse and discord in the household and misdeeds of Petitioner's father occurred after Petitioner left home." *Frederick*, PCD-15-47, slip op. at 33. This finding is reasonable given that Petitioner left home in the early 1970s when Jerome Frederick was only eight or nine years old. Evidentiary Hr'g Tr. vol. I, 137.
- 14 Petitioner also complains that the OCCA's prejudice analysis failed to consider the positive evidence family members could have provided. The OCCA summarized the positive evidence provided by the family members

who testified at the evidentiary hearing, and there is nothing to suggest that it did not consider this evidence when performing its analysis.

- 15 Respondent asserts that the claim raised by appellate counsel on direct appeal was merely that trial counsel was ineffective for failing to call the witness after telling the jury he would do so, not that trial counsel was ineffective for actually failing to present the witness. The Court believes that Respondent parses the claim too narrowly. Additionally, the post-conviction claim encompasses trial counsel's decision to not present the witness and the OCCA resolved that claim in its opinion. *Frederick*, PCD-15-47, slip op. at 33 ("On direct appeal, we thoroughly reviewed trial counsel's alleged ineffectiveness and found his decision not to call Dr. Williams to testify was reasonable trial strategy.")
- 16 Petitioner argues that the OCCA's post-conviction opinion did not make a clear finding regarding the prejudice prong of his appellate ineffectiveness claim and it is therefore not entitled to AEDPA deference. Generally, when a state court disposes of an ineffectiveness claim without specifying which prong it is relying on, AEDPA deference applies to both prongs.  *Premo v. Moore*, 562 U.S. 115, 123 (2011). However, even under *de novo* review, Petitioner cannot show that he suffered any prejudice from appellate counsel's failure to include Dr. Williams' report.
- 17 Contrary to Petitioner's assertion, Mr. Rowan's testimony about being concerned that Petitioner did not interact with Dr. Williams supports the OCCA's finding that counsel's decision not to call Dr. Williams was based in part on Petitioner's failure to cooperate.  *Frederick*, 400 P. 3d at 831.
- 18 Respondent argues that the Court cannot consider any of Petitioner's state post-conviction attachments, including Dr. Williams' report, because they were not introduced at the evidentiary hearing. Of course, review under AEDPA is "limited to the record that was before the state court that adjudicated the claim on the merits."  *Pinholster*, 563 U.S. 170, 181 (2011). Dr. Williams' report, although not introduced at the evidentiary hearing, was attached to Petitioner's post-conviction application and was therefore available to the state court. App. to Appl. for Post-Conviction Relief at Attach. 32. The OCCA also referenced some of Petitioner's post-conviction attachments in its opinion, which suggests that these attachments were considered by the state court. *Frederick*, PCD-15-47, slip op. at 23, 34. But the Court need not definitively determine the matter because, even taking the report into consideration, Petitioner cannot prevail on this claim. See  *Hooks v. Workman*, 689 F.3d 1148, 1193 (10th Cir. 2012).
- 19 Because defense counsel did not object to any of the remarks at trial, the OCCA reviewed the claim for plain error.  *Frederick*, 400 P.3d at 822. The plain error standard set for the by the OCCA in its opinion is akin to the due process standard this Court applies. The claim is therefore considered adjudicated on the merits for purposes of AEDPA. See  *Thornburg v. Mullin*, 422 F.3d 1113, 11-24-1125 (10th Cir. 2005).



**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA**

ORIGINAL

DARRELL WAYNE FREDERICK,)

Petitioner,)

v.)

THE STATE OF OKLAHOMA,)

Respondent.)

NOT FOR PUBLICATION

Case No. PCD-2015-47

FILED
IN COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA

DEC 20 2018

JOHN D. HADDEN
CLERK

**OPINION DENYING APPLICATION FOR POST-CONVICTION
RELIEF**

LUMPKIN, PRESIDING JUDGE:

Petitioner Darrell Wayne Frederick was convicted of First Degree Malice Murder (Count I) (21 O.S.2001, § 701.7(A)), Assault and Battery with A Dangerous Weapon, After Former Conviction of Two or More Felonies (Count II) (21 O.S.2001, § 645), and Domestic Abuse Assault and Battery (Count III) (21 O.S.2001, § 644 (C)), Case No. CF-2011-1946, in the District Court of Oklahoma County. In Count I, the jury found the presence of three aggravating circumstances: 1) the defendant was previously convicted of a

felony involving the use or threat of violence to the person; 2) the murder was especially heinous, atrocious or cruel; and 3) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and set punishment at death. In Counts II and III, the jury recommended imprisonment for twenty-five (25) years and one (1) year, respectively. The trial judge sentenced Petitioner in accordance with the jury's determination and ordered all sentences to run consecutively. This Court affirmed the judgments and sentences in *Frederick v. State*, 2017 OK CR 12, 400 P.3d 786.

Petitioner timely filed his *Original Application for Post-Conviction Relief and Motions for Evidentiary Hearing, Discovery, and Reserving the Right to Supplement Original Application for Post-Conviction Relief in a Death Penalty Case* with this Court in accordance with 22 O.S.2011, § 1089. The requests for *Discovery and Reserving the Right to Supplement Original Application for Post-Conviction Relief in a Death Penalty Case* are denied.¹

¹ There is no right to supplement an application for post-conviction relief. *Coddington v. State*, 2011 OK CR 21, ¶ 24, 259 P.3d 833, 840. Under our Rules any attempt to supplement an existing post-conviction application is considered a second or subsequent application. Rule 9.7(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

Petitioner's request for an evidentiary hearing relates to claims raised in the post-conviction application regarding ineffective assistance of appellate counsel for failing to raise claims of ineffective assistance of trial counsel and a claim of prosecutorial misconduct for a possible discovery violation. After reviewing Petitioner's arguments and supporting material, this Court found that Petitioner had met the requirements of Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018) and shown by clear and convincing evidence that appellate counsel's failure to raise the specified claims of ineffective assistance of trial counsel and prosecutorial misconduct were relevant to claims raised in the post-conviction application. This Court remanded the case to

Discovery may be had on post-conviction where parties did not comply with discovery orders at trial, and where the material sought would have resulted in a different outcome. 22 O.S.2011, § 1089(D)(3); Rule 9.7(D)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). This Court may remand for an evidentiary hearing on the issue of discovery if failure to comply with a discovery order is the grounds for an issue raised in the application. Rule 9.7(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). Petitioner incorporates much of the material from his post-conviction application and other filings in the case regarding issues raised in the first stage of trial relating to the manner and cause of decedent's death. Issues relating to the guilt stage of trial have been waived for purposes of post-conviction review, therefore Petitioner has not shown why discovery is warranted.

the District Court of Oklahoma County with directions to hold an evidentiary hearing in four specifically designated areas.²

The District Court conducted a four day hearing and filed its written findings of fact and conclusions of law with this Court. In a thirty-eight (38) page order, the District Court ruled that appellate counsel was not ineffective for failing to raise the issues contained in the application for post-conviction relief and the claim of prosecutorial misconduct lacked merit as there was no evidence supporting the alleged discovery violation.

The narrow scope of review available under the amended Post-Conviction Procedure Act is well established. *See Coddington v. State*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835; *Harris v. State*, 2007

² The District Court was ordered to consider the following: 1) whether the evidence proffered in the post-conviction application and attached affidavits relating to issues pertinent to the sentencing stage of trial was available to trial and appellate counsel; 2) whether trial and appellate counsel conducted a reasonable investigation of the proffered evidence; 3) whether trial counsel made a strategic decision concerning use of the proffered evidence at trial; and 4) whether appellate counsel made a strategic decision concerning use of the evidence on appeal. Specifically regarding the second stage of trial, the trial court was also ordered to determine whether trial counsel's decision to present the testimony of one witness as the sole evidence in mitigation denied Petitioner the effective assistance of counsel in the sentencing stage under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and 2) whether appellate counsel's failure to raise this claim on appeal denied Petitioner the effective assistance of counsel on appeal.

OK CR 32, ¶ 2, 167 P.3d 438, 441; *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199; *McCarty v. State*, 1999 OK CR 24, ¶ 4, 989 P.2d 990, 993. The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Coddington*, 2011 OK CR 21, ¶ 2, 259 P.3d at 835; *Murphy*, 2005 OK CR 25, ¶ 3, 124 P.3d at 1199. The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. *Murphy*, 2005 OK CR 25, ¶ 3, 124 P.3d at 1199. Accordingly, claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata*. *Id.*

Pursuant to 22 O.S.2011, § 1089(C)(1), the only claims which will be considered on post-conviction are those which “[w]ere not and could not have been raised” on direct appeal and which “support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” A capital post-conviction claim could not have been raised on direct appeal if: (1) it is an ineffective assistance of trial or appellate counsel claim which meets the statute’s definition of ineffective counsel; or (2) the legal basis of the claim was not

recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court or an appellate court of this State, or is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of this State. 22 O.S.2011, §§ 1089(D)(4)(b) & 1089(D)(9). Should a petitioner meet this burden, this Court shall consider the claim only if it “[s]upports a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” *Id.*

Turning to Petitioner’s post-conviction application, he argues various ways in which he was denied the effective assistance of appellate counsel. A claim of ineffective assistance of appellate counsel may be raised for the first time on post-conviction. 22 O.S.2011, § 1089(D)(4)(b)(2). We review such claims using United States Supreme Court precedents. 22 O.S.2011, § 1089(D)(4); *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835. Our review is therefore conducted pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Id.* Under *Strickland*, “the petitioner must show both (1) constitutionally deficient performance, by demonstrating that his

appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding – in this case the appeal – would have been different.” *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064.

However, when a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Id.*, 466 U.S. at 696, 104 S.Ct. at 2070. A finding of prejudice requires a showing of “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. “The likelihood of a different result must be substantial, not just conceivable.” *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835 quoting *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). There is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Petitioner must show “that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy.”

Coddington, 2011 OK CR 21, ¶ 3, 259 P.3d at 835. A strong presumption exists that, where counsel focuses on some issues to the exclusion of others, this reflects a strategic decision rather than neglect. *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835-36.

Initially, Petitioner admits that appellate counsel raised compelling record and extra-record issues on appeal that warrant relief; however, he claims that several issues meriting relief were not presented. To support this claim, Petitioner initially asserts that “state interference” impacted appellate counsel’s ability to present issues on appeal. According to Petitioner, this “state interference” took the form of this Court’s denial of appellate counsel’s request for twenty-five (25) additional pages in her appellate brief to adequately present identified errors. Petitioner asserts that when his case was transferred from appellate counsel to post-conviction counsel, appellate counsel provided propositions of error which she would have included in her appellate brief if she had been granted additional pages. Petitioner asserts these were meritorious propositions warranting relief on direct appeal.³

³ These propositions include: 1) the absence and/or destruction of mitigation evidence attributable to the state; 2) the jury selection process employed by the trial court in removing prospective jurors for cause before adequately establishing

In *Strickland*, the Supreme Court stated that “[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” 466 U.S. at 691-692, 104 S.Ct. at 2067. The Supreme Court went on to explain that “[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel’s assistance” *Id.*, 466 U.S. at 692, 104 S.Ct. at 2067 citing *United States v. Cronin*, 466 U.S. 648, 659, and n. 25, 104 S.Ct. 2039, 2046–2047, and n. 25, 80 L.Ed.2d 657 (1984). *Strickland* further states that “[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. . . . Moreover, such circumstances involve impairments of the Sixth

those jurors could not follow the law; 3) and the trial court abuse of its discretion in allowing the prosecution to introduce irrelevant, prejudicial, confusing and misleading evidence through a “pen pack” during sentencing. Petitioner also claims he suffered from state induced ineffective assistance as appellate counsel’s motion to supplement the record with a letter/report from Dr. Robert Bux, the medical examiner for the El Paso County Coroner’s Office in Colorado Springs, Colorado, was denied.

Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.” 466 U.S. at 692, 104 S.Ct. at 2067.

Circumstances identified as state interference with counsel’s assistance are listed in *Cronic*. These include, but are not limited to, the complete denial of counsel; if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing; and circumstances when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. 466 U.S. at 659-660, 104 S.Ct. at 2047. Circumstances which do not qualify as state interference with counsel’s assistance giving rise to the presumption of prejudice include, but are not limited to, every refusal to postpone a criminal trial and every late appointment of counsel. *Id.*, 466 U.S. at 661, 104 S.Ct. at 2048.

Petitioner’s claims regarding this Court’s denial of appellate counsel’s request for additional pages and motion to supplement are not the type of state interference or “state induced”

ineffectiveness, as coined by Appellant, that *Strickland* and *Cronic* find require a presumption of prejudice. Petitioner's attempt to have this Court review the merits of issues he claims appellate counsel would have raised on direct appeal if granted additional pages or supplementation of the record is unavailing. This Court's rulings did not prevent appellate counsel from raising the additional claims of error, and as those claims of error could have been raised on direct appeal, but were not, consideration of the merits of those claims on post-conviction review is waived.

Petitioner also asserts he was denied the effective assistance of appellate counsel by appellate counsel's failure to follow this Court's rules by: 1) failing to obtain a complete record before filing the direct appeal; 2) believing that she could obtain additional pages for the direct appeal brief and that any related problem could be remedied during post-conviction; 3) failing to submit 3.11 attachments in proper form; and 4) failing to present a meritorious claim in a timely manner. Petitioner has failed to show any prejudice by appellate counsel's alleged shortcomings as this Court has sufficient record to thoroughly review his claims for post-conviction relief.

We next address Petitioner's specific instances of trial counsel

ineffectiveness which he claims appellate counsel should have included in the direct appeal. His first focuses on the Medical Examiner's determination that the manner of the decedent's death was a homicide. Petitioner argues that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to elicit information contained in an Investigator's Narrative attached to the autopsy report. The Investigator's Narrative, discovered during post-conviction investigation, erroneously stated that the decedent's granddaughter, DaJonn Diggs, witnessed Petitioner assault the decedent with a brick. Petitioner asserts that the Medical Examiner, Dr. Harrison, told post-conviction counsel if he had seen the Investigator Narrative, he would have classified the decedent's manner of death as accidental or undetermined, and not homicide. Petitioner argues that if trial counsel had met with the Medical Examiner prior to trial, he would have learned of the information contained in the Investigator's Narrative which would have benefitted the theory of defense that the decedent's injuries were the result of an accidental fall or a fall resulting from a medical condition, and discredited the State's theory that Petitioner assaulted the decedent with a brick. Petitioner also argues trial counsel missed an

opportunity to obtain the information contained in the Investigator's Narrative by failing to follow up with a previously filed discovery request.

Further, Petitioner argues that trial counsel was ineffective for failing to cross-examine the Medical Examiner on the cause of the decedent's head injury and the incorrect information contained in the Investigator's Narrative. Petitioner asserts that counsel's failure to elicit this critical information, "which easily establishes reasonable doubt", constituted ineffective assistance of counsel.

Pertinent testimony from the Evidentiary Hearing showed that the Investigator's Narrative is called different names by different individuals, *i.e.*, "Investigator's Narrative", "OCME" "OCME-1", "CME -1". It will be referred to here as the Investigator's Narrative. Testimony showed it is prepared by an investigator with the Medical Examiner's Office and attached to the Medical Examiner's Report kept in the Medical Examiner's Office. The Investigator's Narrative in this case shows there was no crime scene investigation by the Medical Examiner's office but lists the type of death as violent, unusual or unnatural by means of an assault. The narrative includes information from a woman named Melanie at Hospice House

that the decedent's granddaughter witnessed the assault. The narrative was prepared by the investigator several weeks after the assault on the decedent. The investigator who prepared the narrative testified she could not verify the information contained therein.

Dr. Harrison testified at the Evidentiary Hearing that his determination of the manner of death in this case as a homicide was based upon several factors, including his examination of the body during the autopsy, police reports, Investigator's Narrative and any supplemental reports. He testified that generally the Investigator's Narrative was a preliminary report prepared by investigators with the Medical Examiner's office and submitted prior to the autopsy. Dr. Harrison testified the Investigator's Narrative, containing the false information, was originally included in his final report and that he failed to amend the report after he received supplemental reports and police reports stating that the assault was not witnessed.

Dr. Harrison also stated that when he saw the statement in the Investigator's Narrative about the decedent's granddaughter witnessing the assault he did not take it to mean that the granddaughter actually witnessed Petitioner hit the decedent in the head with a brick but that she witnessed the assault in general terms

as she observed Petitioner push the decedent into the kitchen counter (prior to striking her in the head) and chase the granddaughter around the house. Dr. Harrison testified that regardless of any incorrect information in the Investigator's Narrative, his opinion that the death was a homicide would not have changed. The district court found this testimony showed that trial counsel was not ineffective for failing to ask about the incorrect information in the Investigator's Narrative or pursue this information in any other way.

The issue before the Court in this post-conviction application is whether appellate counsel's failure to raise the issues enumerated herein on direct appeal raises a substantial likelihood that the result of the direct appeal would have been different. In conducting this review, we focus on this Court's affirming of the judgment and sentence as the outcome which would have been affected by different actions on appellate counsel's part. As Dr. Harrison testified at the Evidentiary Hearing that his opinion on the manner of death was not dependent on the information in the Investigator's Narrative, and that his testimony at trial on the issue would not have changed based upon the information in the Investigator's Narrative, Petitioner cannot show any prejudice resulting from counsel's omissions as he

has failed to show a substantial likelihood of different result on appeal.

Petitioner next argues that appellate counsel was ineffective for failing to bring a claim of prosecutorial misconduct for the prosecution's failure to meet its discovery obligations in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and for the State's misrepresentation of Dr. Harrison's testimony during its second closing argument.

Petitioner argues that the prosecution withheld the Investigator's Narrative described above in violation of its discovery obligations. Petitioner asserts the defense specifically requested the prosecution turn over "anything in the Medical Examiner's findings or their investigation" and despite indicating it would abide by all discovery orders, the State failed to provide the Investigator Narrative.

To establish a *Brady* violation a defendant must establish that the prosecution suppressed evidence that was favorable to him or exculpatory and that the evidence was material. *Jones v. State*, 2006 OK CR 5, ¶ 51, 128 P.3d 521, 540-541 citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence 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. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Catherine Hammarsten represented Petitioner until a few months before trial when she was allowed to withdraw from the case. Ms. Hammarsten testified at the Evidentiary Hearing that she made the discovery request, specifically requesting “the form OCME in possession of the Medical Examiner.” She testified that the prosecutor responded by stating she did not what the “OCME” form was.

Ms. Hammarsten explained that she had been informed by a previous Chief Medical Examiner about the Investigator’s Narrative and that she should always ask the Medical Examiner’s office about seeing the form. She testified that in her twenty (20) years of experience, she had never received the Investigator Narrative from the prosecutor, only from the Medical Examiner’s Office. She also testified that she did not always ask for the Investigator Narrative in her discovery request because if she wanted to see the narrative, she would simply ask the Medical Examiner’s Office for it.

The prosecutor, Suzanne Lavenue, acknowledged at the

evidentiary hearing that she had responded to the defense discovery request for the Investigator's Narrative by saying she did not know what the "form OCME" was. She testified that the prosecution typically only received from the Medical Examiner the Medical Examiner's final report and supporting photographs. She said if she had known what the Investigator's Narrative was, or if the prosecution had it in their possession, she would have turned it over to the defense.

Her co-counsel, Clayton Niemeyer, testified he had never heard of or seen an Investigator's Narrative from the Medical Examiner's Office and that he had never heard about reports referred to as "investigator narrative", "OCME", "CME-1", etc. Mr. Niemeyer said he spoke with Dr. Harrison, the Medical Examiner, approximately five (5) days before trial but did not discuss the basis for his findings nor go through his report line by line. Mr. Niemeyer testified that he did not talk with Dr. Harrison about any eyewitness testimony because the evidence showed there were no eyewitnesses to Petitioner hitting the decedent with the brick, nor did he ask if the Medical Examiner's findings were consistent with the defense theory of a fall. Mr. Niemeyer said the first time he saw the Investigator Narrative was at

the remanded evidentiary hearing.

Ms. Hammersten was replaced in her representation by James Rowan. Mr. Rowan testified that it was his understanding that when he entered the case, discovery had been completed. He said he was sure he read the State's response to the discovery request stating they did not know what the "form OCME" was and that he did not pursue the issue. He testified he did not interview the Medical Examiner prior to trial.

Mr. Rowan said there was actually no such thing as the "form OCME" and that he usually got the Investigator Narrative from the Medical Examiner's Office, not the prosecutor. He agreed with the statement that the Investigator Narrative was a "secret weapon for the defense attorney" and that it was something the defense used that the prosecution was not aware of. He said that while he did not have the "OCME" or Investigator's Narrative in Petitioner's case, the erroneous information that the attack was witnessed by the decedent's granddaughter was contained in the Medical Examiner's Final Report, which he had received in discovery.

Appellate counsel Gina Walker also testified at the Evidentiary Hearing. She stated that she had learned early in her career to ask

the Medical Examiner to view the Investigator Narrative. She testified that the Medical Examiner did not normally include the Investigative Narrative with the autopsy report provided to the prosecution. She said she never had a problem getting the narrative from the Medical Examiner when she asked for it. She did not recall ever getting the narrative from the prosecution. Ms. Walker also testified that in preparing the appeal, she did not notice the absence of the Investigator's Narrative.

The record before us contains no support for Petitioner's claim that the prosecution intentionally withheld exculpatory evidence, *i.e.* the Investigator's Narrative. Testimony from the Evidentiary Hearing shows that the prosecution was not aware of the Investigator's Narrative at the time of trial. The testimony clearly shows that defense counsel routinely asked the Medical Examiner's Office for the Investigator's Narrative and did not routinely ask or receive the Investigator's Narrative from the prosecution.

Further, there is no support for Petitioner's contention that Dr. Harrison provided Mr. Niemeyer the Investigator's Narrative when they met a week before trial or that they discussed the information contained in the narrative. The State's theory of the case was that

the decedent was struck in the head by Petitioner with a brick and the prosecutor met with the Medical Examiner to ensure his findings supported that theory. The prosecutor did not meet with the Medical Examiner to discuss evidence which might rebut the prosecution's theory of the case.

The information contained in the Investigator's Narrative that the fatal assault on the decedent was witnessed was actually included in the comments section of the autopsy report which was given to the defense. The testimony elicited at the Evidentiary Hearing simply does not show a *Brady* violation on the part of the prosecution. Therefore, appellate counsel will not be found ineffective for failing to raise a claim on appeal which lacks support in the record.⁴

Petitioner next argues that appellate counsel was ineffective for failing to raise the claim of ineffective assistance of trial counsel for failing to adequately investigate, develop, and present evidence to

⁴ Petitioner raises an additional claim that appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct based on the State's misrepresentation in the second stage closing argument of the medical examiner's testimony. This claim is presented in two sentences with a reference to the trial transcript. This brief statements, sans argument and legal authority, is insufficient to raise the issue for our appellate review. See Rules 9.7(A)(3)(g) and 3.5(A)(5), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018).

rebut the State's argument and evidence that Petitioner was abusive to the decedent. This argument will be considered together with Petitioner's follow-up complaint that appellate counsel was ineffective for failing to raise a claim of trial counsel ineffectiveness for failing to adequately investigate, develop and present mitigating evidence. Petitioner essentially divides this argument into two parts: 1) trial counsel's failure to present family members favorable to him; and 2) mental health experts.

Addressing first the absence of any testimony on Petitioner's behalf by family members, Petitioner asserts that the defense witness list filed shortly before Mr. Rowan took over Petitioner's case listed family members who would rebut the State's characterization of Appellant as abusive and disrespectful to his mother. None of these witnesses were called to testify.

During the second stage of trial, the only mitigation evidence presented was the reading of a portion of a transcript from a 1982 hearing containing testimony from Petitioner's deceased father. Petitioner argues that trial counsel's failure to present testimony from family members showing his dysfunctional childhood and the failure to present family members to say anything positive about him

constitutes ineffective assistance of counsel.

In his post-conviction application, Petitioner has included sworn affidavits from family members who state they were never contacted by the defense nor asked to testify on Petitioner's behalf; but if they had been contacted they would have testified to his dysfunctional childhood, his positive attributes, and that his life should be spared. Petitioner also includes a sworn affidavit from trial counsel stating he does not recall speaking with the family members who have provided affidavits or any other members of Petitioner's family prior to trial.

At the Evidentiary Hearing, Ms. Hammarsten testified to an extensive investigation she and her staff conducted to locate family members willing to support Petitioner at trial. She said the family was very divided on its opinion of Petitioner. Of all the family she located, only two were deemed viable witnesses. Some of the family members she located had no first-hand knowledge of Petitioner's interaction with the decedent and she was concerned that might blunt their impact with the jury. Jimmy Ross and Jerome Frederick, two of Petitioner's brothers, she was unable to locate as they were transient. She said that Mr. Rowan would have been aware from the notes in the case file of the work she had done in trying to locate

family members to testify.

Mr. Rowan testified that Petitioner's brother Tobias was the only family member he spoke with at trial. He said he saw other family members present and assumed they were there, as was Tobias Frederick, to support the decedent. He said he knew that Petitioner was much older than most of his brothers and sisters and that most of them did not know him very well because of the age difference and because he had been in prison for a long time. He said had he known any family members would have supported Petitioner, he would have spoken to them when he entered the case.

Regarding second stage, Mr. Rowan said that he did not have the kind of mitigation evidence that he liked to present in a case, and that he was "grasping at straws". This led to his decision to read the testimony of Petitioner's deceased father in order to "paint a human picture" of Petitioner. Mr. Rowan testified that he had no strategic reason for not interviewing potential witnesses and that he did not call defense/mitigation witnesses because he "just blew it."

Mr. Rowan's self-deprecating claim was not supported by other testimony from the Evidentiary Hearing. Ms. Hammarsten testified that she remembered Mr. Rowan had a reason for not presenting the

two witnesses she designated, but she could not remember the reason at the Evidentiary Hearing. Ms. Walker testified that Mr. Rowan told her that family members did not want to help Petitioner.

Regarding second stage, despite Mr. Rowan's claim that he "blew off family mitigation witnesses", he testified that Petitioner was not helpful in preparing a mitigation case as felt he was innocent and that mitigation evidence was not necessary. He admitted that in the forty-five (45) capital cases he had tried in his career, it was not the first time he had not presented mitigation witnesses. He testified that often mitigation witnesses "can be turned" with their testimony turning out not to be beneficial to the defense.

Four family members testified at the Evidentiary Hearing. Petitioner's second cousin Latrena Sloan, acknowledged her sworn affidavit from 2016 stating that Petitioner was the decedent's primary caregiver, buying her groceries, cooking, and bathing her. However, she admitted that those statements were not based on personal observations but on what others in the family had told her. She said she was not contacted by defense lawyers but would have testified if asked. Ms. Sloan said she did not attend Petitioner's trial and did not witness any testimony, but based upon family gossip, she did not

believe that Petitioner would have hurt the decedent.

Johnita Cole, Petitioner's aunt and grandmother to Ms. Sloan, also acknowledged her 2016 sworn affidavit. However, like Ms. Sloan, she said that much of what was said in the affidavit concerning Petitioner taking care of the decedent was based on what others had told her and not her own personal observations. She acknowledged that Petitioner's family was divided over their concern for him but she loved him.

Latisha Long Miller, Petitioner's cousin and Ms. Sloan's sister, testified she and Petitioner became close when he was released from prison in 2002. She said that Petitioner loved his mother and did the cooking, cleaning around her house, and that he bathed her. She said she was not contacted by defense attorneys prior to trial and that if she had been, she would have testified in his behalf. On cross-examination, she acknowledged that her 2016 affidavit showed she had been approached by defense counsel and an investigator and willingly talked with them. She stated that in her affidavit she said she never saw Petitioner lose his temper or have any argument with anyone, but she admitted she was aware that Petitioner had conflicts with other family members. She said she did not attend trial because

she could not get time off of work. She said she loved Petitioner and felt his life was worth saving.

Petitioner's brother, Jerome Frederick (Jerome), testified to Petitioner's childhood and upbringing. Jerome said Petitioner was four years older than him and that they lived in the same household until Jerome was nine (9) years old, at which time Petitioner left home. Jerome testified that he and Petitioner grew up in a very religious home and were not allowed to celebrate holidays or birthdays. Jerome said his father was a minister and was accused of indiscretions with women in the church he pastored. Children from his father's other relationships were welcomed into their home. He said he and Petitioner were spanked with hoses or extension cords if they misbehaved. He said Petitioner was not the same after a car accident when he was fourteen (14), that he seemed different, and that he quarreled with their father more. Jerome said he did not have any contact with Petitioner when he left home as a teenager (from approximately 1970 until 2002) and he did not talk or visit Petitioner while he was in prison.

Jerome further testified that he did not get along with DaJon Diggs, the decedent's granddaughter, and thought she was

manipulative. He knew about Petitioner's 2003 charges stemming from the incident at the hair salon and the previous murder case. He knew Petitioner had threatened young women, and that he knew of the 2002 allegations that Petitioner had raped underage family members. Jerome also knew of Petitioner's 2009 guilty pleas to assaulting DaJon Diggs and the decedent. Despite these incidents, Jerome testified that Petitioner was not to blame for any these confrontations or misdeeds because of his rough childhood.

When asked why he did not present this mitigating evidence, Mr. Rowan testified he thought it would not be beneficial and a "very bad thing" to show Petitioner grew up in a dysfunctional family where his father "masqueraded" as a Godly figure and where the decedent was "required to raise kids that were the products of his ministering to vulnerable women." Mr. Rowan said that to present that kind of evidence was "very dangerous because you're besmirching the dead" and he would be "disparaging" a culture he did not understand.

Also testifying at the Evidentiary Hearing was Tobias Frederick, Petitioner's brother and a sergeant with the Oklahoma City Police Department. Sgt. Frederick testified, as he did at trial, that he, with help from DaJon Diggs, was the primary caregiver for the decedent.

He testified that he paid the decedent's bills and that either he or Ms. Diggs visited the decedent every day and that they took her grocery shopping and to doctor's appointments. He testified the decedent could cook for herself and bath herself. He said he never saw Johnita Cole or Latisha Long Miller visit the decedent.

Having heard this testimony, the trial court did not give Mr. Rowan's claim that he "just blew it" much credit, finding the claim "too incredible to be believed, particularly from a seasoned capital litigator as James Rowan" and finding "serious, inescapable issues with Ms. Cole and Ms. Miller's testimony."

To obtain relief on an ineffectiveness claim, Petitioner must first demonstrate that Mr. Rowan's representation was deficient. *Strickland*, 466 U.S. at 687. Petitioner must show that Mr. Rowan "made errors so serious that [he] was not functioning as the 'counsel' guaranteed [Petitioner] by the Sixth Amendment." *Id.* The assessment of Mr. Rowan's conduct is "highly deferential," and Petitioner must overcome the strong presumption that Mr. Rowan's actions constituted sound trial strategy. *Id.* at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable...." *Id.* at 690.

As *Strickland* cautions, “[i]t is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.* at 689. Therefore, “[a] fair assessment of [Mr. Rowan's] performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of [his] challenged conduct, and to evaluate the conduct from [his] perspective at the time.” *Id.* at 689. Within “the wide range of reasonable professional assistance,” “[t]here are countless ways to provide effective assistance in any given case [, and] [e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 690.

Mr. Rowan is an experienced capital litigator well known to this Court. As he continued to testify at the Evidentiary Hearing, it became clear that he had strategic reasons for not calling Petitioner's family members to the stand. Serious questions existed concerning the availability and credibility of family members other than Sgt. Frederick. Family members seemed willing to testify after Petitioner had been sentenced to death but there is no indication they did

anything to make themselves available to testify at trial. Counsel will not be found ineffective for failing to call family members who could not, despite due diligence, be located at the time of trial. Even if Ms. Cole, Ms. Sloan and Ms. Miller would have been available to testify at trial, the majority of their testimony regarding Petitioner's conduct around the decedent was based on hearsay.

As for Jerome Frederick, even if he could have been located and presented as a witness at trial, electing not to call him as a witness was unquestionably sound trial strategy. While he may have offered evidence of Petitioner's turbulent childhood, he would also have been the source of evidence of Petitioner's violent, criminal past.

When asked if he had ever "blown it before" on any of his forty-five (45) plus cases, Mr. Rowan said he had and that "perfection is something I strive at but rarely achieve." When asked if the mitigation stage in a capital case is as important as the guilt/innocence stage, Mr. Rowan replied: "I would say it is the be-all and end-all and it's all I care about in a capital murder case most of the time."

In *Harrington*, 562 U.S. at 109-110, 131 S.Ct. at 790, the Supreme Court said:

After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

“Strickland does not guarantee perfect representation, only a ‘reasonably competent attorney.’” *Id.*, at 109-110, 131 S.Ct. at 790 *quoting Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. “Representation is constitutionally ineffective only if it ‘so undermined the proper functioning of the adversarial process’ that the defendant was denied a fair trial.” *Id. quoting Strickland*, 466 U.S. at 686, 104 S.Ct. 2052. The record before us supports the finding that Mr. Rowan made reasonable, strategic decisions not to present Petitioner’s family members as witnesses in first and second stage proceedings.

Further, we find Petitioner was not prejudiced by Mr. Rowan’s omission of this evidence. Contrary to Petitioner’s assertion, the jury was not presented a picture of Petitioner growing up in a “happy, idyllic, Christian home”. Evidence showed Petitioner did not have a good relationship with his father, left home at an early age and entered the criminal justice system as a juvenile. 2017 OK CR 12, ¶

209, 400 P.3d at 834. Many of the incidents of physical abuse and discord in the household and misdeeds of Petitioner's father occurred after Petitioner left home. Therefore, even if further evidence of Petitioner's troubled childhood was introduced, it is not clear it would have been sufficient to mitigate Petitioner's adult criminal conduct. As trial counsel did not render ineffective assistance, appellate counsel was not ineffective for failing to raise this claim on appeal.

Further, Petitioner acknowledges that appellate counsel raised a claim of ineffective assistance of trial counsel for failing to call sociologist Dr. Art Williams to the stand after telling the jury during second stage opening statement that he would present testimony from Dr. Williams regarding Petitioner's life. However, appellate counsel was ineffective, according to Petitioner, for failing to take the claim a step further by presenting Dr. Williams' report on Petitioner to this Court demonstrating resulting prejudice. On direct appeal, we thoroughly reviewed trial counsel's alleged ineffectiveness and found his decision not to call Dr. Williams to testify was reasonable trial strategy. 2017 OK CR 12, ¶¶ 192-195, 400 P.3d at 831. Appellate counsel will not be found ineffective as the claim was sufficiently raised in the direct appeal.

Petitioner next argues appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to present testimony from mental health experts that he suffered from mental deficits and/or traumatic brain injury. Post-conviction counsel obtained the services of forensic psychologist Dr. Curtis Grundy to conduct a comprehensive psychological evaluation of Petitioner, and after obtaining Petitioner's consent, spent over five (5) hours with Petitioner. In a report attached to the post-conviction application, Dr. Grundy diagnosed Petitioner with "personality disorders involving paranoid and antisocial features" and "observed clinical indicators of possible traumatic brain injury." Further, Dr. Grundy stated that "consultation with a mental health professional by defense counsel during trial preparations would have led to advice and instructions about working with an acutely paranoid defendant." Petitioner argues that had his jury been provided with a more complete and accurate picture of his psychological deficits, there is a reasonable probability it would have determined the mitigators outweighed the aggravators in his case.

Dr. Grundy testified at the Evidentiary Hearing that he interviewed Petitioner at the prison in October 2016, approximately

23 months after Petitioner had been sentenced to death. Dr. Grundy set forth the tests he administered and described Petitioner as cooperative. He also detailed the reports, interviews and transcripts he had reviewed in preparing his report. He testified that based upon his evaluation of Petitioner, he could not rule out the possibility that Petitioner suffered a brain injury as a result of the car accident occurring when he was fourteen (14) years old. Dr. Grundy testified that after looking at all the information on Petitioner, he recommended that he be evaluated by a neuropsychologist or neurologist.

Dr. Grundy further testified that his investigation showed that Petitioner had been a difficult client for at least three of his attorneys and that it was reported that Petitioner would not cooperate with counsel. Dr. Grundy said Petitioner had no documented mental history and that his diagnosis of an anti-social personality disorder was not a mental illness.

Psychologist Dr. Antoinette McGarrahan, who specializes in forensic psychology and neuropsychology, testified that she interviewed Petitioner in August 2017, thirty-three (33) months after trial. During the eight (8) hour evaluation, she performed twenty-one

(21) tests on Petitioner to determine whether he suffered from organic brain damage. After reviewing for the court the sources considered for her report, she concluded that Petitioner had “significant indicators of brain damage”.

Dr. McGarrahan noted that Petitioner had cooperated with Dr. Robertson in a competency evaluation in 2009 but he had refused to cooperate with Dr. Williams in 2014. In her opinion, Petitioner associated Dr. Williams with counsel’s attempt to get him to plead guilty, which he did not want to do. She admitted she did not evaluate Petitioner at the time of trial. She stated that a person could have brain damage and anti-social personality disorder, and she did not disagree with the anti-social personality disorder diagnosis. She did not diagnose Petitioner with a traditional mental illness.

Ms. Hammarsten testified that during her representation of Petitioner, she worked very hard to gain his trust and his cooperation to meet with a mental health professional. She said she brought in Dr. Williams to initially evaluate Petitioner. She said Petitioner met with Dr. Williams on one occasion but refused to participate in the evaluation, and even refused to come out of his cell during subsequent attempts to have him evaluated. She testified that she

went to great efforts to persuade Petitioner to assist in his defense and in his mitigation case, but he refused.

Mr. Rowan testified that he did not consult or retain any mental health experts for either first or second stage and that he had no strategic reason for that decision. Yet he admitted to speaking with Dr. Williams and ultimately deciding not to call him to the stand. Mr. Rowan said he did not see any signs of mental illness or markers of brain injury in Petitioner. Mr. Rowan testified that he tried to get Petitioner to talk with mental health experts, but Petitioner refused. Mr. Rowan stated that one of his problems in developing a mitigation case was that Petitioner was not cooperative. He said Petitioner insisted he was innocent and would not cooperate in obtaining or presenting any evidence that he fatally struck his mother, yet did not understand or appreciate what he was doing. Mr. Rowan said he did not retain any mental health experts because it would have been against his client's wishes.

Mr. Rowan concluded his testimony by stating that he had no memory of Petitioner absolutely saying do not call any experts. He said his judgment was clouded by what Ms. Hammarsten told him about Petitioner not cooperating and he made the improper

assumption that Petitioner would not cooperate with any experts.

In determining whether Mr. Rowan exercised reasonable professional judgment, our focus is not on whether he should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Petitioner's mental health was reasonable. Under *Strickland*, we must conduct an objective review of counsel's performance, measured for "reasonableness under prevailing professional norms," 466 U.S. at 688, 104 S.Ct. at 2065. We view the challenged conduct from counsel's perspective at the time, making every effort to eliminate the distorting effects of hindsight. *Id.* 466 U.S. at 689, 104 S.Ct. at 2065.

As the trial court stated in its order, it is apparent Mr. Rowan wants to convince us that he took no action to prepare mental health evidence for trial. However, the reliability of this testimony is questionable in light of his experience as a capital litigator and his testimony regarding the crucial importance of the mitigation stage of a capital trial. His testimony showed he did speak to Dr. Williams and did try to get Petitioner evaluated by mental health experts. However, Petitioner would not cooperate. Testimony shows Petitioner

also did not cooperate with Ms. Hammarsten's efforts to have him evaluated. It would be questionable to put any sort of mental health evidence before the jury where the Petitioner had not been personally interviewed and evaluated. The record before us shows that Petitioner only cooperated with the mental health experts after he had been convicted and given the death sentence. We agree with the trial court's findings that the mental health information provided by the defense at the Evidentiary Hearing was not available to trial counsel due to Petitioner's refusal to cooperate and participate in any testing or evaluation. "[I]t is the competent client's case, not the lawyers. While, counsel has the responsibility to advise, inform, and consult with the client, the defendant has the right be involved in the decision process that will affect his or her life." *Lott v. State*, 2004 OK CR 27, ¶ 164, 98 P.3d 318, 357 citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Here, no question was raised to Petitioner's competency to stand trial. There is no indication he disagreed with counsel's decision not to present additional mitigating evidence. In fact it was Petitioner who prevented the further presentation of just such evidence. Contrary to Mr. Rowan's protestations, the record shows

his decision not to present any mental health evidence was a strategic choice made after reasonable investigation and within the exercise of reasonable professional judgment.

Further, even if trial counsel had the information that Dr. Grundy and Dr. McGarrahan testified to at the Evidentiary Hearing, it is not clear that Petitioner was prejudiced by its absence at trial. Dr. Grundy's diagnosis of an anti-social personality disorder would not have been favorable to the defense. "Evidence of antisocial personality disorder tends to present an aggravating, rather than mitigating, circumstance in the sentencing context." *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017).

Further, despite Dr. McGarrahan's testimony that Petitioner suffered from brain damage, she also concluded that such would not impair his day-to-day activities, and that she could not draw any connection between any brain damage and his criminal conduct. The introduction of evidence of organic brain damage of the kind testified to by Dr. McGarrahan would have given the State ample ground to underscore and highlight this antisocial personality evidence before the jury. Presentation of Dr. McGarrahan's testimony could "have opened floodgates to evidence very harmful to

[Petitioner]”. *Lott*, 2004 OK CR 27, ¶ 161, 98 P.3d at 356. Any mitigating value derived from the introduction of the mental health experts identified here likely would have been significantly diminished by the prosecution’s expected response.

Information from the mental health experts in this case could reasonably be viewed as mitigating to one person and aggravating to another. Given the shortcomings of the testimony by Drs. Grundy and McGarrahan, particularly that neither evaluated Petitioner at or near the time of trial, we conclude that there is no reasonable probability that the omitted mental health evidence would have altered the outcome of the sentencing stage of trial. In reaching this conclusion, we have considered both the totality of the evidence that was before the sentencing jury and the evidence that the prosecution likely would have presented in response to the omitted evidence.

At first blush, Mr. Rowan’s presentation of a single second stage witness, presented only through the reading of the transcript from a prior proceeding, and the omission of any mental health experts, seems to be an obvious case for a finding of ineffectiveness. When combined with trial counsel’s admissions of failure to present evidence, it would seem that relief is certainly warranted. However,

the decision whether to call a witness generally rests within the sound discretion of trial counsel.” *DeLozier v. Sirmons*, 531 F.3d 1306, 1324 (10th Cir. 2008). Additional evidence gathered through the remanded Evidentiary Hearing, shows Mr. Rowan had strategic reasons rooted in the exercise of his professional judgment supporting his decisions.⁵ That his strategy ultimately proved unsuccessful is not grounds for branding him ineffective. *Turrentine v. State*, 1998 OK CR 33, ¶ 41, 965 P.2d 955, 971. “[C]ounsel does not have an obligation to introduce any and all evidence that might conceivably be considered mitigating in the hope that it might outweigh the aggravating evidence and save the defendant’s life. Counsel’s obligation is to use reasonable professional judgment in making decisions concerning the defendant’s case.” *Lott*, 2004 OK CR 27, ¶ 162, 98 P.3d at 356. “The issue for counsel is whether to present evidence to the jury – that is whether putting on the evidence

⁵ Mr. Rowan’s performance has also been reviewed *Littlejohn v. Trammell*, 2014 WL 3743931 (W.D.Okla.July 30, 2104) (unpublished). After being remanded for an evidentiary hearing, the United States District Court for the Western District stated: “Mr. Rowan is a committed professional who undoubtedly and wholeheartedly believes that if his client receives the death penalty, it is because he did not do enough. While the Court does not doubt Mr. Rowan’s sincerity, the Court finds that his testimony was tainted by the high standards he sets for himself and the regret he feels if he is unable to spare his client from a death sentence. This is not uncommon for the dedicated defender.”

is more likely to help or hurt the defendant.” *DeLozier*, 531 F.3d at 1332. Representation will not be deemed inadequate because in hindsight, trial strategy could have been different.” *Stover v. State*, 1984 OK CR 14, ¶ 10, 674 P.2d 566, 568. While post-conviction counsel may wish trial and appellate counsel had done things differently, “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Bland v. State*, 2000 OK CR 11, ¶ 122, 4 P.3d 702, 732 *quoting Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

We find Petitioner has failed to overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment. Further, based on the information known to appellate counsel, it would have been quite reasonable for her to decide that she could not have persuaded this Court that Mr. Rowan’s failure to present additional mitigating evidence had prejudiced Petitioner. Appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 753–54, 103 S.Ct. 3308, 3313–14, 77 L.Ed.2d 987 (1983). The decision not to pursue on direct appeal this ineffectiveness claim does not raise a substantial likelihood that the result of the direct appeal would have

been different. Therefore, we find that appellate counsel was not ineffective in deciding not to raise the ineffectiveness issues discussed herein on direct appeal.

Petitioner's final claim of ineffective assistance of appellate counsel concerns his failure to raise a claim of ineffective assistance of trial counsel for failing to provide legal support in his argument for the lesser included offense of second degree murder. Petitioner argues that in Proposition VIII of his appellate brief, counsel alleged the trial court erred in denying trial counsel's request for lesser included offense instructions to First Degree Malice Aforethought Murder. Petitioner now claims appellate counsel did not include a related claim of ineffective assistance of counsel for failing to request the above referenced instructions. Petitioner asserts appellate counsel failed to argue that the trial court would have likely provided the requested instruction if trial counsel had corrected the "State's obvious misrepresentation of this Court's case law during its argument on the subject."

In our decision on direct appeal, we found Petitioner was not entitled to instructions on any lesser included offenses because his defense was that of innocence. 2017 OK CR 12, ¶ 73, 400 P.3d at

811. Any argument by counsel regarding a lesser included offense would not have changed this result. Therefore, we find appellate counsel quite reasonably omitted a claim of ineffective assistance of trial counsel for failing to cite case law to the court to support his claim for a lesser included instruction.

Finally, in his second proposition of error, Petitioner claims he should be afforded post-conviction relief due to the cumulative impact of errors identified in this application and in his direct appeal brief. A cumulative error argument was raised on direct appeal in Proposition XXI and denied. 2017 OK CR 12, ¶ 202, 400 P.3d at 832-33. Therefore further consideration is barred by *res judicata*. As for his argument of cumulative error on post-conviction review, we have found none of his claims, when considered individually warrant relief. When we find no error, there can be no cumulative error. *Neloms v. State*, 2012 OK CR 7, ¶ 40, 274 P.3d 161, 171. This proposition is denied.

DECISION

After carefully reviewing Petitioner's Application for Post-Conviction relief and records from the remanded Evidentiary Hearing, we conclude (1) there exists no controverted, previously unresolved

factual issues material to the legality of Petitioner's confinement; (2) Petitioner could have previously raised collaterally asserted grounds for review; (3) grounds for review which are properly presented have no merit; and (4) the current post-conviction statutes warrant no relief. 22 O.S.2011, § 1089(D)(4)(a)(1), (2) & (3). Accordingly, Petitioner's Application for Post-Conviction Relief is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY LUMPKIN, P.J.

LEWIS, V.P.J.: Concur

HUDSON, J.: Concur

KUEHN, J.: Concur

ROWLAND, J.: Recuse

jurors that they had been instructed on the law applicable in the case. As the instructions in the present case accurately stated the applicable law, we find that Appellant has not shown that the trial court abused its discretion. *Harney v. State*, 2011 OK CR 10, ¶ 10, 256 P.3d 1002, 1005. Proposition Two is denied.

¶19 As to Proposition Three, we find that, under all the facts and circumstances of the case, Appellant's sentence is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291. This proposition is denied.

DECISION

¶20 The Judgment and Sentence of the District Court is hereby **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

LEWIS, V.P.J.: Concur

JOHNSON, J.: Concur

SMITH, J.: Concur in Part/Dissent in Part

HUDSON, J.: Concur

SMITH, JUDGE, CONCURRING IN PART, DISSENTING IN PART:

¶1 I disagree with the majority's resolution of Proposition II. I continue to believe that jurors should receive instruction on sex offender registration in appropriate cases. *Reed v. State*, 2016 OK CR 10, ¶ 1, 373 P.3d 118, 124 (Smith, P.J., specially concurring); *Bingley v. State*, F-2013-203 (Okl.Cr. Dec. 19, 2014) (not for publication) (Smith, V.P.J., concurring in part, dissenting in part).

¶2 I also disagree with the majority's plain error analysis in Proposition I. I would use the plain error review this Court discussed in *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923, and has used in the majority of cases since then. *Stewart v. State*, 2016 OK

CR 9, ¶¶ 1-2, 372 P.3d 508, 515-16 (Johnson, J., and Smith, P.J., concurring in result).



2017 OK CR 12

Darrell Wayne FREDERICK, Appellant,

v.

The STATE of Oklahoma, Appellee.

Case No. D-2015-15

Court of Criminal Appeals of Oklahoma.

Decided: 05/25/2017

As Amended June 23, 2017

Background: Defendant was convicted in the District Court of Oklahoma County, Timothy R. Henderson, J., of first degree murder, assault and battery with a dangerous weapon, after former conviction of two or more felonies, and domestic abuse assault and battery and was sentenced to death. Defendant appealed.

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

- (1) the trial court's denial of defendant's challenge of seven potential jurors for cause was not an abuse of discretion;
- (2) the prosecutor provided valid, race-neutral reasons for removing prospective juror with a peremptory challenge;
- (3) interaction of deaf and mute victim with police officer and paramedic, through the use of sign language, was not testimonial hearsay;
- (4) as a matter of first impression, defendant's due process rights were not violated when the trial court failed to provide lesser include offense jury instructions;
- (5) evidence was sufficient to support conviction for first degree murder;

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- (6) details of defendant's prior burglary conviction were admissible to support the continuing threat aggravator; and
- (7) sentence of death imposed following first degree murder conviction was not the result of passion or prejudice.

Affirmed.

1. Criminal Law ⚖️1035(5)

Defendant waived his appellate argument alleging his state and federal constitutional rights to due process were violated by the trial court's denial of his request to remove seven specific potential jurors for cause, where defendant did not request additional peremptory challenges, and he did not identify which allegedly unfit jurors he would have excused had he been granted more challenges. U.S. Const. Amend. 14.

2. Criminal Law ⚖️1035(5)

In order to properly preserve for appellate review an objection to a denial of a challenge of a juror for cause, a defendant must demonstrate that he was forced over objection to keep an unacceptable juror; which requires a defendant to excuse the challenged juror with a peremptory challenge and make a record of which remaining jurors the defendant would have excused if he had not used that peremptory challenge to cure the trial court's alleged erroneous denial of the for cause challenge.

3. Criminal Law ⚖️1030(1)

The Court of Criminal Appeals will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.

4. Jury ⚖️85

The selection of jurors involves many subtle observations, and trial courts have broad discretion when considering a request to excuse a juror for cause.

5. Criminal Law ⚖️1035(6)

Jury ⚖️108

The trial court's denial of defendant's challenge of seven potential jurors for cause was not an abuse of discretion, and therefore

did not constitute plain error, during murder prosecution; none of the jurors expressed preconceived notions of the appropriate punishment or views which would prevent or substantially impair the performance of his or her duties as a juror.

6. Criminal Law ⚖️1035(5)

Defendant failed to establish that he was prejudiced by four jurors, who defendant did not challenge for cause, serving on the jury for murder trial; each of the four jurors affirmed their ability to consider all three punishment options, to listen to all of the mitigating and aggravating evidence, and abide by their duty as a juror to impose the most appropriate punishment based on the evidence, none of the jurors indicated they were irrevocably committed to a particular punishment before trial began, and none of the jurors expressed views on capital punishment which would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instruction and his or her oath.

7. Jury ⚖️135

Any claim of jury partiality must focus on the jurors who ultimately sat; this is because the loss of peremptory challenges is not of constitutional dimension.

8. Jury ⚖️131(13)

The trial court's order restricting defense counsel from asking potential jurors questions dealing with the specific facts of the case, which involved a defendant who allegedly killed his mother, was not an abuse of discretion; the questions would not have tested a potential juror's impartiality but would instead test the willingness of the juror to accept the theory of the defense.

9. Jury ⚖️131(1, 3)

The purpose of voir dire examination is to ascertain whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges.

10. Criminal Law ⚖️1152.2(2)

Jury ⚖️131(2)

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.

11. Jury ⚖️131(4)

To facilitate jury selection, the trial court may restrict questions that are repetitive, irrelevant or in regard to legal issues upon which the trial court will instruct the jury.

12. Jury ⚖️131(2)

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

13. Constitutional Law ⚖️3309

Jury ⚖️33(5.15)

The prosecutor provided valid, race-neutral reasons for removing prospective juror with a peremptory challenge, in murder prosecution, and thus there was no Equal Protection violation; juror expressed a desire not to sit on the jury, he had previously been prosecuted and convicted by the district attorney's office that was prosecuting defendant, and he expressed reservations about his ability to impose the death penalty. U.S. Const. Amend. 14.

14. Constitutional Law ⚖️3309

The Equal Protection Clause forbids the prosecution from challenging potential jurors solely on account of their race. U.S. Const. Amend. 14.

15. Constitutional Law ⚖️1040, 3309

In order to raise an equal protection challenge to the State's use of peremptory challenges, the defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race; then, the burden shifts to the prosecutor to articulate a race-neutral explanation related to the case for striking the juror in question. U.S. Const. Amend. 14.

16. Jury ⚖️33(5.15)

A race-neutral reason given by the prosecutor for excusing a juror need not rise to the level of justifying excusal for cause, but it must be a clear and reasonably specific explanation of his or her legitimate reasons for exercising the challenges.

17. Criminal Law ⚖️662.1

In both state and federal criminal prosecutions, an accused has a right to be confronted with the witnesses against him. U.S. Const. Amend. 6; Okla. Const. art. 2, § 20.

18. Criminal Law ⚖️662.8

Under *Crawford* and its progeny, the test for determining whether the admission of an out-of-court statement offered for the truth of the matter asserted violates the Confrontation Clause focuses on whether the statement was testimonial or non-testimonial. U.S. Const. Amend. 6.

19. Criminal Law ⚖️662.8

Statements are nontestimonial, for Confrontation Clause purposes, when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. U.S. Const. Amend. 6.

20. Criminal Law ⚖️662.8

Statements are testimonial, for Confrontation Clause purposes, when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. U.S. Const. Amend. 6.

21. Criminal Law ⚖️662.8

To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency, which would render the resulting statements nontestimonial, for Confrontation Clause purposes, the Court of Criminal Appeals objectively evaluates the circumstances in which the encounter occurs and the statements and actions of the parties. U.S. Const. Amend. 6.

22. Criminal Law ⚖️662.8

Interaction of deaf and mute victim with police officer and paramedic, through the use of sign language that was translated by the victim's granddaughter at the scene and indicated the victim's physical condition and identified defendant as her assailant, was not testimonial hearsay, and therefore not subject to the Confrontation Clause; the primary

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purpose of the police officer's questions, which granddaughter signed to the victim, was to provide medical assistance to the victim and police assistance to meet an ongoing emergency. U.S. Const. Amend. 6.

23. Criminal Law ⇨662.8

A conversation which begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements, for the purpose of Confrontation Clause analysis. U.S. Const. Amend. 6.

24. Criminal Law ⇨662.8

When an officer arrives on the scene and does not know where the perpetrator is, whether he is armed, whether he might have other targets, and whether the violence might continue at the scene or elsewhere, interrogation that has the primary purpose of establishing those facts to assess the situation is designed to meet the ongoing emergency and is nontestimonial, for Confrontation Clause purposes. U.S. Const. Amend. 6.

25. Homicide ⇨1079

Deaf and mute victim's use of sign language to identify defendant as her assailant was not admissible as a dying declaration, during prosecution for murder; while the 85 year old victim was found lying on the floor with severe injuries to her face and head, and was unable to move on her own accord, she was able to interact with emergency personnel and insisted on being taken to a hospital different from that suggested by paramedics. 12 Okla. Stat. Ann. § 2804(B)(2).

26. Criminal Law ⇨366(4, 6)

Deaf and mute victim's identification of defendant as her assailant through the use of sign language was admissible under the excited utterance exception to the hearsay rule, during prosecution for murder; the victim had been assaulted within moments of being found by police, the victim had received a blow that made it impossible for her to move on her own or see clearly, and the victim's responses were her first communications since she was assaulted. 12 Okla. Stat. Ann. § 2803(2).

27. Criminal Law ⇨363

An excited utterance must meet three foundational requirements: (1) a startling event or condition; (2) a statement relating to that startling event or condition; (3) made while the declarant is under the stress of excitement caused by the startling event or condition. 12 Okla. Stat. Ann. § 2803(2).

28. Criminal Law ⇨363

The Court of Criminal Appeals examines both the timing of the statement and its spontaneity on a case-by-case basis to determine whether the statement qualifies as an excited utterance. 12 Okla. Stat. Ann. § 2803(2).

29. Criminal Law ⇨363

Whether a statement qualifies as an excited utterance depends not on a fixed time but on the facts and circumstances. 12 Okla. Stat. Ann. § 2803(2).

30. Criminal Law ⇨363

An excited utterance need not be substantially contemporaneous with the startling event or condition so long as the declarant is under the stress of excitement at the time the statement is made. 12 Okla. Stat. Ann. § 2803(2).

31. Criminal Law ⇨367

Deaf and mute victim's signed identification of defendant as her assailant and description of her physical condition were admissible under the hearsay exception for statements made for the purpose of receiving medical attention, during prosecution for murder; the statements were made to emergency medical personnel soon after her assault in response to inquiries about her injuries. 12 Okla. Stat. Ann. § 2803(4).

32. Criminal Law ⇨553

Contradictions in the testimony and inconsistency in witness testimony does not render the evidence inherently unreliable, but goes to the weight of the evidence.

33. Criminal Law ⇨741(1), 742(1)

The issue of credibility and reliability of evidence is an issue for the jury.

34. Criminal Law ⇨741(1), 742(1), 747

It is the jury's job to weigh the evidence, resolve conflicting evidence, and reconcile conflicting testimony.

35. Criminal Law ⇨1036.6

The trial court's admission of lay and expert opinion testimony from police sergeant, paramedic, neurosurgeon, and the victim's brother did not constitute plain error, even though defendant argued that he did not have notice that the witnesses would identify the source of the victim's head injuries; all of the challenged witnesses were included in the State's witness list, in the accompanying summary of expected testimony it stated that sergeant, paramedic, and the victim's brother would testify to their observations of the victim at the crime scene, and that neurosurgeon would testify consistent with his reports, and defendant was not surprised by the opinion testimony.

36. Criminal Law ⇨455

Testimony from police sergeant and the victim's brother as to the victim's head injuries was admissible as lay witness testimony, during murder prosecution; the testimony was based on their observation of the victim's head wound and the physical surroundings of the victim's bedroom. 12 Okla. Stat. Ann. § 2701.

37. Criminal Law ⇨1147

An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented.

38. Criminal Law ⇨455

Testimony from paramedic that he did not believe the victim's head injury was consistent with a fall was admissible as lay witness testimony, during prosecution for murder; paramedic observed the victim at the scene and prepared her for transport in the ambulance, and his testimony was based on his own personal observations. 12 Okla. Stat. Ann. § 2701.

39. Criminal Law ⇨795(2.90)

Defendant was not entitled to jury instructions on the lesser included offenses of heat of passion manslaughter and second degree depraved mind murder, during prosecution for murder, where defendant asserted from the start of trial that he was not the source of the victim's injuries, and that the victim was injured by falling.

40. Criminal Law ⇨769

The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court.

41. Criminal Law ⇨822(1), 1152.21(1)

Absent an abuse of discretion, the Court of Criminal Appeals will not interfere with the trial court's judgment as to which instructions should be provided to the jury if the jury instructions as a whole, accurately state the applicable law.

42. Criminal Law ⇨795(2.90)

When a defendant defends against a criminal charge by proclaiming innocence, he is not entitled to instructions on any lesser included offense.

43. Criminal Law ⇨772(6), 795(2.90)

Where the defendant makes admissions by counsel during trial that render every defense unavailable save one, he is deemed to have elected that defense; and may, by his election, foreclose the submission of instructions on other theories of defense or lesser-included offenses inconsistent with his defense.

44. Constitutional Law ⇨4637**Criminal Law** ⇨795(2.90)

Defendant's due process rights were not violated when the trial court failed to provide lesser included offense jury instructions, based on the holding in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, during murder prosecution; defendant elected to defend himself on a claim of innocence, and thus there was no evidence of a lesser offense to consider. U.S. Const. Amend. 14.

45. Criminal Law ⇨814(13)

Defendant was not entitled to a jury instruction on flight, during prosecution for

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murder, where defendant offered no evidence explaining his departure from the scene of the crime.

46. Criminal Law ⇨778(11)

Instructions on flight should be given only in cases where the evidence is controverted by the defendant and as an exception rather than as a rule.

47. Criminal Law ⇨778(11)

Before an instruction on flight is given, the defendant must first present evidence explaining his departure.

48. Criminal Law ⇨1037.1(2)

The prosecutor's closing argument reference to defendant leaving the victim's home after she had been beaten and his absence once police arrived did not constitute plain error, during prosecution for murder; the argument was based on the evidence and reasonable inferences therefrom.

49. Homicide ⇨1184, 1184.5

Evidence was sufficient to support conviction for first degree murder; defendant and the victim, his 85-year-old mother, quarreled and had a physical altercation shortly before her murder, the victim's granddaughter intervened and defendant verbally attacked granddaughter and chased her out of the house with a rock or brick in his hand, defendant returned to the house, changed his clothes, and left, granddaughter had called police from a neighbor's house and when police arrived they found the victim in the house with serious injuries to her head. 21 Okla. Stat. Ann. §§ 701.7(A), 702.

50. Criminal Law ⇨1144.13(3), 1159.2(7)

The Court of Criminal Appeals reviews sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

51. Criminal Law ⇨1144.13(5), 1159.4(1)

On a challenge to the sufficiency of the evidence, the Court of Criminal Appeals will accept all reasonable inferences and credibility choices that tend to support the verdict.

52. Homicide ⇨536

Premeditation sufficient to constitute murder may be formed in an instant or it may be formed instantaneously as the killing is being committed. 21 Okla. Stat. Ann. § 701.7(A).

53. Homicide ⇨1136

Malice aforethought may be proved by circumstantial evidence. 21 Okla. Stat. Ann. § 701.7(A).

54. Homicide ⇨1135

The manner of killing and pattern of wounds can support a finding the defendant intended to kill his victim.

55. Sentencing and Punishment ⇨1762, 1789(3)

The trial court committed plain error when it failed to hold an in camera hearing, pursuant to *Brewer v. State*, 650 P.2d 54, to determine whether defendant's prior burglary conviction actually involved the threat or use of violence before the prior conviction could be used to support the capital aggravating circumstance that the defendant was previously convicted of a felony involving the use or threat of violence to the person. 21 Okla. Stat. Ann. § 701.12(1).

56. Sentencing and Punishment ⇨1762

When the aggravator that the defendant was previously convicted of a felony involving the use or threat of violence to the person is alleged, an in-camera hearing should be held in order to determine whether the prior crime actually involved the threat or use of violence. 21 Okla. Stat. Ann. § 701.12(1).

57. Sentencing and Punishment ⇨1789(9)

The trial court's error in failing to hold an in camera hearing, pursuant to *Brewer v. State*, 650 P.2d 54, to determine whether defendant's prior burglary conviction actually involved the threat or use of violence before the prior conviction could be used to support the aggravating circumstance that the defendant was previously convicted of a felony involving the use or threat of violence to the person did not affect defendant's substantial rights, during murder prosecution, where defendant's prior burglary conviction was ad-

missible to prove the prior violent felony aggravator.

58. Sentencing and Punishment ⚖️1762

Details of defendant's prior burglary conviction were admissible to support the continuing threat capital aggravator, during murder prosecution; a first degree burglary always carried with it the likelihood for a violent encounter with an occupant, and defendant forced entry into an occupied home during the early morning hours.

59. Sentencing and Punishment ⚖️1720

To support the continuing threat aggravator, what is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

60. Sentencing and Punishment ⚖️1789(3)

The admission of defendant's juvenile offense of first degree robbery when he was 16 years old to support the aggravating circumstances of prior violent felony and continuing threat did not constitute plain error, during capital murder prosecution. U.S. Const. Amend. 8.

61. Sentencing and Punishment ⚖️1705

Evidence regarding defendant's prior first degree burglary conviction was insufficient to support the prior violent felony aggravating circumstance, during murder prosecution; defendant's prior first degree burglary conviction did not contain evidence of the use of violence or the threat of violence to a person.

62. Sentencing and Punishment ⚖️1789(6, 8)

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

63. Sentencing and Punishment ⚖️1705

Evidence regarding murder defendant's prior robbery with firearms conviction was sufficient to support the prior violent felony

capital aggravator; defendant walked into a gas station carrying a white paper sack and a shotgun, he pointed the shotgun at the store owner and ordered her to fill the sack with money, and the owner complied and defendant ran out of the store.

64. Sentencing and Punishment ⚖️1684

Evidence was sufficient to support the capital aggravating circumstance that the victim's murder was especially heinous, atrocious, or cruel; defendant and the victim, defendant's 85-year old deaf and mute mother, argued over food, the victim's granddaughter took the victim to her room for her own safety, defendant attacked the victim in her bedroom and struck in the head with either a rock, a brick, or his hand, due to her speech disabilities the victim was unable to cry for help, the victim was conscious and aware during the attack, and the victim's injuries were so severe that the victim was almost unrecognizable to her second son.

65. Sentencing and Punishment ⚖️1789(6, 8)

The Court of Criminal Appeals reviews the record to determine whether the evidence, considered in the light most favorable to the State, was sufficient for a rational trier of fact to find the aggravating circumstance that a murder was especially heinous, atrocious, or cruel beyond a reasonable doubt.

66. Sentencing and Punishment ⚖️1684

A particular murder is especially heinous, atrocious or cruel where the evidence shows: (1) that the murder was preceded by either torture of the victim or serious physical abuse; and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious or cruel.

67. Sentencing and Punishment ⚖️1762

Defendant's conduct in hair salon was relevant and admissible to the jury's determination of the future dangerousness aggravator, during capital murder prosecution involving the murder of a victim in her home, even though defendant had been acquitted of the charges filed in relation to his actions in hair salon; sentencing focused on defendant's record and character, and defendant's con-

duct was relevant as to his record and character.

68. Sentencing and Punishment ⚖️1762

A defendant's conviction or acquittal of a criminal charge neither alters the basic evidentiary facts of the underlying conduct, nor determines whether those facts may be offered to show his future dangerousness in a capital sentencing trial.

69. Sentencing and Punishment ⚖️1762

Evidence of a capital defendant's violent acts is relevant and admissible to show the existence of a probability the defendant poses a continuing threat, whether those acts resulted in a conviction of the actual offense, some related or lesser included offense, or no conviction at all.

70. Sentencing and Punishment ⚖️1702, 1704

The focus of capital sentencing centers on the individual defendant's record and character.

71. Sentencing and Punishment ⚖️1789(3)

The use of defendant's prior convictions for robbery with firearms and first degree burglary to support both the aggravating circumstances of prior violent felony and continuing threat did not constitute plain error; defendant's prior conviction for robbery with firearms was indicative of defendant's violent criminal past and was sufficient to support the aggravating circumstance of prior violent felony, and the underlying facts of the offense supported the continuing threat aggravator by showing defendant's propensity for violence and future dangerousness.

72. Sentencing and Punishment ⚖️1789(3)

The trial court's admission of hearsay testimony from hair salon customer during the sentencing stage of murder prosecution as to statements made by pregnant salon customer when defendant allegedly pointed a gun at her did not constitute plain error; the statements were not offered to prove defendant tried to shoot pregnant salon customer, rather, they were offered to show defendant's violent conduct during the hair salon incident, which supported the State's theory

that defendant posed a continuing threat to society.

73. Criminal Law ⚖️419(2)

The hearsay rule does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. 12 Okla. Stat. Ann. § 2801(3).

74. Searches and Seizures ⚖️114

Affidavit in support of search warrant application provided magistrate with probable cause to believe buccal swab from defendant would be probative in prosecution of defendant for murder, and thus search warrant authorizing police officer to obtain buccal swab was valid. U.S. Const. Amend. 4.

75. Criminal Law ⚖️1031(1)

The prosecution's failure to notify defendant they were seeking a search warrant to obtain a buccal swab sample from defendant did not constitute plain error, in murder prosecution; the law did not require notice to be given before a search warrant was executed. U.S. Const. Amend. 4; 22 Okla. Stat. Ann. §§ 1221-1238.

76. Criminal Law ⚖️1134.16, 1171.1(2.1)

A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.

77. Criminal Law ⚖️1171.1(2.1)

In order for the remarks of the prosecuting attorney to constitute reversible error they must be flagrant and of such a nature as to be prejudicial to the defendant.

78. Criminal Law ⚖️1035(6)

The prosecutor's voir dire definition of the word "consider" as "deliberate and talk to 11 other jurors" did not constitute plain error, during murder prosecution; there was no indication the term caused any confusion among potential jurors or that it affected the way potential jurors answered questions regarding the three punishment options.

79. Criminal Law ⇨2095, 2117

The prosecutor's first stage closing argument, during which she misstated the testimony of physician by telling the jury that physician testified that the victim would not take a "header" but she would "wilt," when describing types of falls, and that if the victim had done a "header" he would expect broken bones in her arms did not mislead the jury or affect the outcome at murder trial; the prosecutor's argument contained reasonable inferences from physician's testimony, and while there were misstatements, they were minor.

80. Criminal Law ⇨2094, 2103

During closing argument counsel enjoys a right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it.

81. Criminal Law ⇨1171.1(2.1), 1184(4.1)

The Court of Criminal Appeals will reverse judgment or modify sentence only where grossly improper and unwarranted closing argument affects a defendant's rights.

82. Criminal Law ⇨2117

The prosecutor's closing argument statement that the victim told "anybody that asked her at the scene before she got to the hospital that her son had done this" was a reasonable inference from the evidence, during murder prosecution; the victim's granddaughter and paramedic testified that the victim identified defendant, her son, as her attacker.

83. Sentencing and Punishment ⇨1780(2)

The prosecutor's capital sentencing closing argument, which argued the evidence showed defendant struck the victim, his mother, in the head with an object resulting in injuries severe enough to cause her death less than three weeks later and that evidence was sufficient to support the alleged aggravator that the murder was heinous, atrocious or cruel did not improperly argue that the killing of one's own mother was an aggravating circumstance, as argued by defendant; the prosecutor's comments were reasonable conclusions based on the evidence.

84. Sentencing and Punishment ⇨1780(2)

In the sentencing stage of a capital trial, aggravating and mitigating circumstances are to be discussed; the prosecution has the right, to not only discuss the evidence from his standpoint and all the reasonable inferences arising therefrom, but also to argue the evidence in aggravation.

85. Sentencing and Punishment ⇨1789(3)

The prosecutor's statement during the sentencing phase of trial, when she told the jury that in determining whether the aggravating circumstances outweighed the finding of one or more of the mitigators to consider the grace and love exhibited by defendant's family when it allowed him to move back into the family home after his release from prison, did not constitute plain error, during murder prosecution; the prosecutor argued that the evidence offered by the defense in mitigation should not mitigate defendant's punishment, and she contrasted evidence of defendant's violent past with the generosity his family had shown him and then asked the jury to consider how defendant repaid that generosity.

86. Sentencing and Punishment ⇨1780(2)

The prosecutor erred when he told the jury during capital sentencing phase closing argument in murder prosecution that they were there to do justice for the victim, and not for defendant.

87. Criminal Law ⇨2146

It is improper for prosecutors to ask jurors to have sympathy for victims.

88. Criminal Law ⇨2146

It is clearly improper for a prosecutor to make arguments which tend to divert the jury from its duty to decide the case on the evidence; however, such comments standing alone usually do not warrant reversal.

89. Sentencing and Punishment ⇨1780(2)

While the prosecutor erred when he told the jury during sentencing phase closing argument in capital murder prosecution that they were there to do justice for the victim, and not for defendant, the error did not deprive defendant of a fair trial or affect the jury's assessment of punishment.

90. Sentencing and Punishment ⇨1780(2)

The prosecutor did not impermissibly denigrate the mitigating evidence when he argued that putting defendant in prison was a reward in light of the mitigation evidence, that the jury should not consider mitigation, that mitigation was an excuse and that they should not feel guilty in light of the mitigation offered, during the sentencing phase of murder prosecution; in context of the entire closing argument, the comments fell within the broad parameters of effective advocacy, and the prosecutor's argument merely attempted to minimize the effect of the evidence presented by the defense.

91. Sentencing and Punishment ⇨1780(2)

The prosecutor has the right to discuss evidence during the second stage of murder trial in arguing for an appropriate punishment.

92. Criminal Law ⇨1881

The *Strickland* ineffective assistance of counsel test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. U.S. Const. Amend. 6.

93. Criminal Law ⇨1881

Unless the appellant makes both showings required by the *Strickland* ineffective assistance of counsel test, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. U.S. Const. Amend. 6.

94. Criminal Law ⇨1871

The Court of Criminal Appeals begins its analysis of an ineffective assistance of counsel claim with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. U.S. Const. Amend. 6.

95. Criminal Law ⇨1871, 1884

An appellant must overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the chal-

lenged action could not be considered sound trial strategy. U.S. Const. Amend. 6.

96. Criminal Law ⇨1929, 1939

Trial counsel's failure to file a motion in limine to exclude the victim's alleged hearsay statements did not prejudice defendant, during prosecution for murder, and therefore did not constitute ineffective assistance of counsel; the victim's statements were nontestimonial hearsay, and thus their admission did not violate the Confrontation Clause, and the statements were admissible under the hearsay exceptions for excited utterances and statements made for medical treatment. U.S. Const. Amend. 6; 12 Okla. Stat. Ann. §§ 2803(2), 2803(4).

97. Criminal Law ⇨1888

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. U.S. Const. Amend. 6.

98. Criminal Law ⇨1883

To demonstrate prejudice, an appellant alleging ineffective assistance of counsel must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. U.S. Const. Amend. 6.

99. Criminal Law ⇨1891, 1922

Trial counsel's failure to investigate or present evidence on potential causes for the hand injuries defendant exhibited when he was arrested did not prejudice defendant, during murder prosecution, and therefore did not constitute ineffective assistance of counsel; defendant failed to present clear or convincing evidence of an injury to his finger or hand in the time frame around the victim's death. U.S. Const. Amend. 6.

100. Criminal Law ⇨1935

Trial counsel's failure to cross-examine the victim's son and granddaughter concerning alleged inconsistencies in the testimony provided by granddaughter and paramedic as to the victim's identification of defendant as her attacker did not constitute deficient performance, an element necessary to establish ineffective assistance of counsel during murder prosecution; there were no inconsisten-

cies between the testimony of the victim's granddaughter and paramedic. U.S. Const. Amend. 6.

101. Criminal Law ⇨1943

Trial counsel's decision to inform the jury during first stage opening statement that defendant was a multiple convicted felon who had been institutionalized was reasonable trial strategy, during murder prosecution, and therefore did not constitute ineffective assistance of counsel; there was no indication defendant disagreed with counsel's decisions on how to proceed with the case, and counsel took the first opportunity to humanize defendant before the jury. U.S. Const. Amend. 6.

102. Criminal Law ⇨1880

Counsel must act as an advocate and subject the State's case to adversarial testing. U.S. Const. Amend. 6.

103. Criminal Law ⇨1871, 1884

An appellant asserting a claim of ineffective assistance of counsel must overcome the strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance and equaled sound trial strategy. U.S. Const. Amend. 6.

104. Criminal Law ⇨1870

The Court of Criminal Appeals will consider whether, viewing counsel's challenged conduct on the facts of the case as seen at the time, it was professionally unreasonable. U.S. Const. Amend. 6.

105. Criminal Law ⇨1884

For the purpose of an ineffective assistance of counsel claim, the decision regarding the legal arguments to be made is a matter of trial strategy. U.S. Const. Amend. 6.

106. Criminal Law ⇨1884

For the purpose of an ineffective assistance of counsel claim, the Court of Criminal Appeals will not second guess trial strategy on appeal. U.S. Const. Amend. 6.

107. Criminal Law ⇨1882

Counsel has an obligation to use reasonable professional judgment in making decisions concerning the defendant's case. U.S. Const. Amend. 6.

108. Criminal Law ⇨1891

For the purpose of an ineffective assistance of counsel claim, it is the defendant's case and while counsel has the responsibility to advise, inform, and consult with the defendant, the defendant has the right to be involved in the decision process that will affect his or her life. U.S. Const. Amend. 6.

109. Criminal Law ⇨1943

Counsel's closing argument statements that finding defendant guilty of "assault and battery" of the victim's granddaughter would be "easy" was reasonable trial strategy, during murder prosecution, and therefore did not constitute ineffective assistance of counsel; counsel's emphasis was to prevent a conviction on the murder charge, and counsel argued that even if the evidence allowed for an easy finding of guilt as to assault and battery, it did not allow for a similar finding of guilt for first degree murder. U.S. Const. Amend. 6.

110. Criminal Law ⇨1924

Trial counsel's decision not to highlight further defendant's past conduct in hair salon, which was admitted to support the continuing threat aggravating circumstance, by choosing not to put on additional witnesses to testify to the conduct, even though defendant had been acquitted of all charges based on his conduct in hair salon, did not prejudice defendant, and therefore did not constitute ineffective assistance of counsel, during murder prosecution; there was no indication that introducing any other evidence concerning the acquitted charges would have made the jury less likely to find the existence of the continuing threat aggravator. U.S. Const. Amend. 6.

111. Criminal Law ⇨1882

The claim that appellate counsel would have treated acquitted conduct differently does not make trial counsel ineffective. U.S. Const. Amend. 6.

112. Criminal Law ⇨1884

Absent a showing of incompetence, the appellant is bound by the decisions of his counsel and mistakes in tactics and trial

strategy do not provide grounds for subsequent attack. U.S. Const. Amend. 6.

113. Criminal Law ⇌1961

Trial counsel's decision not to call sociologist to testify, after stating during capital sentencing opening statement that he would present the testimony of sociologist, was reasonable trial strategy, during murder prosecution, and therefore did not constitute ineffective assistance of counsel; sociologist would have testified as to defendant's background, sociologist would have testified as to information that had already been presented to the jury by other witnesses, and the decision not to call sociologist to testify appeared to have forced the prosecution in part to alter its course at trial. U.S. Const. Amend. 6.

114. Criminal Law ⇌1924

For the purpose of an ineffective assistance of counsel claim, counsel may, at times, have legitimate reasons for not calling certain witnesses to testify. U.S. Const. Amend. 6.

115. Criminal Law ⇌1186.1

While errors did occur during murder prosecution, the cumulative effect of the errors was not to egregious as to have denied defendant a fair trial.

116. Criminal Law ⇌1186.1

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

117. Criminal Law ⇌1186.1

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.

118. Sentencing and Punishment ⇌1684, 1705, 1720

Sentence of death imposed following first degree murder conviction was not the result of passion or prejudice; evidence was sufficient to support the prior violent felony aggravator, the heinous, atrocious or cruel aggravator, and the continuing threat aggra-

vator, defendant's criminal history showed a pattern of escalating violence, and murder victim, who was defendant's 85-year-old mother, was bludgeoned to death. 21 Okla. Stat. Ann. §§ 701.12, 701.13(C).

119. Sentencing and Punishment ⇌1720

To support the aggravator of continuing threat, the State must present evidence showing the defendant's behavior demonstrated a threat to society and a probability that threat would continue to exist in the future. 21 Okla. Stat. Ann. § 701.12(7).

120. Sentencing and Punishment ⇌1720

A finding that the defendant would commit criminal acts of violence that would constitute a continuing threat to society is appropriate when the evidence establishes the defendant participated in other unrelated criminal acts and the nature of the crime exhibited the calloused nature of the defendant. 21 Okla. Stat. Ann. § 701.12(7).

121. Sentencing and Punishment ⇌1720

The continuing threat aggravator is aimed at the defendant's future conduct. 21 Okla. Stat. Ann. § 701.12(7).

122. Sentencing and Punishment ⇌1720

To establish the continuing threat aggravator, the State must show a pattern of criminal conduct that will likely continue in the future. 21 Okla. Stat. Ann. § 701.12(7).

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY; THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

APPEARANCES AT TRIAL, JAMES T. ROWAN, TIM WILSON, ASSISTANT PUBLIC DEFENDERS, 320 ROBERT S. KERR, STE. 611, OKLAHOMA CITY, OK 73102, COUNSEL FOR APPELLANT

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OPINION

LUMPKIN, PRESIDING JUDGE:

¶1 Appellant Darrell Wayne Frederick was tried by jury and convicted of First Degree Malice Murder (Count I) (21 O.S. 2001, § 701.7(A)), Assault and Battery with A Dangerous Weapon, After Former Conviction of Two or more Felonies (Count II) (21 O.S. 2001, § 645), and Domestic Abuse Assault and Battery (Count III) (21 O.S. 2001, § 644 (C)), Case No. CF20111946, in the District Court of Oklahoma County. In Count I, the jury found the presence of three aggravating circumstances: 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the murder was especially heinous, atrocious and cruel; and 3) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and set punishment at death. In Counts II and III, the jury recommended imprisonment for twenty-five (25) years and one year, respectively. The trial judge sentenced Appellant in accordance with the jury's determination and ordered all sentences to run consecutively. Appellant now appeals his convictions and sentences.¹

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

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

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

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

¶5 While out of the house, Ms. Diggs phoned both her mother, who lived out of state, and her uncle, Tobias Frederick, to discuss her frustrations with Appellant. Both were the deceased's children and Tobias Frederick was an Oklahoma City Police Officer. Ms. Diggs told both her mother and her uncle that she was afraid Appellant would seriously hurt her or the deceased. When Ms. Diggs returned to the house, she heard Appellant answer the phone. Ms. Diggs was able to determine that it was her uncle Tobias that had called. He told Appellant that he had to leave the deceased's home and find

1. Appellant's Petition in Error was filed in this Court on July 6, 2015. His brief was filed February 16, 2016. The State's brief was filed on June 14, 2016. Appellant's reply brief was filed July 5,

2016. The case was submitted to the Court on June 28, 2016. Oral arguments were held on January 17, 2017.

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another place to live. Appellant replied angrily, “man, I ain’t got time for this” and hung up the phone. Ms. Diggs could hear Appellant yelling into the phone. Ms. Diggs headed for the deceased’s bedroom and told her to stay in the bedroom no matter what happened. Ms. Diggs then shut the bedroom door.

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

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

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

¶ 9 Appellant was located a day after the deceased’s beating. He was found walking along the street approximately three blocks from the deceased’s home. When approached by police, he initially gave a false name but soon admitted his identity. His right hand was significantly swollen and his right finger was cut and bleeding. There was blood on his clothes. Bloodstains were also found in his bedroom at the decedent’s home. Further facts will be set forth as necessary.

JURY SELECTION

[1] ¶ 10 In his first three propositions of error, Appellant asserts that he was denied a fair and impartial jury in several ways during jury selection. In Proposition One, Appellant asserts he was denied his state and federal constitutional rights to due process by the trial court’s denial of his request to remove seven specific potential jurors for cause. Shortly before the exercise of the peremptory challenges, the defense moved to excuse for cause prospective jurors (hereinafter known by their initials) M.S., J.L.W., T.S., S.S., D.M., J.W., and J.S. The trial court denied the request as to each potential juror. Defense counsel later used peremptory challenges to remove all but one of these prospective jurors. The State used a peremptory challenge to remove potential juror J.S.

[2] ¶ 11 “In order to properly preserve for appellate review an objection to a denial of a challenge for cause, a defendant must demonstrate that he was forced over objection to keep an unacceptable juror.” *Eizember v. State*, 2007 OK CR 29, ¶ 36, 164 P.3d 208, 220 (citing *Browning v. State*, 2006 OK CR 8, ¶ 8, 134 P.3d 816, 828.) “This requires a defendant to excuse the challenged juror with a peremptory challenge and make a record of which remaining jurors the defendant would have excused if he had not used that peremptory challenge to cure the trial court’s alleged erroneous denial of the for cause challenge.” *Id.*

[3] ¶ 12 Here, Appellant did not request additional peremptory challenges, nor did he identify which allegedly unfit jurors he would have excused had he been granted more challenges. As a result, Appellant has waived

this claim for appellate review and we review only for plain error. *Browning*, 2006 OK CR 8, ¶ 9, 134 P.3d at 828. Under the test set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701, this Court determines whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.

[4] ¶ 13 In *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851-52 (1985), the United States Supreme Court held that 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.’” *See also Jones v. State*, 2009 OK CR 1, ¶ 14, 201 P.3d 869, 877; *Warner v. State*, 2001 OK CR 11, ¶ 8, 29 P.3d 569, 573. The Court added that this standard does not require a juror’s bias be proved with “unmistakable clarity.” *Wainwright*, 469 U.S. at 424, 105 S.Ct. at 852. The Supreme Court further addressed the issue in *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992), wherein the Court held that, “[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.” Such prospective jurors are to be removed from the jury panel for cause. *Id.* The *Morgan* and *Wainwright* decisions require that jurors be willing to go into the trial with no preconceived notions regarding the appropriate penalty, death or life. The selection of jurors involves many subtle observations, and trial courts have broad discretion when considering a request to excuse a juror for cause. *Underwood v. State*, 2011 OK CR 12, ¶ 37, 252 P.3d 221, 240 *citing Wainwright*, 469

U.S. at 425, 105 S.Ct. at 853. *See also Eizember v. Trammell*, 803 F.3d 1129, 1135 (10th Cir.2015) (“the trial judge is best positioned to determine whether a potential juror will be able to follow his or her instructions-and that a court of appeals removed from the live proceedings must afford significant deference to the trial judge’s assessments”).

[5] ¶ 14 Having thoroughly reviewed the responses of prospective jurors, M.S., J.L.W., T.S., S.S., D.M., and J.W., we find none of them expressed any preconceived notions of the appropriate punishment or views which would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instructions and his or her oath. Therefore, we find the trial court did not abuse its discretion in denying the challenge for cause. Finding no error, we find no plain error.

[6, 7] ¶ 15 On appeal, Appellant acknowledges the failure to request additional peremptory challenges or identify jurors as required by this Court, but now names four additional jurors who sat on the jury, S.C., S.H., J.H., and N.M., and argues they were similarly unfit to serve. “Any claim of jury partiality must focus on the jurors who ultimately sat.” *Rojem v. State*, 2006 OK CR 7, ¶ 36, 130 P.3d 287, 295 (*citing Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273, 2277, 101 L.Ed.2d 80 (1988)). *See also Eizember*, 2007 OK CR 29, ¶ 70, 164 P.3d at 229. This is because the loss of peremptory challenges is “not of constitutional dimension.” *Ross*, 487 U.S. at 88, 108 S.Ct. at 2278. Appellant must establish prejudice in order to warrant relief. *Rojem*, 2006 OK CR 7, ¶ 36, 130 P.3d at 295.

¶ 16 Juror S.C. was one of the initial 30 persons called to the jury box. Under questioning by the State, he said he could keep an open mind as to all punishments. Defense counsel questioned prospective jurors based upon a hypothetical situation of “a guilty murderer, intentional killing and no excuses and no justification for it.” When asked for his “feelings about the death penalty” in that situation, Juror S.C. replied, “I feel primarily that the punishment should fit the crime” and “I would be willing to listen to any circumstances that might be pertinent to

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that". When asked if he was "leaning toward one of the three [punishment] options", S.C. said, "I think initially I would be predisposed to think for the death penalty because that's what was made (sic) it out to the victim."

¶ 17 Juror S.H. told the court he could consider all three possible punishments. When asked by the prosecutor if he had any "qualms with either three of those punishments", S.H. replied, "not really, no." When asked to explain his answer, he said "it would be difficult but, yes, I could do it." S.H. said he could give "meaningful consideration" to the death penalty if the State proved its aggravating circumstances. He said "it'd be tougher" to give meaningful consideration to life without parole but he could do so and that he would want to "hear the whole story." He explained it would not be impossible for him to consider life without parole and life imprisonment.

¶ 18 In response to questioning by defense counsel regarding his "thoughts" about the death penalty, S.H. said he "would really hate to be the one that says, yes, you have to die, but it's my duty." He indicated he understood that even if the State proved an aggravating circumstance, the State must still prove the aggravating circumstances outweigh the mitigating evidence and that even in that situation, he was not required to impose the death penalty. When asked if he leaned in any particular way, S.H. said he would "have to hear all—hear everything first." Under defense counsel's hypothetical, he said he would "lean more toward the death penalty, but I would listen to what everyone had to say and consider all three." S.H. disagreed with defense counsel's statement that in all first degree murder cases, the death penalty would be the first option. S.H. said he would have to hear all the facts and could consider a sentence of life without the possibility of parole for intentional malice aforethought murder. S.H. admitted though that at that point, he had no direction "on what malice and all that other stuff is by law", but said that at that moment, he would probably "lean away from life with the possibility of parole."

¶ 19 Juror J.H. initially told the court that he could consider all three punishment op-

tions. In response to the State's questions, J.H. said "the severity of the crime should actually in my opinion fit the punishment", but he could consider all three punishments. In response to defense counsel's hypothetical, J.H. said he could consider all three punishments. He said he would not "lean toward any of the three options more than any other option", "depending on the severity of the murder." J.H. said he would want to know about the mitigating evidence and that it might make a difference to him.

¶ 20 Juror N.M. also initially told the court he could consider all three possible punishments. Under questioning by the State, he said that if death was determined to be the appropriate punishment, he would not have a problem signing that verdict. N.M. indicated he could consider a sentence of life without parole if that was warranted by the evidence. Under questioning by defense counsel, N.M. said he did not have "a problem with the death penalty", explaining that it depended on "if it fits the crime." He said he was "kind of" one of those people "who are an eye-for-an-eye kind of person" but he wanted to know all of the evidence. He said he would listen to all of the mitigating evidence, and that his mind was not "pre-formed or pre-made up . . . , to death or life without parole" until he had heard all of the evidence.

¶ 21 None of these four jurors was challenged for cause by Appellant. A review of the *voir dire* shows that each of these four jurors affirmed their ability to consider all three punishment options, to listen to all of the mitigating and aggravating evidence, and abide by their duty as a juror to impose the most appropriate punishment based on the evidence. None of these four jurors indicated they were irrevocably committed to a particular punishment before trial began. None of these four jurors expressed views on capital punishment which would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instruction and his or her oath. The record shows that each was qualified to serve and could be a fair and impartial juror. Appellant has not shown he was forced to keep an unacceptable juror after he had exercised all of his peremptory challenges. Thus, he has

not established prejudice sufficient to warrant relief. This proposition is denied.

[8] ¶ 22 In Proposition II, Appellant contends the trial court erred in denying defense counsel's request to *voir dire* potential jurors as to their ability to consider all three possible punishments in the event Appellant was convicted of murdering his mother. The record shows defense counsel repeatedly asked the court to be allowed to posit questions based upon the facts of the case to gauge the prospective jurors' views on punishment. Defense counsel particularly wanted to *voir dire* on the hypothetical situation of a defendant convicted of first degree murder where the victim was the defendant's mother. The trial court would not allow defense counsel to present that hypothetical to the jury but did allow questioning regarding the prospective juror's attitudes on the death penalty in the hypothetical situation of first degree intentional murder.

[9-12] ¶ 23 The purpose of *voir dire* examination is to ascertain whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges. *Warner v. State*, 2006 OK CR 40, ¶ 15, 144 P.3d 838, 858. 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*, 2007 OK CR 29, ¶ 67, 164 P.3d at 228. To facilitate jury selection, the trial court may restrict questions that are repetitive, irrelevant or in regard to legal issues upon which the trial court will instruct the jury. *Hogan v. State*, 2006 OK CR 27, ¶ 13, 139 P.3d 907, 917. 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. *Eizember*, 2007 OK CR 29, ¶ 67, 164 P.3d at 228.

¶ 24 This Court has previously rejected claims of abuse of discretion by the trial court in restricting defense counsel from asking questions dealing with the specific facts of the case on trial or hypothetical situations mirroring the facts of the case on trial. *Black v. State*, 2001 OK CR 5, ¶ 19, 21 P.3d 1047, 1058; *Jackson v. State*, 1998 OK CR 39, ¶ 12, 964 P.2d 875, 883. In both *Black* and *Jack-*

son, we found no abuse of discretion as defense counsel's questions were an effort to test jurors' willingness to accept the theory of defense rather than to test their impartiality.

¶ 25 In the present case, we likewise find no abuse of discretion. Defense counsel's hypothetical questions regarding the specific facts that the murder victim was the defendant's mother seemed designed to test the jury's willingness to accept the theory of defense rather than to test their impartiality. Further, counsel's questions were an attempt to prejudice the case and try the capital sentencing stage of the trial before it had begun. Appellant argues that questioning on the specific facts of the case was relevant as several potential jurors said that the status of the victim as a family member might make a difference in their ability to consider all three punishments. None of the three prospective jurors named by Appellant (in a footnote to this proposition) actually sat on the jury that rendered the verdict in this case.

¶ 26 This Court has held that it is "not interested in whether or not a certain question was allowed to be asked, but rather whether the defendant was allowed sufficient *voir dire* to determine if there were grounds to challenge a particular juror for cause and to intelligently exercise his preemptory challenges." *Jackson*, 1998 OK CR 39, ¶ 11, 964 P.2d at 883. Here, the trial court allowed considerable leeway in questioning regarding the potential jurors' views on punishment.

¶ 27 Appellant compares his case to *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), a capital case, where the trial judge refused the defendant's request to question prospective jurors on the issue of racial prejudice. The Supreme Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Id.*, 476 U.S. at 36-37, 106 S.Ct. at 1688. The Supreme Court explained that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to

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operate but remain undetected.” *Id.*, 476 U.S. at 35, 106 S.Ct. at 1687. Further finding that “the risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence”, the Court said that by refusing to question prospective jurors on racial prejudice, “the trial judge failed to adequately protect the defendant’s constitutional right to an impartial jury.” *Id.*, 476 U.S. at 35–36, 106 S.Ct. at 1688. Appellant’s reliance on *Turner* is misplaced. Appellant’s attempt to put the concerns regarding the risk of racial prejudice infecting a capital sentencing proceeding on the same footing as a potential juror’s knowledge that the crime on trial involved matricide is not persuasive.

¶ 28 The limitations imposed upon the defense’s *voir dire* in this case were proper. *See Harmon v. State*, 2011 OK CR 6, ¶ 9, 248 P.3d 918, 928. The record shows that defense counsel was permitted to question the potential jurors at length about their attitudes toward the death penalty. The district court’s limitation on the use of a hypothetical question involving the specific facts of the case did not prevent defense counsel from fully exploring the potential jurors’ views on the death penalty. The *voir dire* allowed was broad enough to enable defense counsel to challenge prospective jurors for cause and to intelligently exercise peremptory challenges. We find no abuse of the trial court’s discretion and this proposition of error is denied.

[13–15] ¶ 29 In Proposition III, Appellant contends the trial court erred in accepting the State’s explanation for removing prospective Juror R.G. with a peremptory challenge in the face of Appellant’s objection under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). “The Equal Protection Clause forbids the prosecution from challenging potential jurors solely on account of their race.” *Mitchell v. State*, 2011 OK CR 26, ¶ 41, 270 P.3d 160, 173 (quoting *Batson v. Kentucky*, 476 U.S. at 89, 106 S.Ct. at 1719). Further:

In order to raise an equal protection challenge to the State’s use of peremptory challenges, the defendant must first make a *prima facie* showing that the prosecutor has exercised peremptory challenges on

the basis of race. Then, the burden shifts to the prosecutor to articulate a race-neutral explanation related to the case for striking the juror in question. The trial court must then determine whether the defendant has carried his burden of proving purposeful discrimination. The trial court’s findings are entitled to great deference, and we review the record in the light most favorable to the trial court’s ruling.

Id. (internal citations omitted).

¶ 30 When the State sought to excuse R.G. with a peremptory challenge, Appellant objected and raised a *Batson* challenge. When asked to give a race-neutral explanation for the removal, the State gave five: 1) that R.G. caused a significant delay on the first day of *voir dire* by absenting himself from the courtroom and thus causing the court to adjourn early for the day; 2) when called to the jury box, R.G. responded, “shit”; 3) he had been previously prosecuted and convicted by the district attorney’s office (the same office prosecuting Appellant), for embezzlement, receiving a two year deferred sentence; 4) his father had been previously prosecuted and convicted of armed robbery, the same crime which would be used for enhancement purposes in the second stage; and 5) his beliefs indicated he would not consider the death penalty as he considered it too light of a punishment. Appellant takes issues with each of the State’s explanations, finding them merely a pretext to conceal racial discrimination.

¶ 31 The record reflects that late in the day, on the first day of jury selection, R.G. asked to be excused for the restroom. When he did not return after approximately 20 minutes, the court adjourned for the day. When asked about this the next day, the prospective juror indicated he did not return to the courtroom because he felt ill but he felt fine the next day. The court accepted his explanation and continued with *voir dire*. Defense counsel raised an objection and moved for a mistrial because the court’s initial conversation with the prospective juror was in private. The court relayed to counsel the reason for the prospective juror’s absence and denied the objection and motion for a mistrial. Both the State and the defense

waived calling the prospective juror to repeat what he had told the judge. Neither the State nor the defense voiced any objection to continuing on with *voir dire*. Appellant asserts the State expressed no hesitation in proceeding with *voir dire* and that the issue was resolved to both party's satisfaction. The record indicates the State did not voice any opinion at that point as to R.G.'s presence in the venire.

¶ 32 Appellant compares R.G.'s situation to that of prospective juror P.B. who also caused delays in jury selection. The record shows that P.B. simply missed a part of jury selection by showing up late the second day. Noting that the prospective juror was not present for the start of proceedings that day, the court continued on with jury selection. No objections were raised by the State or the defense and there was no delay in the proceedings. Defense counsel eventually asked for P.B.'s excusal, with no objection by the State, due to her failure to follow the concepts and questions discussed in jury selection. This record shows P.B.'s situation was very different from that of R.G.'s. The State's decision not to seek P.B.'s excusal due to her being late on the second day does not support Appellant's argument that the first reason given for excusing R.G. was not race-neutral.

¶ 33 Appellant claims that the State questioned R.G. "in a light hearted manner" about his response when called to the jury box. Therefore, he claims that to use that later to excuse him was racially motivated. It is not clear from the record whether the exchange between the prosecutor and R.G. was in a light hearted manner. What is clear from the record is that R.G. said he did not want to be on the jury panel, explaining that he "wanted to stay in [his] little corner in the back of the courtroom." This Court has found that a prospective juror's desire not to sit on a jury a sufficient race-neutral rationale for excusal by peremptory challenge. *Smith v. State*, 2007 OK CR 16, ¶¶ 13–15, 157 P.3d 1155, 1162–63.

¶ 34 Appellant challenges the third and fourth reasons for removal—R.G.'s prior prosecution and conviction by the same district attorney's office involved in the trial and

his father's prior conviction—by arguing that these reasons had a disparate impact upon minorities and by pointing out two prospective jurors whom the State did not seek to excuse who had either personal prior convictions or family members with prior convictions.

¶ 35 Past criminal history, either of a prospective juror or of a relative, has been found to be a race neutral reason for removal. *Coddington v. State*, 2006 OK CR 34, ¶ 14, 142 P.3d 437, 444; *Harris v. State*, 2004 OK CR 1, ¶ 22, 84 P.3d 731, 743; *Black*, 2001 OK CR 5, ¶ 32, 21 P.3d at 1061–1062; *Short v. State*, 1999 OK CR 15, ¶ 15, 980 P.2d 1081, 1092. While Appellant points to two jurors who had prior convictions or relatives with prior convictions, he fails to acknowledge two other prospective jurors, not identified as members of a minority, who were excused based upon either their own prior conviction or that of a boyfriend. These strikes show that the State was not acting with any racially motivated pretext when it sought R.G.'s removal for these two reasons.

¶ 36 Appellant cites to *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) to support his claim that striking potential jurors for criminal involvement has the potential to disparately impact black jurors or to conceal purposeful racial discrimination and this disparate impact alone could be sufficient to support a finding of purposeful, impermissible racial discrimination. *Hernandez* involved a prosecutor's removal of bilingual, Spanish speaking jurors in a case involving a Latino defendant. In finding a race-neutral basis had been given for the peremptory strikes, a plurality of the Supreme Court said:

In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law. A court addressing this issue must keep in mind the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact.... Proof of racially discriminatory intent or purpose is required

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to show a violation of the Equal Protection Clause.” “ ‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ it’s adverse effects upon an identifiable group.”

500 U.S. at 359–360, 111 S.Ct. at 1866 (internal citation omitted).

¶37 Appellant has failed to show any proof of racially discriminatory intent or purpose as a result of excusing prospective jurors based upon criminal history.

¶38 Finally, Appellant asserts that R.G. said he was capable of considering all three possible punishments and gave no answers indicating he could not sit on the jury. While R.G. did say he could consider all three punishments, he also told the prosecutor he felt like a person “should suffer for the rest of their life because death is the easy way out . . . you could always consider death if it’s just overwhelming, but I’d rather have a person suffer and have to deal with it till they die than just put them out of their misery.” R.G. reiterated this sentiment when questioned by defense counsel. When asked if he understood that life without the possibility of parole meant just that, R.G. responded, “they have to deal with what they did till they die, not just get out of it by dying.” This Court has found no discriminatory intent in the striking of a juror who expressed reservations about his or her ability to impose the death penalty. *Harris*, 2004 OK CR 1, ¶20, 84 P.3d at 743.

[16] ¶39 A race-neutral reason given by the prosecutor need not rise to the level of justifying excusal for cause, but it must be a “clear and reasonably specific” explanation of his or her “legitimate reasons” for exercising the challenges. *Coddington*, 2006 OK CR 34, ¶11, 142 P.3d at 443. “[A] pretextual reason, that is, one not supported by the record, should be rejected.” *Bland v. State*, 2000 OK CR 11, ¶16, 4 P.3d 702, 711. In this case, the prosecutor’s reasons for excusing R.G. were supported by the record. A record which shows the prosecutor did not exercise peremptory challenges to purposefully discrimi-

nate and exclude jurors on the basis of race. The trial court did not abuse its discretion in accepting the prosecutor’s reasons for excusing R.G. This proposition is denied.

FIRST STAGE ISSUES

¶40 In his fourth proposition of error, Appellant contends the trial court erred in admitting the decedent’s statement identifying him as her attacker. Appellant concedes that no objection was raised at trial to the admission of the statement and therefore our review is for plain error. As previously stated, when we review for plain error, an appellant must show an actual error, which is plain or obvious, affecting his substantial rights. *Hogan*, 2006 OK CR 19, ¶38, 139 P.3d at 923.

¶41 Relying on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), Appellant asserts that the hearsay statements were testimonial in nature and their admission violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The State responds that the decedent’s statements met the hearsay exception of a dying declaration and therefore do not violate the Confrontation Clause.

[17] ¶42 In both state and federal criminal prosecutions, an accused has a right “to be confronted with the witnesses against him.” *Mitchell v. State*, 2005 OK CR 15, ¶15, 120 P.3d 1196, 1202 (citing U.S. Const. amends. VI and XIV; Okla. Const. art. 2, §20). In *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), the United States Supreme Court summed up the law on the right to confrontation as follows:

The Confrontation Clause of the Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The Fourteenth Amendment renders the Clause binding on the States. In *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), we explained that the confrontation right does

not bar admission of statements of an unavailable witness if the statements “bea[r] adequate ‘indicia of reliability.’” We held that reliability can be established if “the evidence falls within a firmly rooted hearsay exception,” or if it does not fall within such an exception, then if it bears “particularized guarantees of trustworthiness.”

562 U.S. at 352-353, 131 S.Ct. at 1152 (internal citation omitted).

[18] ¶ 43 The Supreme Court overruled *Ohio v. Roberts* in *Crawford v. Washington*, 541 U.S. at 60-63, 124 S.Ct. at 1369-1371. In *Crawford*, the Supreme Court drew a distinction between “testimonial” and “nontestimonial” hearsay statements, noting that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” 541 U.S. at 51, 124 S.Ct. at 1364. *Crawford* limited the Confrontation Clause’s reach to “testimonial” statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment “demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Bryant*, 562 U.S. at 354, 131 S.Ct. at 1153 (quoting *Crawford*, at 68, 124 S.Ct. 1354). Under *Crawford* and its progeny, the test for determining whether the admission of an out-of-court statement offered for the truth of the matter asserted violates the Confrontation Clause focuses on whether the statement was testimonial or non-testimonial. “Only statements of this sort [testimonial] cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” *Davis*, 547 U.S. at 821, 126 S.Ct. at 2273.

¶ 44 The State relies on *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) to argue that the Supreme Court has said that dying declarations “do not run afoul of the Confrontation Clause.” In *Giles*, the Supreme Court considered whether a defendant forfeits his rights under the Confrontation Clause when a judge determines that a

wrongful act by the defendant made the witness unavailable to testify at trial. However, the State did not dispute, and the Supreme Court “accept[ed] without deciding”, that the out-of-court statements at issue were testimonial. *Id.*, 554 U.S. at 358, 128 S.Ct. at 2682. Therefore, *Giles* tells us that the first determination to be made regarding the admissibility of the hearsay statement is whether it is testimonial or non-testimonial. Whether the statement is admissible under an exception to the hearsay rule is a separate issue.

[19,20] ¶ 45 In *Crawford*, the Supreme Court did not provide a comprehensive list of what it considered to be a “testimonial statement”. This came a few years later in *Davis v. Washington* and *Hammon v. Indiana* (two cases consolidated for consideration). *Davis* and *Hammon* were both domestic violence cases. The Supreme Court expanded upon the meaning of “testimonial” in a situation involving an ongoing emergency. The Supreme Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822, 126 S.Ct. at 2273-74.

[21] ¶ 46 “To determine whether the ‘primary purpose’ of an interrogation is ‘to enable police assistance to meet an ongoing emergency,’ which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” *Bryant*, 562 U.S. at 359, 131 S.Ct. at 1156, (quoting *Davis*, 547 U.S. at 822, 126 S.Ct. at 2273-2274). Whether an emergency exists and is ongoing is a highly context-dependent inquiry. *Id.*, 562 U.S. at 363, 131 S.Ct. at 1158.

[22] ¶ 47 Here, police responded to Ms. Diggs’ call to find the 85 year old victim,

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lying on the floor of her bedroom, face down on her left side. She was unable to get up on her own. Her face was bruised and extremely swollen on the left side. Ms. Diggs went to help her grandmother sit up and keep her from trying to stand up. A police officer asked Ms. Diggs to ask her grandmother whether she was in pain and “who did it?” Ms. Diggs testified at trial that the victim replied by making the sign she used to identify Appellant. Emergency medical personnel arrived soon after and Adam Simmons, a responding paramedic, also asked Ms. Diggs to ask her grandmother what had happened. Mr. Simmons testified at trial that Ms. Diggs told him that her grandmother said “her son did it”, that he had an object in his hand and there “was an unknown amount of hits.” The victim was then transported to the hospital.

[23] ¶ 48 “A conversation which begins as an interrogation to determine the need for emergency assistance” can “evolve into testimonial statements.” *Bryant*, 562 U.S. at 365, 131 S.Ct. at 1159. “This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute.” *Id.* Appellant argues that after the initial questioning of the victim pertaining to her physical condition, the primary purpose of the questioning was to prove past events potentially relevant to later prosecution.

[24] ¶ 49 The initial inquiries in this case resulted in the type of nontestimonial statements upheld in *Davis*. At the time the victim identified Appellant as her attacker, police did not know if Appellant was still in the house, if he was armed, if he had left the house or if he was likely to return. Once named, Appellant was quickly identified as a convicted felon, one potentially armed. The situation soon encompassed not only a threat to the victim but also potentially to the police and the public. “When an officer arrives on the scene and does not know where the perpetrator is, whether he is armed, whether he might have other targets, and whether the violence might continue at the scene or elsewhere, interrogation that has the primary purpose of establishing those facts to assess

the situation is designed to meet the ongoing emergency and is nontestimonial.” *Bryant*, 562 U.S. at 371–372, 131 S.Ct. at 1163. The questions asked by the officer and paramedic in this case—what had happened and who had injured the victim—“were the exact type of questions necessary to allow the police to ‘assess the situation, the threat to their own safety, and possible danger to the potential victim’ and to the public, . . . including to allow them to ascertain ‘whether they would be encountering a violent felon,’ . . . In other words, they solicited the information necessary to enable them ‘to meet an ongoing emergency.’” *Bryant*, 562 U.S. at 376, 131 S.Ct. at 1166 (quoting *Davis*, 547 U.S. at 827 & 832, 126 S.Ct. at 2276 & 2279). Based upon the facts in this case, we cannot say that a person in the victim’s situation would have had a “primary purpose” “to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822, 126 S.Ct. at 2273.

¶ 50 Because the circumstances of the encounter as well as the statements and actions of the victim and the police/paramedic objectively indicate that the primary purpose of the interrogation was to enable medical assistance to the victim and police assistance to meet an ongoing emergency, the victim’s identification of Appellant as her assailant was nontestimonial hearsay. Based upon the facts of this case, we find the Confrontation Clause did not bar the admission of her statement.

¶ 51 Relying on *Miller v. State*, 2004 OK CR 29, ¶ 27, 98 P.3d 738, 744 Appellant asserts that even if we find the hearsay statement nontestimonial, in order for it to be admissible, we must find that it falls within a firmly rooted hearsay exception and there is no firmly rooted exception that fits the statement in this case. Since we decided *Miller*, the Supreme Court decided *Davis* and *Bryant* and made it clear that deciding whether the admission of a hearsay statement violates the Confrontation Clause based upon whether it is testimonial or nontestimonial in nature is a separate analysis from determining whether the statement is admissible under an exception to the hearsay rule. Therefore, for purposes of the Confrontation

Clause, we find the statements in this case were nontestimonial and their admission did not violate Appellant's rights under the Confrontation Clause. We find no error and thus no plain error.

[25] ¶ 52 Appellant's assertion that there are no hearsay exceptions which fit the statements in this case leads to Proposition V. There, Appellant argues that the improper admission of the decedent's hearsay statements violated his constitutional rights to due process under the Fifth and Fourteenth Amendments. Appellant asserts that the statements were inadmissible as they were unreliable hearsay and were not corroborated by any other evidence. Our review is again for plain error, as Appellant raised no objections to the admission of the decedent's statements. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶ 53 As no objections to the admission of the declarant's hearsay statements were raised at trial, there is no record of any discussion regarding the admissibility of the statements. In Proposition IV, the State argued that the decedent's hearsay statements were properly admitted under the dying declaration exception to the hearsay rule. A well recognized exception to the hearsay rule, a dying declaration is defined as a statement made by a declarant, in a prosecution for homicide, while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death. 12 O.S.2011, § 2804(B)(2). *See also Moore v. State*, 1988 OK CR 176, ¶ 32, 761 P.2d 866, 871.

¶ 54 Here, the 85 year old victim was found lying on the floor with severe injuries to her face. She was conscious but unable to move on her own accord. She was placed in a "C" collar and immobilized on a back board before being moved onto a stretcher and then to the ambulance. She was able to interact with emergency personnel and insisted on being taken to a hospital different from that suggested by the paramedics. While it is impossible to know exactly what the elderly victim was thinking at the time, we are not convinced that at the time she made her statements to emergency personnel, she believed her death was imminent. Her hearsay

statements were not admissible under the dying declaration exception to the hearsay rule.

[26–30] ¶ 55 Another exception to the hearsay rule is that of an excited utterance. Title 12 O.S.2011, § 2803(2) provides that a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the startling event or condition" is not excluded by the hearsay rule. "An excited utterance must meet three foundational requirements: (1) a startling event or condition; (2) a statement relating to that startling event or condition; (3) made while the declarant is under the stress of excitement caused by the startling event or condition." *Martinez v. State*, 2016 OK CR 3, ¶ 50, 371 P.3d 1100, 1113; *Mitchell*, 2005 OK CR 15, ¶ 27, 120 P.3d at 1205. "We examine both the timing of the statement and its spontaneity on a case-by-case basis." *Martinez*, 2016 OK CR 3, ¶ 51, 371 P.3d at 1113. "Whether a statement qualifies as an excited utterance depends not on a fixed time but on the facts and circumstances." *Id.* "An excited utterance 'need not be substantially contemporaneous with the startling event or condition . . . so long as the declarant is under the stress of excitement at the time the statement is made.'" *Id.*

¶ 56 Here, the elderly victim had been assaulted within moments of being found by the police. She had received a blow which made it impossible for her to move on her own and see clearly. Her responses to the officer and paramedic were her first communications since being assaulted. Considering the timing and circumstances of the decedent's statements, made while she was still under the evident stress of the startling and certainly unexpected assault, we find her statements could have been properly admitted as excited utterances.

[31] ¶ 57 A hearsay exception also exists for statements made for the purposes of receiving medical attention. 12 O.S.2011, § 2803(4). *See also Kennedy v. State*, 1992 OK CR 67, ¶ 10, 839 P.2d 667, 670. As the decedent's statements were made to emergency medical personnel soon after her assault in response to inquiries regarding her

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injuries, the statements were properly admitted under this exception. As the decedent's statements fell within more than one recognized hearsay exception, we find no error, and thus no plain error in their admission.

¶ 58 Appellant further argues that the State did not produce any witnesses to verify that Ms. Diggs was asked to question her grandmother about what happened and who assaulted her. Appellant also challenges Paramedic Simmons' statement that the decedent indicated her son assaulted her. Appellant asserts that Simmons' report does not say that he received such information directly from the victim only that it was gathered at the scene and that some of the information included in his report was provided by using "whatever drop down box was closest in similarity to the information he claimed he provided." Appellant goes on to argue that both Sgt. Ulman, one of the first officers on the scene, and Simmons testified to how "chaotic and emotional things were when dealing with Ms. Diggs and [the victim] in the bedroom." Appellant claims these were all factors to consider in assessing the reliability of the information gathered at the scene.

[32-34] ¶ 59 To the extent that Appellant argues the decedent's statements were not corroborated, there is no requirement of corroboration for their admission. Any apparent contradictions between the decedent's statements and witnesses' testimony does not make the statements inadmissible. Contradictions in the testimony and inconsistency in witness testimony does not render the evidence inherently unreliable, but goes to the weight of the evidence. *Ochoa v. State*, 1998 OK CR 41, ¶ 32, 963 P.2d 583, 596. The issue of credibility and reliability of evidence is an issue for the jury. *Malicoat v. State*, 2000 OK CR 1, ¶¶ 17-18, 992 P.2d 383, 397. "It is the jury's job to weigh the evidence, resolve conflicting evidence, and reconcile conflicting testimony." *Bell v. State*, 2007 OK CR 43, ¶ 12, 172 P.3d 622, 626-627. Accordingly, we find no error and thus no plain error.

¶ 60 In Propositions VI and VII, Appellant challenges the testimony of four witnesses: Sgt. Ulman; Paramedic Simmons; Michael Hahn, M.D., the neurosurgeon on call at Mercy Hospital the night the decedent was

taken in and who performed surgery on her; and Tobias Frederick, Appellant's brother. In Proposition VI, Appellant asserts he was denied his due process rights to a fundamentally fair trial by the State's failure to give notice that these witnesses would testify as experts in identifying the source of or excluding the source of the decedent's head injuries. In Proposition VII, Appellant challenges the actual testimony of Ulman, Simmons and Tobias Frederick arguing that it was beyond the witnesses' training and experience and was merely speculation. He claims the testimony was unreliable, prejudicial and denied him his due process rights to a fair trial.

[35] ¶ 61 The lack of notice claim raised in Proposition VI is being raised for the first time on appeal. No objections based on lack of notice were raised before the trial court. Therefore, we review the claim for plain error only. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶ 62 Under 22 O.S.2011, § 2002(A)(1)(a),(b) & (d), upon request of the defense, the State shall be required to disclose the names and addresses of witnesses which the State intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement; law enforcement reports made in connection with the particular case, and any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. There is no requirement that the State is to designate in its witness list or summary of testimony that a witness will testify as an expert.

¶ 63 All of the challenged witnesses were included in the State's witness list. In the accompanying summary of expected testimony, it is stated that each of the above witnesses would testify to their observations of the victim at the crime scene. Regarding Dr. Hahn, the summary of testimony provided that he would testify consistent with his reports prepared in his treatment of the decedent. However, as Appellant points out, none of the witness summaries specifically stated

that the witnesses would give their opinion as to the source of the decedent's head injuries.

¶ 64 The record indicates Appellant was not surprised by this opinion testimony. He did not claim surprise or ask for a continuance to rebut the testimony. Further, the record shows that except for Dr. Hahn, none of the challenged witnesses were offered or qualified as experts in head trauma or the source of the decedent's injuries. Finding no statutory requirement to designate witnesses as experts, and as the summary of testimony sufficiently informed the defense of the anticipated testimony of the witnesses, we find no error and thus no plain error. Proposition VI is denied.

[36] ¶ 65 In Proposition VII, Appellant admits that Sgt. Ulman and Tobias Frederick were not offered or qualified by the trial court as expert witnesses. During the direct examination of both witnesses, defense counsel objected on grounds that the State was trying to qualify the witnesses as experts in head trauma. The trial court overruled the objection and allowed the witnesses to testify as lay witnesses based upon their own observations and personal knowledge. *See* 12 O.S. 2011, § 2701.

[37] ¶ 66 In light of Appellant's objection, we review the trial court's ruling for an abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

¶ 67 Appellant relies on *Williams v. State*, 2008 OK CR 19, 188 P.3d 208 and *Head v. State*, 2006 OK CR 44, 146 P.3d 1141 to argue that the opinion testimony of Ulman and Frederick was improperly admitted. In *Williams*, a police officer testified to injuries present on the defendant's body at the time of arrest—a fresh abrasion on his right wrist and hand area, and a laceration on his left shin. He explained that in meeting with other detectives, it had been determined that one of the suspects had fled by jumping off a second floor balcony and that the defendant's

injuries “looked like injuries that one might receive by . . . jumping and falling.” *Williams*, 2008 OK CR 19, ¶ 80, 188 P.3d at 225. This testimony was offered by the State as lay witness opinion testimony. Reviewing for plain error, this Court found it “impossible for a lay person to determine how the injuries occurred”, and without some specialized knowledge, any opinion about the source of the injuries was pure speculation. *Id.*, 2008 OK CR 19, ¶ 83, 188 P.3d at 225.

¶ 68 In *Head*, the officer testified that the robbery victim, when shown a photographic display, indicated through body language that he recognized the defendant as the man who robbed him. However, the victim had not made a pre-trial identification of the defendant and failed to identify the defendant at trial. 2006 OK CR 44, ¶ 17, 146 P.3d at 1146–47. Reviewing for plain error, this Court saw the officer's testimony as an attempt to take the victim's lack of explicit identification as a positive identification. This Court found that using the testimony of a police officer in the “guise of expert opinion” in this manner is error. *Id.*, 2006 OK CR 44, ¶ 18, 146 P.3d at 1147–48.

¶ 69 In *Williams* and *Head*, the officers testified to something that could only be known by someone with some sort of specialized knowledge—injuries received from jumping off a building and “the nonverbal medium of ‘body language’”. *Head*, 2006 OK CR 44, ¶ 18, 146 P.3d at 1146. In the present case, Sgt. Ulman and Officer Frederick gave their opinions on an issue any lay witness could give—whether the decedent's injury to the head looked consistent with that received from a fall to the ground from a standing position. The testimony in this case is similar to that found admissible in *Mitchell* where a lay witness testified that the injuries he saw on the victim looked like bite marks. 2011 OK CR 26, ¶ 76, 270 P.3d at 179. There, the trial court informed the jury that the witness was not qualified as an expert and did not know how the victim received her injuries. This Court found the testimony was based on the witness's personal observation and was properly admissible as lay witness opinion testimony. *Id.*, 2011 OK CR 26, ¶¶ 76–77, 270 P.3d at 179.

¶ 70 Appellant insinuates that merely because the witnesses were police officers that their testimony was that of an expert. However, neither witness was qualified as an expert. It is clear from their testimony that they were not present when the victim was injured and did not know how she was injured. Their testimony was based upon their own observations of the victim's head wound and physical surroundings of her bedroom. Their opinions as to the source of her injuries were relevant to rebut Appellant's claim that the decedent merely fell and hit her head. We find the testimony was properly admitted as lay witness opinion testimony under 12 O.S.2011, § 2701. *See also Littlejohn v. State*, 2004 OK CR 6, ¶¶ 34–35, 85 P.3d 287, 299. The trial court did not abuse its discretion in admitting the testimony.

[38] ¶ 71 As for Paramedic Simmons, no objection was raised to his testimony that he did not believe the decedent's injuries were consistent with a fall. Reviewing only for plain error, we find none. *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121. Simmons testified that he arrived on the scene to find the victim lying on the floor but propped upright by Ms. Diggs. It was clear he was not present when she received her injuries. Simmons observed the injuries and prepared the victim for transport in the ambulance. His testimony concerning the source of her injuries was based upon his own personal observations and was therefore properly admitted as lay opinion testimony under 12 O.S.2011, § 2701. Proposition VII is denied.

FIRST STAGE JURY INSTRUCTIONS

[39–41] ¶ 72 In Proposition VIII, Appellant contends the trial court erred in refusing to give his requested instructions on the lesser included offenses of heat of passion manslaughter and second degree depraved mind murder as such instructions were warranted by the evidence. “The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court.” *Eizember*, 2007 OK CR 29, ¶ 111, 164 P.3d at 236. “Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a

whole, accurately state the applicable law.” *Id.*

[42, 43] ¶ 73 When a defendant defends against a criminal charge by proclaiming innocence, he is not entitled to instructions on any lesser included offense. *Harney v. State*, 2011 OK CR 10, ¶ 11, 256 P.3d 1002, 1005; *Grisson v. State*, 2011 OK CR 3, ¶ 35, 253 P.3d 969, 982; *Gilson v. State*, 2000 OK CR 14, ¶ 119, 8 P.3d 883, 918. This rule applies whether the defendant presents his defense through his own testimony at trial as well as when the theory of defense is presented through statements of counsel. *Grisson*, 2011 OK CR 3, ¶ 35, 253 P.3d at 982. “Specifically, where the defendant makes admissions by counsel during trial that render every defense unavailable save one, he is deemed to have elected that defense; and may, by his election, foreclose the submission of instructions on other theories of defense or lesser-included offenses inconsistent with his defense.” *Id.* From opening statement through cross-examination of witnesses to closing argument, Appellant asserted that he was not the source of the decedent's injuries; rather those injuries came as a result of her falling. Based upon this record, Appellant is not entitled to instructions on any lesser included offenses.

[44] ¶ 74 Appellant also asserts that by failing to instruct the jury on any lesser forms of homicide, his federal due process rights under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) have been violated. In *Beck*, the Supreme Court held that a sentence of death may not constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict. 447 U.S. at 637, 100 S.Ct. at 2389. This holding was limited in *Schad v. Arizona*, 501 U.S. 624, 646, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), where the Court held that due process does not require the jury to be instructed on every non-capital lesser-included offense supported by the evidence, just that the jury may not be placed in an “all-or-nothing” choice between capital murder and innocence. *Valdez v. Ward*, 219 F.3d

1222, 1242 (10th Cir. 2000). *See also Eizember v. Trammell*, 803 F.3d 1129, 1147 (10th Cir. 2015).

¶ 75 In contrast to *Beck* and *Schad*, a first degree murder conviction in Oklahoma is not automatically tied to the death penalty. The jury is not instructed that if they convict the defendant of the charged offense, they are required to impose the death penalty. Instead, Oklahoma juries have a choice. In the sentencing stage they must weigh mitigating evidence against aggravating circumstances before deciding to impose life in prison, life in prison without the possibility of parole or death. In *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999), the Tenth Circuit found that aspect of state law not sufficient to preclude a *Beck* analysis. Specifically, the Court said “a proper reading of *Beck* entitles a defendant in a capital case to a lesser included instruction when the evidence warrants it, notwithstanding the fact that the jury may retain discretion at sentencing to issue a penalty less than death.” 184 F.3d at 1227. Therefore, Oklahoma’s sentencing scheme does not preclude a *Beck* analysis.

¶ 76 However, the applicability of *Beck* in a case such as the present where a defendant defends himself by proclaiming innocence appears to be a question of first impression. As we have previously stated, an instruction on a lesser included offense is not warranted when a defendant chooses as his defense that of innocence, and not guilt of a lesser form of homicide. By choosing to proclaim his innocence, Appellant forecloses the admission of evidence or submission of instructions on other theories of defense. *Grissom*, 2011 OK CR 3, ¶ 35, 253 P.3d at 982. This Court was not called upon to do a *Beck* analysis in *Grissom*. As of the date of this opinion, the Tenth Circuit has not ruled on *Grissom*.

¶ 77 *Beck* repeatedly indicates that lesser-included-offense instructions are proper only where the evidence warrants them. *Id.* 447 U.S. at 635 n. 11, 636 & n. 12, 100 S.Ct. 2382, n. 11 & 12. This principle was upheld in *Schad*, 501 U.S. at 648, 111 S.Ct. at 2505. *See also Valdez v. State*, 1995 OK CR 18, ¶ 55, 900 P.2d 363, 378–379 (“Neither *Beck v. Alabama* nor *Schad v. Arizona* require that a jury in a capital case be given a third, non-

capital option where the evidence absolutely does not support that option”). In a first degree murder prosecution like the present case, *Beck* requires a court to consider whether there was sufficient evidence introduced at trial from which a jury could rationally conclude that the defendant did not intend to kill the victim and that supported a finding of guilt of a lesser form of homicide. *Taylor v. Workman*, 554 F.3d 879, 890 (10th Cir. 2009). The sufficiency of the evidence of the greater offense is distinct from the *Beck* inquiry into whether the evidence might allow a jury to acquit a defendant of the greater of the offenses and convict of the lesser. *Hogan v. Gibson*, 197 F.3d 1297, 1305 (10th Cir. 1999).

¶ 78 In the present case, since Appellant elected to defend himself on a claim of innocence and not guilt of a lesser offense, there is no evidence of a lesser offense to consider. Defense counsel did not present evidence nor argue that Appellant killed the victim but did so without malice. Counsel’s cross-examination of witnesses and his argument in closing asserted that the victim’s injuries were caused by her falling of her own accord. Counsel argued that Appellant did not intend to kill the victim, that the State did not have any evidence that he ever touched her after she left the kitchen, and that there was no evidence that he killed his mother.

¶ 79 In *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) the defendant admitted to not only killing the victim, but that he intended to kill the victim and that he would do the same thing again in similar circumstances. *Id.* 456 U.S. at 612, 102 S.Ct. at 2053. The Supreme Court found that “the evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim.” *Id.* 456 U.S. at 613, 102 S.Ct. at 2054. Therefore, an instruction on a lesser form of homicide was not warranted. *Id.*

¶ 80 Nothing in *Beck* suggests that the courts are constitutionally compelled to give lesser included offense instructions where they are not supported by the evidence. Under the facts of this case, we find Appellant’s federal due process rights under *Beck* have

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not been violated because under state law he was not entitled to any instructions on lesser included offenses by claiming innocence as his defense and therefore there was no evidence upon which to find him guilty of a lesser form of homicide. Accordingly, this proposition of error is denied.

[45] ¶ 81 In Proposition IX, Appellant argues that improper argument concerning flight and the absence of a jury instruction on flight denied him his due process rights to a fair trial. The record shows that no instruction on flight was requested. During closing argument, the prosecutor referred to Appellant's leaving the decedent's home after she had been beaten and his absence once police arrived. No objections were raised to the absence of the flight instruction or the argument regarding flight. Now on appeal, Appellant asserts the argument regarding flight and/or failing to stop the proceedings and properly instruct the jury on how to consider flight evidence infringed upon his right to remain silent and was a violation of his rights to due process and a fair trial under the Fourteenth Amendment to the United States Constitution and Article II, § 7 and 20 of the Oklahoma Constitution. In the absence of any objections, our review is for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

[46, 47] ¶ 82 Instructions on flight should be given only in cases where the evidence is controverted by the defendant and as an exception rather than as a rule. *Mitchell v. State*, 1993 OK CR 56, ¶ 11, 876 P.2d 682, 685.² See also *Dawkins v. State*, 2011 OK CR 1, ¶ 16, 252 P.3d 214, 219; *Hancock v. State*, 2007 OK CR 9, ¶ 104, 155 P.3d 796, 820; *Jones v. State*, 2006 OK CR 5, ¶ 43, 128 P.3d 521, 539. Before an instruction is given, the defendant must first present evidence explaining his departure. *Mitchell*, 1993 OK CR 56, ¶¶ 9–11, 876 P.2d at 684–685. Here, Appellant offered no evidence explaining his departure from the scene of the crime. Therefore, the giving of an instruction on flight was not warranted.

2. It is for this very reason that I voiced my concern in *Mitchell* and urged the Court to require a flight instruction in every case where the evidence warranted it. 876 P.2d at 686–687

[48] ¶ 83 As for the prosecutor's closing arguments on flight, they were proper as based on the evidence and reasonable inferences therefrom. *Sanchez v. State*, 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004. Evidence of a defendant's actions after a crime is committed, including flight, is relevant to show consciousness of guilt. *Dodd v. State*, 2004 OK CR 31, ¶ 34, 100 P.3d 1017, 1031. Further, the prosecutor made no reference to Appellant's right to remain silent. Based upon the record before us, we find no error and thus no plain error in the absence of a flight instruction and the prosecutor's closing argument.

SUFFICIENCY OF THE EVIDENCE OF FIRST DEGREE MURDER

[49–51] ¶ 84 In Proposition X, Appellant challenges the sufficiency of the evidence supporting his first degree murder conviction. We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111. This Court will accept all reasonable inferences and credibility choices that tend to support the verdict. *Id.*

¶ 85 Appellant first argues that neither of the State's expert witnesses, Dr. Hahn and Dr. Harrison, "could conclusively exclude the possibility" that the decedent's injuries came from a fall. Drs. Hahn and Harrison both provided testimony and written reports which concluded that the decedent's injuries were not consistent with a fall from a standing position. Whether or not this testimony was conclusive on the subject was for the jury's determination. The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the jury. *Id.*, 2011 OK CR 29, ¶ 83, 268 P.3d at 112. Here, the jury was well within its province in agreeing with the doctors' opinions.

(Lumpkin, P.J. concur in part/dissent in part). It is only through a proper instruction that jurors can understand how to evaluate flight from the scene.

¶ 86 Appellant also argues that the State “failed to overcome evidence that [he] was angry and upset and actually had a tussle with both Da’Jon Diggs and [the decedent] in the minutes leading up the arrival of the police,” and that even if the Court finds the evidence sufficient to prove he caused the injuries, it does not prove beyond a reasonable doubt that the injuries were inflicted with the intent to take the decedent’s life.

[52, 53] ¶ 87 A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. 21 O.S.2011, § 701.7(A). “Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.” *Id.* “A design to effect death [i.e., premeditation] is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed.” 21 O.S.2011, § 702. *See also Davis*, 2011 OK CR 29, ¶ 76, 268 P.3d at 111. Premeditation sufficient to constitute murder may be formed in an instant or it may be formed instantaneously as the killing is being committed. *Id.* Malice aforethought may be proved by circumstantial evidence. *Id.*

¶ 88 Unquestionably, the evidence showed that the decedent and Appellant quarreled and had a physical altercation shortly before her murder. Appellant shouted at his 85 year old mother and cursed her for taking some food. Appellant shoved his mother against the kitchen cabinet. Worried about the safety of her grandmother, Ms. Diggs intervened and led the decedent to her bedroom. A few minutes later, Appellant verbally attacked and threatened Ms. Diggs, ultimately chasing her out of the house. Still carrying the rock or brick he used to threaten Ms. Diggs, Appellant returned inside the house.

¶ 89 Although we cannot know for sure in which order subsequent events occurred, Appellant severely beat the decedent about the head, changed his clothes and then left the house. Appellant cites to a variety of extra-record evidence stating that physical pushing, shoving, and fighting was “a scenario not unique in that household.”

[54] ¶ 90 Be that as it may, such a claim does not negate the inference that at the time of the murder, Appellant acted with malice aforethought. In fact, Appellant’s evidence would seem to support the State’s argument that Appellant had repeatedly argued with his mother and that he sought to put an end to those arguments by killing her. *See Rutan v. State*, 2009 OK CR 3, ¶ 55, 202 P.3d 839, 850 (defendant’s history of threats and physical abuse inflicted on the victim supported the finding that the victim died as a result of the criminal acts of the defendant). He silenced his mother by beating her in the head to the extent that her face was almost unrecognizable. When apprehended the following day, Appellant’s right hand was extremely swollen. The manner of killing and pattern of wounds can support a finding the defendant intended to kill his victim. *See Hogan*, 2006 OK CR 27, ¶ 22, 139 P.3d at 919.

¶ 91 Based on the State’s evidence, the jury could logically infer that Appellant deliberately intended to take the elderly decedent’s life by beating her in the head. Having reviewed the evidence in the light most favorable to the State, we find sufficient evidence was presented to prove beyond a reasonable doubt that Appellant acted with malice aforethought when he killed the decedent. This proposition of error is denied.

SECOND STAGE ISSUES

[55] ¶ 92 In Proposition XI, Appellant challenges the use of his prior conviction for First Degree Burglary to support the aggravating circumstances of prior violent felony and continuing threat. First, Appellant contends there was no threat or use of violence in his prior conviction and the trial court erred in admitting the evidence without first holding a hearing pursuant to *Brewer v. State*, 1982 OK CR 128, 650 P.2d 54. Appellant argues that had a proper hearing been held, the evidence would not have been admitted to the jury.

[56] ¶ 93 The aggravating circumstance of prior violent felony provides: “[t]he defendant was previously convicted of a felony involving the use or threat of violence to the

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person.” 21 O.S.2011, § 701.12(1). In *Brewer*, this Court said, “[t]he State is required to go beyond simple proof that a defendant in a capital case had prior felony convictions to establish the aggravating circumstance.” 1982 OK CR 128, ¶ 36, 650 P.2d at 62. “The State must additionally prove that the prior felonies involved the use or threat of violence to the person.” *Id.* When the aggravator is alleged, an *in-camera* hearing should be held in order to determine whether the prior crime actually involved the threat or use of violence. *Id.*, 1982 OK CR 128, ¶ 41, 650 P.2d at 63.

¶ 94 In the present case, the First Degree Burglary conviction was included in the State’s *More Definite and Certain Statement in Re Punishment*. In a pre-trial motion hearing, defense counsel moved to strike his non-violent felony convictions, specifically the first degree burglary conviction, from the more definite and certain statement. The State responded by setting out the facts of the prior conviction and arguing it was a violent offense. The court overruled the defense objection. There is no indication in the record that an objection was raised to the absence of the *in-camera* hearing required by *Brewer*. Therefore, we review that claim for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶ 95 The State asserts that a *Brewer* hearing was not required in this case because the prior conviction was also used to support the continuing threat aggravating circumstance. The State’s interpretation of *Brewer* is not exactly correct. In *Brewer*, this Court said that following the *in-camera* finding by the trial court that the prior felony did involve the threat or use of violence, the defendant is to be given the opportunity to personally stipulate that the prior conviction involved the use or threat of violence. In *Cole v. State*, 2007 OK CR 27, 164 P.3d 1089, we held that the defendant does not have the right to so stipulate if the prior conviction is also used to support the aggravating circumstance of continuing threat. “When the State alleges both

of these aggravators, ‘the jury is entitled to have before it all possible relevant information about the individual defendant whose fate it must determine.’” *Id.* 2007 OK CR 27, ¶¶ 49–50, 164 P.3d at 1100. The Court has not held that merely because the same prior conviction is used to support the two aggravators, that a *Brewer* hearing is not required.

¶ 96 In *Coddington*, 2011 OK CR 17, 254 P.3d 684, this Court found that the record did not reflect that the trial court had conducted a pre-trial *Brewer* hearing on the evidence offered to support the prior violent felony aggravating circumstance. However, this failure was not found to require relief as the details of the convictions alleged to support the allegation that the defendant had prior violent felonies were admissible in support of the State’s claim that the defendant presented a continuing threat to society. *Id.*, 2011 OK CR 17, ¶ 56, 254 P.3d at 708.

[57] ¶ 97 Here, the record likewise does not reflect a *Brewer* hearing was held. The error was plain and obvious. Did this error affect Appellant’s substantial rights? The State’s evidence showed that Appellant broke into an occupied home at approximately 3:30 a.m. by twisting the locked doorknob. Appellant stole personal property, cash, credit cards and personal identification. The responding officers testified that Appellant was not cooperative with the officers, that he struggled and resisted arrest. Appellant said he was 19 years old when he was actually 25, and was found to be in possession of channel lock pliers.³

¶ 98 However, the homeowner testified that he was not aware of the burglary at the time of its commission and that he was awakened by police officers shouting at him to come outside with his hands up. When he responded, the homeowner was told by the officers that a burglary suspect might be inside the home. Appellant was located in the homeowner’s backyard and taken into custody. This evidence shows that the crime did

3. Appellant asserts that the officers interjected evidentiary harpoons into their testimony. However, his argument is not fully developed, his citation to the record is inaccurate and his supporting case is found only in a footnote. Under

our rules, this claim is not properly before the Court. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017).

not involve the use of violence or the threat of violence to the homeowner or his family. Therefore, the evidence should not have been admitted to support the prior violent felony aggravator.

[58, 59] ¶ 99 Details of the burglary were admissible for a different and entirely legitimate purpose, to support the continuing threat aggravator. See *Smith v. State*, 2013 OK CR 14, ¶ 62, 306 P.3d 557, 577. To support the continuing threat aggravator, “[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.” *Smith v. State*, 1991 OK CR 100, ¶ 29, 819 P.2d 270, 277 (quoting *Jurek v. Texas*, 428 U.S. 262, 275–276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976)). “This relevant information may include evidence from the crime itself, evidence of other crimes, admissions by the defendant of unadjudicated offenses, or any other relevant evidence.” *Id.* Factual details of Appellant’s prior burglary conviction meet this criteria.

¶ 100 Appellant argues that a First Degree Burglary conviction does not normally indicate a continuing threat of violence, citing to *Lockett v. State*, 2002 OK CR 30, 53 P.3d 418. In *Lockett*, this Court stated that “[w]hile a prior burglary conviction would not usually indicate the existence of a probability that the defendant would commit future criminal acts of violence constituting a continuing threat to society, it did so in the present case.” 2002 OK CR 30, ¶ 33, 53 P.3d at 428. While Appellant did not have the five shotguns, two rifles, two pistols, three hunting knives and several boxes of ammunition that *Lockett* had, this Court has found that “[a] first degree burglary always carries with it the likelihood for a violent encounter with an occupant, and it is this likelihood which the jury must determine when it considers future dangerousness.” *Cleary v. State*, 1997 OK CR 35, ¶ 74, 942 P.2d 736, 752. Appellant’s forced entry into an occupied home during the early morning hours certainly carried with it the likelihood for a violent encounter and was sufficient to show that Appellant would commit future criminal acts of violence constituting a continuing threat to society.

¶ 101 Accordingly, we find the trial court’s error in failing to hold the requisite *Brewer* hearing did not affect Appellant’s substantial rights as evidence of the First Degree Burglary conviction, while not admissible to prove the prior violent felony aggravator, was admissible to support the continuing threat aggravator. Finding no plain error, this proposition is denied.

[60] ¶ 102 In Proposition XII, Appellant argues that admission of his juvenile offense, a First Degree Robbery conviction when he was 16 years old, to support the aggravating circumstances of prior violent felony and continuing threat violated his rights under the Eighth Amendment. This objection is raised for the first time on appeal. Therefore, we review only for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶ 103 Appellant relies on *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) where the Supreme Court held that execution of individuals who were under the age of 18 at the time of their capital crimes violates the Eighth and Fourteenth Amendments. Appellant argues that the holding and reasoning in *Simmons* should preclude the use of juvenile adjudications to support aggravating circumstances in a capital sentencing proceeding. This Court has previously rejected this claim. *Harmon*, 2011 OK CR 6, ¶ 74, 248 P.3d at 942; *Coddington*, 2011 OK CR 17, ¶¶ 51–52, 254 P.3d at 707; *Mitchell v. State*, 2010 OK CR 14, ¶¶ 83–87, 235 P.3d 640, 659–60. Appellant’s analysis and authorities provide no reason to overturn our prior holding.

[61] ¶ 104 In Proposition XIII, Appellant challenges the sufficiency of the evidence supporting the prior violent felony aggravating circumstance. Referring to arguments raised in prior propositions of error, he reiterates that the evidence surrounding the First Degree Burglary conviction was insufficient to meet the statutory definition of prior violent felony and that evidence of his juvenile offense was improperly admitted under *Roper v. Simmons*. He argues that without this evidence, there is no support for the aggravator.

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[62] ¶ 105 When the sufficiency of the evidence supporting an aggravator is challenged on appeal, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the facts necessary to support the aggravating circumstance beyond a reasonable doubt. *Bush v. State*, 2012 OK CR 9, ¶ 31, 280 P.3d 337, 345.

¶ 106 As addressed in Proposition XI, Appellant's First Degree Burglary conviction did not contain evidence of the use of violence or the threat of violence to a person and was therefore not sufficient to support the prior violent felony aggravator.

[63] ¶ 107 Regarding the conviction for Robbery with Firearms, Appellant was shown to have walked into a gas station, carrying a white paper sack and a shotgun. Appellant pointed the shotgun at the store owner and ordered her to fill the sack with money. The owner complied and Appellant ran out of the store. When reviewed in the light most favorable to the State, we find this evidence sufficient to support the jury's finding of the prior violent felony aggravator beyond a reasonable doubt. See *Patton v. State*, 1998 OK CR 66, ¶ 85, 973 P.2d 270, 295–296. This proposition is denied.

[64–66] ¶ 108 In Proposition XIV, Appellant claims that the evidence was insufficient to prove beyond a reasonable doubt that the decedent's murder was especially heinous, atrocious, or cruel. We review the record to determine whether the evidence, considered in the light most favorable to the State, was sufficient for a rational trier of fact to find the aggravating circumstance beyond a reasonable doubt. *Postelle v State*, 2011 OK CR 30, ¶ 78, 267 P.3d 114, 143. A particular murder is especially heinous, atrocious or cruel where the evidence shows: (1) that the murder was preceded by either torture of the victim or serious physical abuse; and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious or cruel. *Id.*, at ¶ 79, 267 P.3d at 143. The “term ‘torture’ means the infliction of either great physical anguish or extreme mental cruelty.” *Id.* A finding of “serious physical abuse” or “great physical anguish” requires that the victim have experienced

conscious physical suffering prior to death. *Id.* “[T]he term ‘heinous’ means extremely wicked or shockingly evil; the term ‘atrocious’ means outrageously wicked and vile; and the term ‘cruel’ means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.” *Id.*

¶ 109 Appellant and the decedent were arguing over food when the altercation began. He took food out of her hand and shoved her into the kitchen cabinet. This resulted in her being taken to her bedroom for her own safety. Appellant attacked the decedent in her bedroom, bludgeoning her in the head with either a rock, a brick or his hand. He either caused her to fall to the floor or struck her once she was on the ground. It is a reasonable inference from the evidence that the decedent saw Appellant, her own son, strike her. Due to her speech disabilities, she would have been unable to cry for help. Her injuries were so severe she was almost unrecognizable to her son Tobias. The bruising about her left eye was so bad that doctors were unable to open it later at the hospital. There is no dispute that the decedent was conscious throughout the attack. In fact she tried to get herself up from the floor but was unable to physically do so. Her head injuries were so severe that her skull was actually crushed in several places. Doctors ordered surgery within minutes of examining her. Evidence that the victim was conscious and aware of the attack supports a finding of torture and serious physical abuse. *Pavatt v. State*, 2007 OK CR 19, ¶ 75, 159 P.3d 272, 294; *Patton*, 1998 OK CR 66, ¶ 91, 973 P.2d at 296–97.

¶ 110 Appellant relies on *Hawkins v. State*, 1994 OK CR 83, 891 P.2d 586 to argue that the aggravator is not met due to the lack of gratuitous violence. In *Hawkins*, the victim's cause of death was drowning. This Court said that “[n]o evidence of serious physical abuse, that is, gratuitous violence inflicted on the victim beyond the act of killing” was present in the case. *Id.*, at ¶ 33, 891 P.2d at 596–97. In *Browning*, 2006 OK CR 8, ¶ 50, 134 P.3d at 843, however, this Court noted that no definition of “serious physical abuse” has been adopted, “including the one in *Hawkins*

....” See also *Bush*, 2012 OK CR 9, ¶ 37, 280 P.3d at 337, 346. Further, in *Hawkins*, evidence of serious physical abuse was only one aspect of the aggravating circumstance examined by the Court. The Court went to look at evidence of torture and the infliction of extreme mental cruelty. This Court found the evidence sufficient to support the “most extreme form of mental cruelty” and ultimately the aggravating circumstance. *Hawkins*, 1994 OK CR 83, ¶ 45, 891 P.2d at 597.

¶ 111 The evidence shows that Appellant intended to inflict a high degree of pain and did so with utter indifference to the decedent’s conscious physical suffering. There was sufficient evidence for the jury to find beyond a reasonable doubt that the decedent’s murder was especially heinous, atrocious or cruel. This proposition is denied.

[67] ¶ 112 In Proposition XV, Appellant asserts that the use of a previous acquittal to support the continuing threat aggravating circumstance renders his death sentence invalid under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corollary provisions in the Oklahoma Constitution.

¶ 113 In support of the continuing threat aggravator, the State offered evidence that Appellant had been charged in the District Court of Oklahoma County, Case No. CF-2003-3810, with five counts of Kidnapping, five counts of Assault with a Dangerous Weapon, two counts of Assault and Battery with a Dangerous Weapon, one count of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm and one count of Possession of a Firearm, After Former Conviction of a Felony. A jury acquitted Appellant on 13 counts and one count was dismissed by the State. Appellant objected to the use of this evidence. At a pre-trial hearing, the trial court overruled Appellant’s objection finding that evidence of a prior acquittal could be properly admitted in support of the continuing threat aggravator. Appellant renewed his objection at the time the evidence was presented and was again overruled. We review the trial court’s ruling admitting the evidence for an abuse of discretion. *Davis*, 2011 OK CR 29, ¶ 156, 268 P.3d at 125.

¶ 114 Appellant acknowledges our holding in *Harmon*, 2011 OK CR 6, ¶¶ 61–63, 248 P.3d at 939–940 where we said that the Supreme Court and other courts have held that “the admission of acquitted conduct in sentencing proceedings is permissible provided the conduct is proven by a preponderance of the evidence” (citing *United States v. Watts*, 519 U.S. 148, 157, 117 S.Ct. 633, 638, 136 L.Ed.2d 554 (1997)).

¶ 115 Appellant challenges our reliance on *Watts* arguing that is an extremely narrow decision which may not still be good law. *Watts* was also challenged in *Harmon*, although on grounds that it had been rendered obsolete by *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) because *Watts* did not require evidence supporting the aggravating circumstance to be proven beyond a reasonable doubt in a capital sentencing proceeding. We found both cases distinguishable as neither required the offenses offered to prove future dangerousness be proven beyond a reasonable doubt. The cases only required that the aggravating circumstance to support a death verdict be proven beyond a reasonable doubt. *Harmon*, 2011 OK CR 6, ¶ 63, 248 P.3d at 940.

¶ 116 In the present case, Appellant cites no authority supporting his assertion that *Watts* is no longer good law. Instead, he relies on the fact that *Watts* was a short, *per curiam* opinion to which Justice Stevens wrote a strong dissent. Be that as it may, we have not found where *Watts* has been overruled and Appellant’s attempts to distinguish the case are not persuasive.

[68, 69] ¶ 117 In *Harmon*, quoting to *Sanchez*, 2009 OK CR 31, ¶¶ 69–70, 223 P.3d at 1004, this Court reiterated that we have long recognized that “unadjudicated offenses linked to a defendant in a capital case may be introduced to support the claim of future dangerousness.” Further, “[a] defendant’s conviction or acquittal of a criminal charge neither alters the basic evidentiary facts of the underlying conduct, nor determines whether those facts may be offered to show his future dangerousness in a capital sentence-

ing trial.” *Id.*, 2011 OK CR 6, ¶ 62, 248 P.3d at 939–940. Evidence of a capital defendant’s violent acts is relevant and admissible to show the existence of a probability the defendant poses a continuing threat, “whether those acts resulted in a conviction of the actual offense, some related or lesser included offense, or no conviction at all.” *Id.*

¶ 118 Appellant briefly asserts that his jury was not instructed that any burden of proof was required or provided any definition of what that burden is. To the contrary, the jury was instructed that the State was required to prove beyond a reasonable doubt that the defendant’s behavior demonstrated a threat to society and a probability that this threat will continue to exist in the future. Oklahoma Uniform Jury Instruction—Criminal 2d 4-74. The “beyond a reasonable doubt” standard is a higher standard of proof than the preponderance of the evidence standard discussed in *Watts*.

¶ 119 Appellant argues that permitting the State to use his acquitted conduct forced him to defend himself from something he had already defeated. Appellant fails to recognize that it is his prior conduct that is being relied upon to prove the aggravator not that the conduct resulted in criminal charges. In the present case, the State presented two witnesses who testified that on June 27, 2003, Appellant entered a hair salon where at least five people were present. He pulled a gun from his waistband, pointed it at one of the hairdressers and pulled the trigger. The gun did not fire, so he struck the hairdresser in the head several times causing her to fall to the ground.

¶ 120 Appellant then pointed the gun at two more people and again pulled the trigger but the gun did not fire. He then pointed it at a woman who pleaded with him not to shoot because she was pregnant. Ignoring her pleas, he pointed the gun at her stomach and pulled the trigger. The gun did not fire. He hit the woman in the head causing her to fall to the floor. Appellant eventually exited the salon followed soon thereafter by the customers. Appellant jumped into a nearby car and fired at the salon customers as they left the building. The jury heard that this conduct resulted in the filing of criminal charges, a

trial, and that Appellant was found not guilty by the jury.

[70] ¶ 121 “The focus of capital sentencing centers on the individual defendant’s record and character.” *Id.* 2011 OK CR 6, ¶ 63, 248 P.3d at 940. Appellant’s conduct in the hair salon was properly admitted as relevant to the jury’s consideration of his future dangerousness and whether he posed a continuing threat to society. This proposition is denied.

[71] ¶ 122 In Proposition XVI, Appellant asserts that use of his prior convictions for Robbery with Firearms and First Degree Burglary to support both the aggravating circumstances of prior violent felony and continuing threat is unconstitutional. This argument is being raised for the first time on appeal. Therefore we review only for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶ 123 This Court has rejected this specific claim numerous times, finding that evidence of prior convictions to support these two aggravating circumstances does not show the same aspect of Appellant or his crime. *Coddington*, 2011 OK CR 17, ¶ 57, 254 P.3d at 708; *Rojem v. State*, 2006 OK CR 7, ¶ 65, 130 P.3d 287, 300; *Fitzgerald v. State*, 2002 OK CR 31, ¶ 16, 61 P.3d 901, 906; *Williams v. State*, 2001 OK CR 9, ¶ 98–101, 22 P.3d 702, 725–26.

¶ 124 Appellant argues that under *United States v. McCullah*, 76 F.3d 1087, 1112 (10th Cir. 1996), the use of duplicative aggravating factors was found to create an unconstitutional skewing of the weighing process which necessitates a reweighing of the aggravating and mitigating factors. In *Turrentine v. State*, 1998 OK CR 33, ¶ 84, 965 P.2d 955, 978–979, we said that in *McCullah*, “the Court, . . . held that submission of four particular aggravating circumstances to the jury, one of which was a non-statutory aggravator, was unconstitutional as all four of the aggravators addressed the same aspect of the defendant’s mental state.” *Id.* We found *McCullah* distinguishable in that it highlights the difference in federal case law where both statutory and non-statutory aggravators are utilized. *Id.* We found this very different

from our state statutory scheme where distinct aggravators aimed at very different aspects of the defendant's character and conduct are set forth and these are the only aggravators which can be utilized in determining the appropriateness of a death sentence. *Id.* This analysis has been upheld in *Johnson v. Gibson*, 169 F.3d 1239, 1252 (10th Cir. 1999).

¶ 125 As discussed in Proposition XI, the prior conviction for First Degree Burglary was insufficient to support the prior violent felony aggravator. Evidence of Appellant's prior conviction for Robbery with Firearms is indicative of Appellant's violent criminal past and sufficient to support the aggravating circumstance of prior violent felony. The underlying facts of the offense support the continuing threat aggravator by showing Appellant's propensity for violence and future dangerousness and the need to protect society from his probable future conduct. As the evidence in the present case supporting the two statutory aggravators involved different aspects of Appellant's character or crime, we find no duplication or overlapping of aggravators. Finding no error, we find no plain error and this proposition is denied.

¶ 126 In his seventeenth proposition of error, Appellant contends that the erroneous admission of evidence to support the aggravating circumstances violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Oklahoma Constitution. According to Appellant, the improperly admitted evidence consisted of evidence surrounding his prior convictions for First Degree Burglary and Robbery with Firearms and evidence of the 2003 criminal charges for which he was tried and acquitted. Appellant asserts that had this improperly admitted evidence been excluded from sentencing, the remaining evidence in aggravation would have been four instances of domestic violence, "dramatically altering the weighing process of aggravating circumstances and mitigating circumstances."

¶ 127 In Proposition XI, we found evidence of the First Degree Burglary insufficient to meet the statutory definition of prior violent

felony, but sufficient to support the continuing threat aggravator. In Proposition XII, we found evidence of the prior conviction for Robbery with Firearms committed when Appellant was a juvenile properly admitted. In Proposition XV, we found evidence of Appellant's 2003 acquittal properly admitted. Based upon our analysis in those propositions of error, the improper admission of the First Degree Burglary conviction did not constitute plain error as the evidence was properly admitted to support the continuing threat aggravator. No other improper evidence was admitted during the capital sentencing stage of trial. Appellant's cumulative error claim with respect to this evidence is denied.

[72] ¶ 128 In Proposition XVIII, Appellant asserts that erroneous and highly prejudicial evidence was admitted during the sentencing stage which violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Oklahoma Constitution. Specifically, he refers to hearsay testimony from Natalie Patterson given during presentation of the evidence surrounding Appellant's 2003 charges and testimony from Inspector Klika regarding obtaining a buccal swab from Appellant. No objections were raised at trial to either testimony, therefore we review only for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶ 129 The State called Tammie Brookins to testify to events surrounding the 2003 incident at the hair salon. Ms. Brookins told the jury that Natalie Patterson was in the salon at the time and was six months pregnant. Brookins described how when Appellant pulled out his gun, Patterson ran to get away. Brookins testified that at some point, Appellant approached Patterson and "she was telling him, like please, don't—you know, don't shoot me, don't shoot me. He was, like, 'bitch, don't beg for your life now. You wasn't begging for your life when you was talking all that shit.'" Antonio Jackson, another patron at the salon, testified that Patterson was pleading with Appellant to leave her alone, that she said something about "her having a baby because she's pregnant" and Appellant basically told her "F your baby" and he

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pulled the trigger at her stomach. Ms. Patterson did not testify at trial.

[73] ¶ 130 Initially, we consider the alleged hearsay properly admitted in the absence of any objection. *See Short v. State*, 1999 OK CR 15, ¶ 32, 980 P.2d 1081, 1096 (when alleged hearsay is admitted without objection, the statements may be considered as though they are admissible). *See also Plantz v. State*, 1994 OK CR 33, ¶ 37, 876 P.2d 268, 279. Further, it is not clear that the statements were hearsay. The hearsay rule is applicable only when an out of court statement is offered to prove the truth of the matter asserted. 12 O.S.2011, § 2801(3). The hearsay rule, however, does not operate, to render inadmissible every statement repeated by a witness as made by another person. *Woodruff v. State*, 1993 OK CR 7, ¶ 57, 846 P.2d 1124, 1139. It does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. *Id.*

¶ 131 Here, Patterson's statements were not offered to prove that she asked Appellant not to shoot her. The statements were offered to show Appellant's violent conduct during the 2003 incident at the hair salon which supported the State's theory that Appellant posed a continuing threat to society. We find no error and no plain error in the admission of Ms. Patterson's statements.

[74] ¶ 132 Inspector Klika testified that in June 2012, he executed a search warrant on Appellant at the county jail to obtain a buccal swab. Klika testified that Appellant resisted his attempts to obtain the swab. Appellant became aggressive and additional officers were called in to subdue Appellant. Klika said when he was finally able to get Appellant's mouth open to insert the swab, Appellant bit Klika's finger. This evidence was offered by the State to support the continuing threat aggravating circumstance.

¶ 133 Appellant contends that the "use of the covert warrant process" contravenes the law as set forth in *Cole v. Parr*, 1979 OK CR 51, 595 P.2d 1349. In *Cole*, the State petitioned the District Court to compel the defendant to allow the State to obtain blood,

saliva, hair and seminal fluid samples from him. The State argued in its motion that certain items of evidence, *i.e.*, hair, blood, and stains of an unknown nature, had been taken from the victim and the crime scene and that they were being held and examined. This Court framed the issue as "whether an examination and analysis of the defendant's specimens would be of probative value in the prosecution of this defendant." *Id.* 1979 OK CR 51, ¶ 2, 595 P.2d at 1351. This Court found that at the hearing in District Court, the State had "failed to demonstrate that the samples taken from the scene of the crime and the body of the victim were viable testing samples . . . or that any rational connection joined the samples within the possession of the State and the specimens sought of the defendant". *Id.*

¶ 134 Citing to *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), this Court said "the 'overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.' This mandates a protection against those intrusions not justified in the circumstances nor made in a proper manner." This Court concluded:

Despite the State's assertion of necessity, we hold that it is not only unnecessary, but it is improper procedure to require an accused to provide physical samples for testing by the State prior to the State's testing of specimens from the body of the victim and the scene of the crime. . . . However, we see the issue as being whether the State has presented sufficient evidence of the probative value of such tests in the prosecution of the case. If the State can show the probative value of the requested tests at an evidentiary hearing, then the defendant may be subject to submitting to the extractions in a reasonable manner, of similar samples from his own body.

Cole, 1979 OK CR 51, ¶ 5, 595 P.2d at 1351–52.

¶ 135 The State asserts the prosecution did present sufficient evidence of the probative value of such tests prior to obtaining Appellant's buccal swab. The State argues this case is similar to *Pyle v. State*, 1982 OK CR 51,

645 P.2d 1390. In *Pyle*, the prosecution obtained a search warrant to retrieve hair, blood and saliva samples from the defendant. This Court said the affidavit articulated sufficient underlying facts to establish probable cause to believe that the defendant had committed the crime and that it provided the magistrate with probable cause to believe that the evidence requested to be seized would be probative in the prosecution of the case. *Id.*, 1982 OK CR 51, ¶ 6, 645 P.2d at 1391. This Court found the search of the defendant's body pursuant to the valid search warrant was reasonable and that the State did not violate the appellant's Fourth Amendment right to be free from unreasonable search and seizures under *Schmerber*. The Court concluded that "the rule in *Cole* was sufficiently followed." *Id.*

¶ 136 In the present case, the affidavit supporting the search warrant provided the magistrate with probable cause to believe the buccal swab from Appellant would be probative in the prosecution of Appellant for the decedent's murder. As in *Pyle*, we find the State's obtaining the buccal swabs from Appellant pursuant to the valid search warrant was reasonable, that Appellant's Fourth Amendment rights to be free from unreasonable search and seizures was not violated, and the principle of *Cole* was sufficiently followed. *Id.*

[75] ¶ 137 Appellant also argues that his Sixth Amendment rights were violated when the prosecution did not notify defense counsel they were seeking a search warrant to obtain the buccal swab. Appellant not only raises this objection for the first time on appeal, but he fails to cite any authority in support of his claim. We note only that the law does not require notice be given before a search warrant is executed. The record reflects that the search warrant was obtained, executed and returned in compliance with state law. *See* 22 O.S.2011, §§ 1221–1238. Finding no error in Inspector's Klika's testimony, we find no plain error. This proposition of error is denied.

ALLEGATIONS OF PROSECUTORIAL MISCONDUCT

[76, 77] ¶ 138 In Proposition XIX, Appellant alleges that several instances of prosecu-

torial misconduct denied him a fair trial. It is well established that a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. *Davis*, 2011 OK CR 29, ¶ 174, 268 P.3d at 128. In order for the remarks of the prosecuting attorney to constitute reversible error they must be flagrant and of such a nature as to be prejudicial to the defendant. *Id.* From a practical standpoint, every slight excess by the prosecutor does not require that a verdict be overturned and that a new trial be ordered. *Id.*

¶ 139 None of the comments challenged on appeal were met with contemporaneous objections at trial. Therefore, our review is for plain error under the standard set forth above. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

[78] ¶ 140 During *voir dire*, the prosecutor asked a potential juror whether she recalled an earlier question about being able to consider all three possible punishments. The prosecutor added, "[a]nd when I say consider, deliberate and talk to 11 other jurors." Now on appeal, Appellant asserts the prosecutor improperly defined the word "consider" and this error "obviously affected" the way a potential juror answered the critical question whether he could consider a "straight life punishment". Appellant contends that in *Mitchell v. State*, 2010 OK CR 14, ¶ 32, 235 P.3d 640, 650, this Court cautioned courts against attempts to define or further explain the term "consider". In *Mitchell*, the appellant challenged death qualification questions asked by the trial court; specifically use of the term "meaningful consideration" which was not included in the uniform jury instructions. In a footnote to *Mitchell v. State*, 2006 OK CR 20, ¶ 40, n. 97, 136 P.3d 671, 690, n. 97 we cautioned courts against attempts to define or further explain the term "consider" because the word "consider" has a commonly understood meaning; and even good-faith attempts to clarify its significance in this con-

text invariably run the risk of shading its meaning in a way that is misleading or erroneous. *Id.*

¶ 141 In the 2010 *Mitchell* decision, we found that the court, prosecutor and defense counsel had all used the terms “meaningful consideration” “consideration” and “consider” interchangeably. We held there was no indication the term caused any confusion among potential jurors. 2010 OK CR 14, ¶ 32, 235 P.3d at 650. *Mitchell* merely cautioned against defining terms which have a commonly understood meaning. It did not state that doing so was error.

¶ 142 In the present case, defense counsel provided a nearly identical definition as that of the prosecutor who said to prospective jurors, “you must deliberate with other jurors, and that’s talk to them.” Here, we find no error and thus no plain error in the prosecutor’s statement as there is no indication the term caused any confusion among potential jurors or that it affected the way potential jurors answered questions regarding the three punishment options.

[79] ¶ 143 Appellant next asserts that in first stage closing argument, the prosecutor misstated the testimony of Dr. Hahn by telling the jury that Dr. Hahn testified that the decedent wouldn’t take a “header” but she would “wilt”; that he would expect lacerations to be smooth if she fell on the floor and the three scars found at the autopsy were consistent with this testimony; and that if the decedent had done a “header” he would expect broken bones in her arms.

[80, 81] ¶ 144 We have long allowed counsel for the parties “a wide range of discussion and illustration” in closing argument. *Sanchez*, 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004 (citing *Hamilton v. State*, 1944 OK CR 69, 79 Okla.Crim. 124, 135, 152 P.2d 291, 296). Counsel enjoy a “right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it.” *Id.* We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant’s rights. *Id.*

¶ 145 There was considerable discussion between both counsel and Dr. Hahn on what

type of fall it would take to produce the injuries seen in the decedent. Dr. Hahn noted that typically when a person falls, they “catch” themselves with their hands or have other injuries; “unless they have something called syncope where they pass out and they’re unable to get their arms out in front of them. A lot of people when they pass out, they just slump. So usually they don’t have that type of head injury.” There was no evidence that the decedent suffered from syncope disorder.

¶ 146 On re-direct, Dr. Hahn testified that the injuries he saw on the decedent were more than he would expect from a fall in the home. He said that even considering the decedent’s heart condition, it was a rare case for a person with a heart condition to just fall straight forward to the ground. He explained that “oftentimes people like that will wilt”; by wilting he explained that “if you’re standing there they just kind of fall to their knees and then—either to their side”. On cross-examination, Dr. Hahn was asked if a family member had reported being with the decedent when “perhaps she wilted”, whether she complained of chest pains and was rushed to the hospital for a heart condition, and “would that impact at all on your opinion today?” Dr. Hahn responded, “my opinion thus far is just that there was a woman with a head injury.” When asked “would she be more susceptible perhaps to falling if that was her situation?” the doctor responded, “it still typically doesn’t look like that.”

¶ 147 The prosecutor’s argument contained reasonable inferences from Dr. Hahn’s testimony. As the prosecutor noted, she recalled Dr. Hahn’s testimony differently than defense counsel. While there was a misstatement or two of the testimony, these were minor misstatements which did not mislead the jury and could not have affected the outcome of the trial. *See Bland v. State*, 2000 OK CR 11, ¶ 102, 4 P.3d 702, 728. The majority of the argument was well within the wide latitude permitted in closing argument.

[82] ¶ 148 Appellant also asserts the prosecutor improperly argued that the decedent would “tell [] anybody that asked her” that Appellant was her attacker. Appellant

calls this a gross misstatement of the evidence in light of Detective Helm's affidavit in support of the arrest warrant that the only thing the decedent said at the scene was that she had to go to the bathroom, and two sources which he seeks to have added to the record through Rule 3.11.⁴

¶ 149 Initially, the prosecutor's comment was, "[y]ou have the single-most important piece of evidence you could possibly have in the fact that Connie Frederick, the deceased in this case, told you this wasn't a fall. She told you through telling anybody that asked her at the scene before she got to the hospital that her son had done this."

¶ 150 Further, none of the evidence now relied upon by Appellant was admitted at trial. Detective Helm did not testify and the referenced affidavit was not admitted into evidence, nor were the alleged statements of Tobias Frederick and Da'Jon Diggs. Evidence which was admitted included testimony from Ms. Diggs and Paramedic Simmons that the decedent identified Appellant as her attacker. The prosecutor's comment was a reasonable inference and not a gross misstatement. We find no error and thus no plain error in the prosecutor's statement.

[83,84] ¶ 151 The next group of challenged statements is from capital sentencing closing argument. First, Appellant contends the prosecutor improperly argued that the enormity of killing one's own mother was an aggravating circumstance. Reading the challenged comments in context, we find no error and thus no plain error. The jury was instructed on the alleged aggravating circumstances and killing one's own mother was not included as an aggravating circumstance. The prosecutor argued that the evidence in the case showed that Appellant struck his mother in the head with an object resulting in injuries severe enough to cause her death less than three weeks later and that this evidence was sufficient to support the alleged aggravator of heinous, atrocious or cruel. We do not read these comments to be an expression of personal opinion but as reasonable conclusions based on the evidence. "In the sentencing stage of a capital trial, aggrava-

ting and mitigating circumstances are to be discussed. The prosecution has the right, to not only discuss the evidence from his standpoint and all the reasonable inferences arising therefrom, but also to argue the evidence in aggravation." *Paxton v. State*, 1993 OK CR 59, ¶ 70, 867 P.2d 1309, 1330.

[85] ¶ 152 Appellant next argues the prosecutor gave an inaccurate account of the weighing process by telling the jury that in determining whether the aggravating circumstances outweigh the finding of one or more of the mitigators, to consider the grace and love exhibited by Appellant's family when it allowed him to move back into the family home. Appellant asserts the argument asked the jury to incorporate an irrelevant factor into the weighing process, much like calling for victim impact evidence to be improperly used in the weighing process.

¶ 153 Reading the prosecutor's argument in context, she argued that the evidence offered by the defense in mitigation, should not mitigate Appellant's punishment. She contrasted evidence of Appellant's violent past with the generosity his family had shown him and then asked the jury to consider how Appellant repaid that generosity. We will not require counsel in such serious cases "to address the jury with lifeless and timid recitations void of moral reflection or persuasive power." *Sanchez*, 2009 OK CR 31, ¶ 75, 223 P.3d at 1005. The prosecutor reminded the jury they had to find the aggravating circumstances outweighed the mitigating factors and that the evidence supporting the aggravators outweighed the mitigating evidence. The jurors were well aware that the statements of counsel were not evidence and were intended to persuade the jury during its deliberations. We find no error in these comments, and thus no plain error.

[86] ¶ 154 Appellant asserts the prosecutor erred in telling the jury that they were there to do justice for the victim, and not for Appellant. He argues this is a misstatement of the law which this Court has characterized as "fundamental error." During the second

4. In his footnotes 80 and 81, Appellant refers to videotaped interviews of Tobias Frederick and

Da'Jon Diggs. These interviews are more fully addressed in Proposition XX.

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portion of the sentencing closing argument, the prosecutor commented that “[w]e’re not here to do justice for him. He is not why we’re here. We’re here to do justice for Connie Frederick. That’s why we’re here.”

[87–89] ¶ 155 It is improper for prosecutors to ask jurors to have sympathy for victims. *Warner v. State*, 2006 OK CR 40, ¶ 190, 144 P.3d 838, 890; *Jones v. State*, 1987 OK CR 103, ¶ 15, 738 P.2d 525, 529; *Tobler v. State*, 1984 OK CR 90, ¶ 16, 688 P.2d 350, 354. “It is clearly improper for a prosecutor to make arguments which tend to ‘divert the jury from its duty to decide the case on the evidence.’” *Jones*, 1987 OK CR 103, ¶ 17, 738 P.2d at 530. However, such comments standing alone usually do not warrant reversal. In *Tobler*, the conviction was reversed based upon numerous instances of misconduct. 1984 OK CR 90, ¶ 28, 688 P.2d at 356. Here, the comment was inappropriate. We review such comments 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. *Simpson v. State*, 2010 OK CR 6, ¶ 26, 230 P.3d 888, 899. Given the strength of the State’s evidence against Appellant we find that the inappropriate comment did not deprive Appellant of a fair trial or affect the jury’s assessment of punishment. There was no plain error here.

[90] ¶ 156 Finally, Appellant asserts the prosecutor denigrated the mitigating evidence by arguing that putting Appellant in prison is a reward in light of the mitigation evidence, that the jury should not consider mitigation, that mitigation was an excuse and that they should not feel guilty in light of the mitigation offered. Appellant relies in part on *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) wherein the United States Supreme Court stated that persuading the sentencer to ignore mitigating evidence is error.

[91] ¶ 157 Reading the challenged comments in context of the entire closing argument, we find they fall within the broad

parameters of effective advocacy. The prosecutor has the right to discuss evidence during the second stage in arguing for an appropriate punishment. *Warner*, 2006 OK CR 40, ¶ 192, 144 P.3d at 890. The prosecutor may properly attempt to minimize the effect of the evidence presented by the defense. *Id.*

Here, the prosecutor did not denigrate the mitigating evidence or tell the jury to ignore the evidence offered in mitigation. The prosecutor’s argument merely attempted to minimize the effect of the evidence presented by the defense. Several of the comments were invited by defense counsel’s closing argument. See *Pickens v. State*, 1993 OK CR 15, ¶ 63, 850 P.2d 328, 343 (the prosecution has the right to respond to arguments made by defense counsel in their closing argument). Further, the jury was appropriately instructed as to the mitigating evidence and was not in any way precluded from considering any and all mitigating evidence. Accordingly, we find no error and thus no plain error.

CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

[92, 93] ¶ 158 In Proposition XX, Appellant asserts he was denied the effective assistance of counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. The *Strickland* test requires an appellant to show: (1) that counsel’s performance was constitutionally deficient; and (2) that counsel’s deficient performance prejudiced the defense. *Id.* Unless the appellant makes both showings, “it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.*

[94, 95] ¶ 159 The Court begins its analysis with the strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance. *Id.*, 2013 OK CR 1, ¶ 15, 293 P.3d at 206 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065). Appellant must overcome this pre-

sumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* This Court has stated that the issue is whether counsel exercised the skill, judgment and diligence of a reasonably competent defense attorney in light of his overall performance. *Id.*, 2013 OK CR 1, ¶ 15, 293 P.3d at 206–207.

[96] ¶ 160 Appellant first finds counsel ineffective for failing to file a motion *in limine* to exclude the decedent's alleged hearsay statements. Appellant argues that as demonstrated in Propositions IV and V, the decedent's statements should not have been admitted as they violated the Confrontation Clause. Appellant asserts that if the erroneously admitted hearsay had not been admitted, there is a reasonable probability the outcome of the trial would have been different.

¶ 161 In Propositions IV and V we addressed the admissibility of the decedent's statements through Da'Jon Diggs and Paramedic Simmons. After a thorough analysis we found the statements were non-testimonial hearsay and their admission did not violate the federal Confrontation Clause. We further found the statements properly admissible pursuant to state law under the hearsay exceptions for an excited utterance and statements made for medical treatment.

[97, 98] ¶ 162 When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Id.*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207 (*citing Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.* “The likelihood of a different result must be substantial, not just conceivable.” *Id.*, (*quoting Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011)). Here, as the statements were properly admitted, we find Appellant was not prejudiced by counsel's failure to file a motion *in limine*.

[99] ¶ 163 Appellant next argues counsel was ineffective for failing to investigate or present evidence on potential causes for the injuries to Appellant's hand. When located by police the day after the assault, Appellant's right hand was swollen and his fingernail was bleeding. Appellant made statements to the effect that his hand was swollen due to gout and he had cut his finger at work. Appellant argues that counsel had a duty to conduct a reasonable investigation to find evidence that could be used to support a defense or discredit a piece of the State's evidence. The evidence supporting this claim of error is included in the *Notice of Extra-Record Evidence Supporting Propositions XV, XIX, and XX of the Brief of Appellant and Rule 3.11 Motion to Supplement Direct Appeal Record and Request for an Evidentiary Hearing* tendered for filing contemporaneously with the appellate brief.

¶ 164 Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to utilize available evidence which could have been made available during the course of trial. *Warner*, 2006 OK CR 40, ¶ 207, 144 P.3d at 893. Once an application has been properly submitted along with supporting affidavits, this Court reviews the application to see if it contains sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. *Id.* See also *Grissom*, 2011 OK CR 3, ¶ 80, 253 P.3d at 995; *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–906.

¶ 165 Appellant refers us to Attachment E to his motion. This is a signed affidavit from David Dicus, an Investigator with the Oklahoma County Public Defender's Office. Mr. Dicus states that upon the request of appellate counsel he interviewed Keith Prince also known as Keith Elliott to see if he remembered anything about an injury to Appellant's finger or hand in the time frame related to the decedent's death. Mr. Dicus stated that Mr. Elliott told him “that it was a long time ago but he did vaguely remember [Ap-

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pellant] cutting his hand or his finger in the course of helping him with the horses and/or tending the property. He could not remember any specifics or great detail because of the time that has passed.” (Affidavit of David Dicus, Attachment E).

¶ 166 In order to meet the clear and convincing standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo. *Lott v. State*, 2004 OK CR 27, ¶ 136, 98 P.3d 318, 351. The affidavit from Mr. Dicus contains unreliable, hearsay information which is admittedly not specific. We have said that “[w]e will not hold counsel ineffective for failing to investigate every possible avenue of defense; counsel may make strategic choices based on less than complete investigation, which will be considered reasonable to the extent that reasonable professional judgment supports the limitations on investigation.” *Browning*, 2006 OK CR 8, ¶ 20, 134 P.3d at 833. The affidavit of Mr. Dicus fails to present clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to investigate and present further evidence of potential causes for the injuries to Appellant’s hand. Therefore, **the motion to remand for an evidentiary hearing on this ground is denied.**

¶ 167 Regarding the claim of ineffectiveness raised in the appellate brief concerning counsel’s failure to investigate and present further evidence of potential causes for the injuries to Appellant’s hand, Appellant has not shown trial counsel to be ineffective under the more rigorous federal standard set forth in *Strickland* for ineffective assistance of counsel. See *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905-906.

¶ 168 Appellant argues further that “a simple Google search supports the contention that gout can settle in a person’s hand.” It is not clear whether Appellant is arguing that defense counsel failed to conduct such a search of the issue or if he is asking this Court to conduct such a search. If Appellant wants to put the results of an internet search before this Court, he must follow our court rules and include such in a motion to supplement. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22,

Ch. 18, App. (2017). Appellant has not done so. Further, there was no evidence that Appellant actually suffered from gout. Therefore, we find Appellant has failed to show that he was prejudiced by the absence of any evidence regarding the effects of gout on a person’s hands.

[100] ¶ 169 Appellant finds counsel ineffective for failing to thoroughly cross-examine Da’Jon Diggs and Tobias Frederick with available impeachment evidence. Appellant refers us to Proposition V where inconsistencies between the testimony of Ms. Diggs and Paramedic Simmons were addressed. He asserts that counsel failed to argue these inconsistencies to the jury. Our review of the record shows that both Ms. Diggs and Mr. Simmons testified that the decedent identified Appellant as her attacker. Ms. Diggs testified that the decedent made the sign for “D” which was her sign for Appellant and Mr. Simmons testified that Ms. Diggs told him the decedent said her “son” attacked her. As Appellant was the only one of the decedent’s sons present at the time of the attack, there does not appear to be any inconsistency between the testimony of Ms. Diggs and Paramedic Simmons. Further, as Appellant was identified by other witnesses as the assailant, we will not find counsel ineffective for belaboring the exact nomenclature used to identify Appellant.

¶ 170 Appellant also finds counsel ineffective for failing to impeach Ms. Diggs and Tobias Frederick regarding the decedent’s history of falling, that on a previous occasion the decedent had hit one of Diggs’ aunts in the head with a brick and that Diggs had her cell phone on her that day. To support this argument, Appellant directs us to his motion for evidentiary hearing and Attachment A, a DVD copy of a police interview with Ms. Diggs and Attachment B, a DVD copy of a police interview with Tobias Frederick. Having reviewed these interviews with police, we find they do not provide clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize the evidence.

¶ 171 Ms. Diggs was cross-examined about the decedent’s history of falling. Ms. Diggs maintained that the decedent did not have

fainting spells, but admitted that at Preliminary Hearing she had testified that the decedent had fainted two years earlier. Mr. Frederick did not testify regarding whether the decedent had a history of falling. That he said during the police interview that he had seen her trip on occasion does not impeach his testimony. Further, Ms. Diggs testified that she had her cell phone the day of the attack, but she left it in the house when Appellant chased her outside. We fail to see any relevance in any statement by Ms. Diggs that the decedent had previously hit a family member with a brick.

¶172 Appellant also directs us to Attachment C, information and police reports in the prosecution of Jerome Frederick for domestic abuse of Ms. Diggs and the decedent. Appellant claims that Jerome Frederick (his brother) told police that Ms. Diggs made up the allegations of abuse to keep him away from the decedent's house. Appellant claims this was a recurrent theme in his case and the information from Jerome Frederick's case would have impeached Ms. Diggs' testimony that Appellant struck the decedent.

¶173 The records provided by Appellant show that Jerome Frederick told police that in his case, the assault occurred because Ms. Diggs wanted to keep him away from the decedent, whom he later assaulted. There is nothing in the information about Ms. Diggs making up the assault claim against Jerome Frederick. Further, the information about Jerome Frederick's case was not relevant in the prosecution of Appellant. Ms. Diggs was thoroughly cross-examined by defense counsel as to whether she was telling the truth when she said Appellant was the assailant and why she claimed he was the assailant.

¶174 Having thoroughly reviewed Appellant's motion, we find the information contained in Attachments A, B, and C do not provide clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to use the complained-of evidence. **The motion to remand for an evidentiary hearing on these grounds is DENIED.**

¶175 Regarding the claim raised in the appellate brief, this case is distinguishable from *Glossip v. State*, 2001 OK CR 21, 29

P.3d 597 relied upon by Appellant. In *Glossip*, the appellant met his 3.11 burden and the case was sent back for an evidentiary hearing. This Court affirmed the trial court's finding that counsel was ineffective for failing to utilize important impeachment evidence against Justin Sneed, upon whose testimony the State's case entirely relied. *Id.*, 2001 OK CR 21, ¶19, 29 P.3d at 602. The State's case against Appellant did not rely entirely upon the testimony of Ms. Diggs. The evidence now relied upon by Appellant was not important impeachment evidence which if heard by the jury would have altered the outcome of the trial.

[101] ¶176 Appellant next asserts that counsel was not acting as his advocate when he informed the jury during first stage opening statement that Appellant was a multiple convicted felon who had been institutionalized. Appellant claims he was never consulted on the decision to proceed in that manner. Appellant further finds counsel ineffective for telling the jury at different times in the trial that he was hard to get along with, had issues with women, refused to cooperate in testing and acted like an "ogre". He complains that in first stage closing argument, counsel said that convicting Appellant of the assault and battery of Ms. Diggs "was easy" and that during second stage closing argument, he gratuitously conceded the alleged aggravating circumstances, although stating that he didn't think he would check as many boxes as the prosecutor had.

[102-104] ¶177 "Counsel must act as an advocate and subject the State's case to adversarial testing." *Malicoat*, 2000 OK CR 1, ¶48, 992 P.2d at 405. "Appellant must overcome the strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance and equaled sound trial strategy". *Id.* This Court will consider whether, viewing counsel's challenged conduct on the facts of the case as seen at the time, it was professionally unreasonable. *Id.*

¶178 In opening statement, defense counsel, a seasoned capital practitioner, told the jury about Appellant's past—that much of it had been spent in prison, he was not the

favorite son or favorite sibling and he had spent time in juvenile homes. Counsel explained that despite this history, Appellant had family who loved and cared for him and let him move into their home when he had no place to live. Counsel admitted that Appellant had picked up some bad habits in his life and that due to spending most of his life in prison, did not know how to relate to women. Counsel explained how his time in prison caused him and Ms. Diggs not to get along and helped to make him possessive of things like food. Counsel told the jury it was important for them to understand the “dynamics of what’s going on in this family”.

[105–108] ¶179 The decision regarding the legal arguments to be made is a matter of trial strategy. *Short*, 1999 OK CR 15, ¶ 87, 980 P.2d at 1107. We will not second guess trial strategy on appeal. *Id.* Counsel has an obligation to use reasonable professional judgment in making decisions concerning the defendant’s case. *Lott*, 2004 OK CR 27, ¶ 162, 98 P.3d at 356. This is not to say that counsel is to make all of the decisions in the case. *Id.*, 2004 OK CR 27, ¶ 164, 98 P.3d at 357. It is the defendant’s case and while counsel has the responsibility to advise, inform, and consult with the defendant, the defendant has the right be involved in the decision process that will affect his or her life. *Id.*

¶180 Here, there is no indication that at trial Appellant disagreed with counsel’s decisions on how to proceed with the case. Defense counsel took his first opportunity to humanize Appellant before the jury and to put into the defense’s perspective, evidence the jury was going to hear. This was reasonable trial strategy.

[109] ¶181 In first stage closing argument, counsel did say that finding the defendant guilty of “assault and battery” of Ms. Diggs would be “easy”. However, when read in context, this was not a concession of guilt. Counsel vigorously questioned Ms. Diggs’ credibility and motive. It was in this vein that counsel said, referring to Ms. Diggs, “I think it’s remarkable that a person who was in fear of her life and in fear and running from a big old ogre like [Appellant] that she’s very matter of fact. By the way send the police out here. She’s done that before.” Counsel told

the jury they should believe the testimony of one of the witnesses who saw Appellant chase Ms. Diggs outside that Appellant did not assault Diggs. Further, counsel’s emphasis in closing argument was to prevent a conviction on the most serious of the charges, first degree murder. He argued that even if the evidence allowed for an easy finding of guilt as to the assault and battery charge, it did not allow for a similar easy finding of guilt for first degree murder. Counsel’s remarks were not a concession of guilt, but reasonable trial strategy to maintain credibility with the jury.

¶182 In capital sentencing closing argument, counsel did not concede the aggravating circumstances. Leading up to the challenged comment, he referenced the jury instructions and the prosecutor’s coverage of them in her closing argument. Counsel in effect said that under the evidence, he had no disagreement with the list of aggravating circumstances sent to the jury for their consideration. However, throughout his argument, counsel challenged the evidence supporting the alleged aggravators, reminded the jury that the decision to find the existence of an aggravating circumstance was a group decision and that it must be unanimous. He further reminded them that even if they were to find the existence of an aggravator, they were then only authorized to consider the death penalty, they were not required to return a death sentence.

¶183 Contrary to Appellant’s contention, counsel’s argument was not a concession to the existence of the aggravators or that the death sentence was a foregone conclusion. Counsel went on to argue that the mitigating evidence outweighed the aggravating and therefore the death penalty was not warranted. Counsel concluded by stating that “perhaps [Appellant] could make a life in prison for himself where he’s made a life for himself in the past. Maybe life is enough.” During the sentencing stage of trial, arguing for the lightest possible sentence is certainly a sound tactical choice on counsel’s part.

[110] ¶184 Appellant next asserts counsel failed to subject the State’s evidence of

the prior acquitted conduct to any meaningful adversarial testing. Defense counsel raised an objection to admission of the evidence but was overruled. The State presented two witnesses, Antonio Jackson and Tammie Brookins, who testified to the facts of the incident at the hair salon. Appellant now argues defense counsel should have called witnesses who testified in the prior trial that there was no evidence corroborating the State's witnesses and that he should have offered the transcript of the testimony of Letava Williams, a defense witness who was deceased by the time of the instant trial. Appellant criticizes defense counsel for not knowing that Ms. Williams was deceased.

¶ 185 As part of his Rule 3.11 motion, Appellant includes an affidavit from Willie Germany, Chief Investigator with the Oklahoma County Public Defender's Office, who states that he was able to determine that Ms. Williams passed away in 2009 and that she is the same person called as a defense witness in the prior trial for crimes arising out of the incident at the hair salon. (Affidavit of Willie Germany, Attachment D).

¶ 186 Appellant also includes Attachment G, a copy of Ms. Williams' prior testimony. In the trial of the 2003 charges, Ms. Williams testified that people in the hair salon were talking about Appellant. She said Appellant had been very nice to her, and she thought all of the talk about him was unnecessary. She did not specify the nature of the talk but said the atmosphere in the salon made her uncomfortable. On cross-examination, she testified that was her first visit to the salon. She said she never heard anyone threaten Appellant, that Appellant was minding his own business, she did not know Appellant or anyone in the salon except for her hairdresser and that she left before the acts on trial occurred.

¶ 187 Appellant has not shown by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to know that Ms. Williams was deceased or for failing to offer her prior testimony. Ms. Williams had left the salon by the time Appellant threatened and assaulted the others. Her testimony would not have contradicted that of Jackson and Brookins as to Appel-

lant's conduct at the time of the assaults. **The motion to remand for an evidentiary on this ground is DENIED.**

¶ 188 As for the claim raised in the appellate brief, Appellant asserts that in the original trial of the incident at the hair salon, the State called nine witnesses, including four police officers. Appellant asserts that in the trial for his mother's death, defense counsel should have called the officers responding to the hair salon who allegedly testified in the previous trial there was no corroborating evidence of Appellant's guilt. Appellant also asserts that once the previous jury came back with 13 not guilty verdicts, the State dismissed the charge of possession of firearm after former conviction of a felony. Appellant asserts this should have been introduced as an admission by party opponent that the evidence was not credible enough to proceed to a jury.

¶ 189 It is easy with hindsight to argue that trial counsel should have essentially sought to retry the 2003 hair salon case. However, it is not clear if the trial judge would have allowed it or if it would have been the best use of counsel's time and resources. Evidence of the incident at the hair salon in 2003 was properly admitted as acquitted conduct in support of the continuing threat aggravating circumstance. The best response to the State's evidence was that Appellant's conduct did not result in a criminal conviction. The jury heard just such testimony. Would it have made a difference in the jury's finding of the aggravating circumstance if they heard from more than one witness that Appellant had been acquitted of the criminal charges associated with the hair salon incident, or that witnesses in that previous trial did not corroborate the testimony of the witnesses the State chose to testify to the acquitted conduct? We can't say. What we can say is that the acquitted conduct evidence was only a part of the evidence introduced to support the continuing threat aggravating circumstance. The jury also heard evidence of nine instances of Appellant's prior use or threats of violence.

[111, 112] ¶ 190 The claim that appellate counsel would have treated the acquitted conduct differently does not make trial coun-

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sel ineffective. See *Shultz v. State*, 1991 OK CR 57, ¶ 9, 811 P.2d 1322, 1327 (“[t]he fact that another lawyer would have followed a different course during the trial is not grounds for branding the appointed attorney with the opprobrium of ineffectiveness”, citing *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir.1965)). Absent a showing of incompetence, the Appellant is bound by the decisions of his counsel and mistakes in tactic and trial strategy do not provide grounds for subsequent attack. *Id.*

¶ 191 Counsel’s decision not to highlight further the acquitted conduct evidence by choosing not to put on additional witnesses to testify to the conduct was a reasonable strategic decision. Further, we are not convinced that introducing any other evidence concerning the acquitted charges would have made the jury less likely to find the existence of the continuing threat aggravator. Therefore we find Appellant has failed to meet the more rigorous *Strickland* standard of ineffectiveness as he has not shown any prejudice by counsel’s defense of the continuing threat aggravator and more specifically, counsel’s failure to further challenge the State’s acquitted conduct evidence.

[113] ¶ 192 Appellant next directs our attention to counsel’s failure to call Dr. Art Williams to testify. During capital sentencing stage opening statement, defense counsel told the jury that he would present testimony from Dr. Art Williams, a sociologist, who would tell the jury about Appellant and his life. However, defense counsel rested his case without calling the witness. At the close of evidence, defense counsel explained to the court that he was not calling Dr. Williams to testify as Appellant never “interacted” with the doctor. Counsel said that Dr. Williams reported that the two were in the same room, but Appellant refused to talk or participate in any testing. Counsel explained that Dr. Williams would testify that Appellant was institutionalized but that evidence had already come in, “so, I don’t think we need a sociologist to tell us something that’s obvious.” Counsel also admitted he was worried about the prosecutor’s cross-examination of the witness. Counsel informed the court he

had fully intended to call the doctor but decided that day not to for strategic reasons.

¶ 193 Now on appeal, Appellant complains that counsel’s decision not to call the witness to testify after telling the jury he would do so was not reasonable trial strategy. Appellant argues that counsel should have known of his concerns before telling the jury it would hear from the witness.

¶ 194 The record shows that counsel’s decision not to call the witness was based in part on Appellant’s failure to cooperate but also on counsel’s realization of the intense scrutiny the witness would have been placed under during cross-examination. The prosecutor affirmed counsel’s concerns by informing the court that she was prepared to cross-examine and impeach the doctor on specific points and that she was planning on calling a witness to impeach and refute Dr. Williams’ testimony. Defense counsel informed the court he was worried that through these experts, the jury would hear that Appellant had been previously acquitted of murder.

[114] ¶ 195 Based upon this record, counsel’s decision not to call the witness, despite his comment in opening statements, was reasonable trial strategy. We recognize that counsel may, at times, have legitimate reasons for not calling certain witnesses to testify. *Smith v. State*, 1982 OK CR 143, ¶ 21, 650 P.2d 904, 908. The decision of which witness to call at trial is one of strategy best left to counsel, and generally will not be second-guessed on appeal. *Id.*

¶ 196 The record shows that Dr. Williams was a sociologist who would have testified to Appellant’s background. As defense counsel told the trial court, much of what Dr. Williams would have testified to was already before the jury in the form of testimony from other witnesses. Not calling Dr. Williams to testify appears to have forced the prosecution in part to alter its course at trial. That the witness was not called to testify was easily explained in closing argument. Appellant has not shown that counsel’s failure to call the witness to testify after stating he would was in any way held against the defense. Based upon the record before us, Appellant has failed to show any prejudice.

¶ 197 Appellant further finds counsel ineffective for failing to request additional peremptory challenges during *voir dire* and failing to identify unqualified jurors whom he would have struck with his additional challenges. As we addressed in Proposition I, there is no evidence to suggest that an unfit juror sat on Appellant's jury or that the result of the trial would have been any different had defense counsel requested, received and exercised additional peremptory challenges. Therefore, Appellant has failed to show any prejudice and this claim of ineffectiveness is denied. See *Young v. State*, 1998 OK CR 62, ¶¶ 71–72, 992 P.2d 332, 347.

¶ 198 Finally, Appellant finds counsel ineffective for failing to object to errors at trial and request admonishments. Rather than repeating his arguments, Appellant merely lists them and requests they be reviewed as violations of the Sixth and Fourteenth Amendments to the United States Constitution as well as for plain error. These allegations include: 1) counsel's failure to object to capital sentencing prosecutorial misconduct, see Proposition XIX; 2) counsel's failure to object to the alleged hearsay statement of the decedent identifying Appellant as her attacker and the alleged hearsay statements of Natalie Patterson, see Proposition IV; 3) counsel's failure to object to improper opinion testimony of Paramedic Simmons, see Proposition VII; and 4) counsel's failure to object to the prosecution's flight argument or request proper instructions, see Proposition IX.

¶ 199 We have addressed each of these claims in this opinion and found no error warranting relief. Therefore, any objections by the trial court would have been denied. We have repeatedly held that we will not find counsel ineffective for failing to raise objections which would have been denied. *Eizember*, 2007 OK CR 29, ¶ 155, 164 P.3d at 244.

¶ 200 Having thoroughly reviewed Appellant's *Notice of Extra-Record Evidence Supporting Propositions XV, XIX, and XX of the Brief of Appellant and Rule 3.11 Motion to*

Supplement Direct Appeal Record and Request for an Evidentiary Hearing, and accompanying affidavits, we find he has failed to show by clear and convincing evidence a strong possibility that defense counsel was ineffective for failing to investigate further and utilize the complained-of evidence.⁵ **We decline to grant Appellant's application for an evidentiary hearing on Sixth Amendment grounds. We also deny his motion to supplement the record.**

¶ 201 Additionally, after thoroughly reviewing the record, and Appellant's allegations of ineffectiveness, we have considered counsel's challenged conduct on the facts of the case as viewed at the time and have asked if the conduct was professionally unreasonable and, if so, whether the error affected the jury's judgment. *Warner*, 2006 OK CR 40, ¶ 206, 144 P.3d at 893. Defense counsel's performance in this case did not "so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064. Appellant has failed to meet his burden of showing a reasonable probability that, but for any unprofessional errors by counsel, the result of the trial would have been different as any errors or omissions by counsel did not influence the jury's determination of guilt or decision to impose the death sentence. Accordingly, we find that Appellant was not denied the effective assistance of counsel and this proposition of error is denied.

ACCUMULATION OF ERROR CLAIM

[115–117] ¶ 202 In Proposition XXI, Appellant asserts that cumulative error warrants a new trial 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. *Warner*, 2006 OK CR 40, ¶ 223, 144 P.3d at 896. However, when there have been numerous irregularities during the course of a trial that

5. After the filing of his brief in chief, Appellant tendered for filing a *Motion to Stay Proceedings to Allow Supplementation of Appellant's Ineffective Assistance of Counsel claim in his brief-in-chief as well as supplementation of Appellant's*

3.11B Motion and a Supplemental Brief of Appellant to Proposition XX. This motion and the filing of the supplemental brief were denied by this Court.

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.* While certain errors did occur in this case, even considered together, they were not so egregious or numerous as to have denied Appellant a fair trial. Therefore, no new trial or modification of sentence is warranted and this proposition of error is denied.

MANDATORY SENTENCE REVIEW

[118] ¶203 In his Proposition XXII, Appellant contends his sentence should be modified under our mandatory sentence review. He argues his death sentence was rendered arbitrarily in this case as a result of passion and prejudice caused by all of the foregoing errors. Appellant further argues his execution would violate the Eighth Amendment prohibition against cruel and unusual punishment.

¶204 Pursuant to 21 O.S.2011, § 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.2011, § 701.12. Turning to the second portion of this mandate, the jury found the existence of three aggravating circumstances: 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the murder was especially heinous, atrocious and cruel; and 3) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.2011, § 701.12(1)(4)(7).

¶205 In Proposition XIII, we found the evidence sufficient to support the prior violent aggravator. In Proposition XIV, we found the evidence sufficient to support the aggravating circumstance of heinous, atrocious or cruel.

[119–122] ¶206 To support the aggravator of continuing threat, the State must present evidence showing the defendant's behavior demonstrated a threat to society and a probability that threat would continue to ex-

ist in the future. *Davis*, 2011 OK CR 29, ¶136, 268 P.3d at 122. To prove this aggravating circumstance, the State may present any relevant evidence, in conformance with the rules of evidence, including evidence from the crime itself, evidence of other crimes, admissions by the defendant of unadjudicated offenses or any other relevant evidence. *Id.* A finding that the defendant would commit criminal acts of violence that would constitute a continuing threat to society is appropriate when the evidence establishes the defendant participated in other unrelated criminal acts and the nature of the crime exhibited the calloused nature of the defendant. *Id.* The continuing threat aggravator is aimed at the defendant's future conduct. *Ryder v. State*, 2004 OK CR 2, ¶66, 83 P.3d 856, 871. To establish continuing threat, the State must show a pattern of criminal conduct that will likely continue in the future. *Id.*

¶207 In support of this aggravator the State presented evidence of Appellant's juvenile conviction in 1972 for Robbery with Firearms, the details of his 1981 conviction for First Degree Burglary, and his 2003 conduct at the hair salon leading to the filing of criminal charges. The State also offered evidence that in 2006, Appellant beat his sister Karen Frederick. Witnesses testified that Appellant attacked her, hit her in the jaw and dislocated it, grabbed her crutches and beat her with them, and stomped and kicked her while she was on the ground. Other evidence showed that sometime after that attack, Appellant assaulted Ms. Frederick's grandson, hitting him in the head, choking and strangling him. Evidence also showed that in 2006 or 2007, Appellant physically threatened and attacked a ten year old friend of Ms. Diggs and in 2010 he turned a visit with his neighbor into a violent encounter when in the absence of any provocation, he attacked and beat the woman, repeatedly punching her in the face with his fists.

¶208 Appellant's criminal history shows a pattern of escalating violence. This evidence, combined with the evidence of the bludgeoning of the decedent, overwhelmingly supports the aggravator as establishing the existence of a probability that Appellant would commit criminal acts of violence that would constitute

a continuing threat to society. *See Davis*, 2011 OK CR 29, ¶ 139, 268 P.3d at 122–23.

¶ 209 Evidence offered in mitigation showed that Appellant was raised in a strict, church going family. However, as he grew older, his father was gone from the family for long periods of time and Appellant was exposed to certain negative influences from which he had previously been protected. Evidence showed that Appellant was easily led by others, immature in many ways and slow to understand things. When he 14 years old he rebelled against his father and left home. He found he was not equipped to take care of himself and returned home, however his father thereafter did not take an interest in him. When he was 14 or 15 years old, he was involved in a car wreck and hit his head on the windshield. His father thought he was never the same after that. His father thought Appellant would have benefitted from juvenile rehabilitation programs after his robbery conviction but he was never given the opportunity. Evidence showed that being institutionalized made Appellant suspicious of others and overly aggressive, that he has never learned to live as a free man and is unable to cope with stress and the strain of society. This evidence was summarized and presented to the jury in Instruction No. 15 along with any other mitigating evidence the jury might find existed.

¶ 210 Upon our review of the record and careful weighing of the aggravating circumstances and the mitigating evidence, we find the sentence of death to be factually substantiated and appropriate. Under 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.2011, § 701.13(C), in finding that the aggravating circumstances outweighed the mitigating evidence. Accordingly, finding no error warranting reversal or modification, this appeal is denied.

DECISION

¶ 211 The **JUDGMENTS** and **SENTENCES** are **AFFIRMED**. The **motions to**

6. The Clerk of this Court is directed to return the motion to defense counsel and keep a copy for record keeping purposes. Rule 1.13(K), *Rules of*

Supplement the Record and Remand for Evidentiary hearing on Sixth Amendment grounds are DENIED.⁶ Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

LEWIS, V.P.J.: Concur

JOHNSON, J.: Recuse

SMITH, J.: Concur in Result

HUDSON, J.: Concur



2017 OK CR 10

Shaun Michael BOSSE, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. D–2012–1128

Court of Criminal Appeals of Oklahoma.

FILED MAY 25, 2017

Rehearing Granted July 24, 2017

Background: Defendant was convicted in the District Court, McClain County, Greg Dixon, J., of three counts of first degree murder and one count of first degree arson, and was sentenced to death, for his killing of a mother and her two children. Defendant appealed. The Court of Criminal Appeals, Smith, J., 360 P.3d 1203, affirmed. Upon granting certiorari, the United States Supreme Court, 137 S.Ct. 1, 196 L.Ed.2d 1, vacated judgment and remanded.

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

the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2017)

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 2, 2023

Christopher M. Wolpert
Clerk of Court

DARRELL WAYNE FREDERICK,

Petitioner - Appellant,

v.

Christe Quick, Warden, Oklahoma State
Penitentiary,

Respondent - Appellee.

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

ORDER

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

This matter is before the court on *Petitioner/Appellant Darrell Wayne Frederick's Petition for Rehearing and Request for En Banc Consideration*. We also have a response from Appellee. Having carefully considered the petition, response, and the filings in this appeal, we direct as follows.

To the extent the appellants seek panel rehearing, the petition is denied by a majority of the panel pursuant to Federal Rule of Appellate Procedure 40. Judge Rossman would grant panel rehearing.

The petition 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, the request for rehearing *en banc* is denied pursuant to Federal Rule of Appellate Procedure 35(f).

Entered for the Court,

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk